

DISSERTATION

ON

**Trusteeship: A comparative study on Bangladesh and English Legal
System**

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Sadman Rafid Pratyasha

ID: 2017-3-66-037

Declaration

I certify that this thesis does not contain any material that has been previously submitted for a degree or diploma in any university without proper citation; and, to the best of my knowledge and belief, it does not contain any material that has been previously published or written by another person, unless proper citation is included within the text.

Abstract

Bangladesh is a developing country. This country is struggling to develop in every perspective. Trust can play an important role in developing our country in many sectors. Trust is made to protect the properties of the owner and for the benefits of beneficiaries. It is main significance to make the Trust. It has some other significance also. In 1882, there passed a law for Trusts. The name of the Act is The Trusts Act, 1882. The reason of this Law is to make sure the proper systematic approach to make a Trust and its consequences. In this research paper I am going to give a comparative study on The Trusts Act, 1882, different types of Trusts, It's consequence in Bangladesh, difficulties of in Bangladesh and the cooperative discussion with English Legal system. A quality research paper always need some pure information, in this research paper I am trying to examine the difficulties and find out the challenges and recommendations with the arguments and analysis.

This research paper help to find out the problems of the Trusteeship issues. The aim of this thesis is to find out the lacking of the Trusts Act, 1882 and know how we can develop this system.

Chapter 1: Introduction

1.1 Rational of the Research paper

In this research paper I have done a comparative analysis on The Trusts Act, 1882 and the English Legal system on Trusts. I also focus on the aspects of the Trust in many sectors of Bangladesh and find out the challenges and recommendations by the arguments and analysis. Over all this research paper is focused on the trusteeship issue in Bangladesh.

1.2 Literature Review

There are many authors who wrote regarding trustee law and they find out situation of the trustees and about their powers and duties. In many books, journal, articles, and online source, many author wanted to say that the laws regarding the trustee in our country are not enough. On the other hand, In English legal system, the laws about trustees are written in a specific manner. Many author are writing about the laws and mentioned their judiciary system in many books, Journals, articles, online source. There is not enough literature about trusteeship law. I could not found enough articles, journals, online matters, books about comparison matters between the Bangladesh and English legal system regarding the issues I am writing, for such reason, I have decided to research in this topic.

1.3 Methodology

The research should be in an exploratory way. It is necessary to make it qualitative and quantitative way. My study methodology required collecting relevant data and info from the various documents to know Trusts Law and understand the situation of this law in Bangladesh.

This research paper is explorative in nature, because the aim of the research paper is focus on Trusteeship system in Bangladesh and also focus on many aspects of the trust law of Bangladesh.

The study is based on various data. These data have been collected from various books authored by local foreign writers, previous studies, articles, newspapers, the Internet and various government documents.

1.4 Scope of study

In this research paper, there is a huge scope to explore in the sector of Trusts. This research paper cover all over the problems and prospective in the trust areas. I have got the chance to work on the modern countries by doing the research paper so that it helps me to be able to develop our trusteeship issues. In this research paper I have shown that there is lacking in our trusteeship system and the problems and how they can overcome the problems in Bangladesh.

1.5 Research Question

Does the Bangladeshi legal system require several laws on Trusteeship like English legal system? Or Trusts Act 1882 is adequate enough?

1.6 Limitations of the study

On the time of working on this research paper there are some problems I had to face. One of the major issues was to collect the English law relating many consequences. There are also many confidential and internal issues relating to trusteeship which are the limitations. Collect data from many trust organization is an another limitation. Data from various sources are inconsistent which created problems. There is no proper database or website to know about all the running trusts in our country. Time limitation is an another issue which creates some limitations.

Chapter 2: Introduction of the Trusteeship

In human life, there are lots of uncertainty. We do not even what will even happen in our life. It is not possible to know the future. For any person or even own self we may need to do something. Making of trust can help to do that. Any competent person¹ can create a trust for any beneficiaries for even for his any betterment. A trust can be used to manage his property or distributed to his beneficiaries while he is alive or after his death.

2.1 History of the Trusteeship

The history of the trusteeship is many years old. The trust is the most particular achievement of English equity jurisprudence. Land was first permanently owned by one man for the use of another man in the 13th century, when land was given away to the borough community for the use of the Fransiscan friars. Their order forbade them from having any kind of wealth. However, because some kind of property was clearly required, the device of having land given to the borough community for the purpose of the friars was selected. The Statutes of Mortmain also prevented land from being conveyed under common law to religious institutes and monasteries. The provisions of these regulations were now being circumvented by granting lands to third parties for the purpose of using these houses.² Originally used for religious purposes, it was rapidly adapted for secular purposes in the 14th century, allowing for conveyances that would otherwise be impossible under common law, like as (a) making a will! (in effect), or (b) a man conveying land to himself or his wife. Land could only be conveyed through feoffment with 'livery of seisin' at common law, hence these were impossible. Stepwise, it was discovered that the device could be beneficial for other purposes as well, for example (a) avoiding feudal services such as reliefs, warships, and marriages, as well as avoiding the feudal law of forfeiture for treason and escheat for felony, (b) avoiding creditors, and (c) avoiding dower. All of this was accomplished by the owner of the land feoffing the land to one or more people, who then acted as a cloak for the real owner. The feoffees became the legal owners, but the feoffee had an agreement that the

¹ Section 7, The Trusts Act, 1882

² Durga Das Basu, *Equity, Trusts and Specific Relief* (seventh edition), 103

former would keep the profits and enjoy the land.³ According to Maitland,⁴ there are two types of right. One is personal and another is for all. In English Jurisprudence, there are no types of these things. They are told about ownership. Though after explanation of all things, according to trust law, there arise personal right. It is the basis of trust law. According to the court of chancery, in 1882, Trust Act was passed in this subcontinent. Though before passing it, many trust things like the English customary systems were running in this subcontinent.

2.2 Meaning of Trusteeship

A trustee may be anyone who can hold property, but he must be competent to contract to execute a trust. A trust is accepted by the trustee's words or actions indicating such acceptance. Instead of accepting a trust, the intended trustee may disclaim it within a reasonable time period, preventing him from receiving trust property. One or more co-trustees may disclaim their co-trusteeship and become sole trustees of the trust upon their disclaimer.⁵

2.3 Types of Trusteeship

Judicial Trustees

A judicial trustee may be assigned either jointly or solely, and may replace all or any original trustees.⁶ The appointment is expressly made at the court's discretion, so no one can claim a right to one. In one case, the court denied to make an appointment when one of two trustees wanted to be discharged and the tenant for life was willing to appoint a person to whom no objection was made.⁷

³ Durga Das Basu, *Equity, Trusts and Specific Relief* (seventh edition), 104

⁴ Pro. Md. Altaf Hossain, *Law of Equity and Trust*, (eleventh edition), 243

⁵ The Trusts Act 1882, s 10

⁶ *Re Martin* [1900] WN 129

⁷ *Re Chisholm* (1898) 43

The Official Solicitor

The Official Solicitor accepts trusts to act as an impartial trustee in cases where trustees or beneficiaries cannot agree on how to administer a trust; to facilitate the sale or purchase of real estate when a trustee is disabled; and to act as trustee of property held for a disabled person pursuant to a court order. The Official Solicitor will consider taking on new things matter that the Public Trustee cannot due to statutory constraints. The court must appoint the Official Solicitor as a trustee.

The Public Trustee

The Public Trustee may be appointed as an original or new trustee, or as an additional trustee, under the same circumstances, by the same persons, or by the court as a private trustee.⁸ No matter how many trustees were initially appointed, and regardless of whether the trust instrument specifies that the number of trustees must not be less than a certain number.⁹

Custodian Trustees

The 'custodian trustee' was created for greater security, while the 'managing trustees' remain in charge of the trust. The trust property is thus forwarded to the custodian trustee as though he's a sole trustee, and vesting orders may be made if necessary. The Public Trustee cannot act as both custodian and managing trustee,¹⁰ so when the managing trustee died and the Public Trustee wanted to manage the trust, his custodian trusteeship had to be discharged before he could be assigned an ordinary trustee.¹¹

⁸ Re Duxbury's Settlement Trusts [1995]

⁹ Re Moxon [1916]

¹⁰ Foster v Williams Deacon Bank Ltd [1935]

¹¹ Re Squire's Settlement (1946)

2.4 Assign of Trusteeship

The first trustees are typically appointed by the settlor or testator¹² who establishes the trust and is responsible for its administration. It is not necessary for a trust created through a will to fail if all of the trustees appointed by the testator predecease the testator or otherwise cease to exist, or even if no trustees were originally appointed by the testator at all, if all of the trustees appointed disclaim the trust; or if the trustee appointed is legally incapable of taking, the trust will not fail¹³. In such a case, the court will have the authority to appoint trustees in accordance with the powers discussed below. The personal representatives will be considered to be constructive trustees in the meantime, and it will not be possible to successfully argue that the trust was not fully constituted during this time. It is not common to include an express power to appoint new trustees in a trust agreement because the statutory power is generally considered sufficient. Naturally, the operation and impact of an express power are determined by the interpretation of the specific words used, and it appears that such a power will be rigidly interpreted. The assign of trustee also be possible by the beneficiaries. The court has also the power to assign a trustee by its jurisdiction according to the statute of that region. A sole trustee is capable of carrying out his or her responsibilities, whereas there is no limit to the number of trustees who may be appointed. Even so, statutory provisions can place restrictions on both the maximum and minimum number of trustees in a variety of circumstances.

2.5 Revocation of Trusteeship

A trustee cannot be obligated to accept the position. He may resign the office, which constitutes a disclaimer of the property¹⁴, at any time prior to acceptance, but once accepted, it cannot be resigned.¹⁵ Acceptance may be express or implied through the alleged trustee's actions or conduct. Execution of the trust deed by the trustee will typically be considered as an express acceptance of the trust, and where a person is appointed executor and trustee by will, it appears

¹² Re Smirthwaite's Trusts (1871)

¹³ Sonley v Clock Makers' Co (1780)

¹⁴ Re Tryon (1844)

¹⁵ Re Lister [1926]

that if he obtains probate of the will, he will also be deemed to have accepted the trust.¹⁶ While it is sometimes stated that acceptance will be presumed in the absence of contrary evidence, this is far from certain. Trusteeship can be revoked by his death. The court has also power for removing any person from his trusteeship by his inherent power. In an activity for the administration or operation of a trust, the Court has inherent jurisdiction to revoke a trustee without necessarily electing a new trustee, and regardless of whether the facts are disputed.¹⁷ In *Letterstedt v Broers*¹⁸, the Privy Council observed that there was little authority to guide it in determining when the jurisdiction should be exercised, and it was unwilling to lay down any general rule beyond the very broad principle that its primary consideration must be the beneficiaries' welfare. Although enmity between a trustee and beneficiaries are not always, or even usually, sufficient grounds for removing a trustee,¹⁹ the court may believe it is appropriate to consider this and, accordingly, to remove a trustee in some circumstances, even if he has committed no breach of trust.²⁰

Chapter Conclusion:

In the 13th century, one man permanently possessed land for another man's use. From religious to secular use in the 14th century, it enabled conveyances that would otherwise be impossible under common law. A trustee can be anyone with property, but must be competent to contract. The court appoints the Official Solicitor as an impartial trustee. The settlor or testator appoints the trustees. The number of trustees selected is unlimited. The court has the authority to appoint a trustee based on local law. A solitary trustee can perform his or her duties. A trustee cannot be forced to accept. Acceptance can be expressed or implied through actions or conduct. His death can revoke trusteeship. Whether or whether facts are challenged, the Court has inherent jurisdiction to revoke a trustee.

¹⁶ *Mucklow v Fuller* (1821)

¹⁷ *Re Chetwynd's Settlement* [1902]

¹⁸ 1884) 9 App Cas 371, 385

¹⁹ *Forster v Davies* (1861)

²⁰ *Re Consiglio Trusts* (1973)

Chapter 3: Bangladesh perspective

3.1 Trusts Act,1882

The short title of the Act specifies that the purpose of the Act is to establish rules governing private trusts and trustees in the country of Bangladesh. As a result, in the situation of public trusts, the provisions of this Act do not apply.

3.2 Trustees Duties, Liabilities, Rights and Powers

Duties of the Trustee

The trustee must fulfill the trust's purpose and follow the author's directions. The trust's purpose can be changed with the consent of all contracting beneficiaries. However, a trustee is not required to follow a direction if it is impractical, illegal, or clearly harmful to the beneficiaries. He must promptly become acquainted with the nature and situations of the trust property; obtain a handover of the trust property to himself; and invest trust funds. He must take other reasonable steps to preserve and protect the trust property's title. He may not create any title to trust property morally opposed to the beneficiary's interest. He must treat trust property with the same care as if it were his own. If the trust property is wasting the trustee must convert it into permanent and immediately profitable property. When there are multiple beneficiaries, the trustee must be fair in favor of one over another. In cases where the trust is set up to take advantage of several people, and one of them is in control of the trust property, the trustee must intervene if the person threatens to do so. A trustee must maintain truthful accounts of the trust property and must timely provide the beneficiary with true and clear information about the trust property's value and condition. If the trust property includes money that cannot be used immediately for the trust's purposes, the trustee can sometimes invest up to 25% of that money in securities listed on a Bangladeshi stock exchange.²¹ Unless authorized by a principal Civil Court of original jurisdiction, a trustee who has been ordered to sell within a certain time must prove to the beneficiary that the extension does not prejudice him. The court has instructed a trustee

²¹ The Trusts Act 1882, s 13-20

who has accepted the trust to cooperate with the other trustees in all proper and required acts of administration.²² Trustees have the right and responsibility to ensure that their appointment is appropriately made.²³ They should also examine the trust documents and papers to see whether there are any notices of encumbrances or other concerns impacting the trust.²⁴ In *Bartlett v Barclays Bank Trust Co Ltd*²⁵, the Court of Appeal determined that a bank was an expert trustee who should have demonstrated a higher level of care, whereas in *Nationwide Building Society v Davisons Society*²⁶, the Court of Appeal determined that the standard for a solicitor was reasonableness rather than perfection. As proven by *Gregon v HAE Trustees Ltd*²⁷, a director of a trust company could be found personally accountable for breach of trust.

Liabilities of the Trustee

A trustee who breaches trust is liable to make good the loss suffered by the trust property or the beneficiary unless the beneficiary, being competent to contract, has himself concurred in the breach or subsequently acquiesced therein, with full knowledge of the facts and of his own rights and obligations. A trustee who breaches trust is not responsible for paying interest unless actual interest where the breach is a failure to pay trust money to the beneficiary. The trustee should have received interest, but hasn't where he is likely to receive interest. He must account for compounding (with half-yearly breaks) if he fails to invest trust money and accumulate interest or dividends. The beneficiary may elect to account for either compound interest (with half-yearly breaks). A trustee who is responsible for a loss caused by the breach of trust cannot set-off that liability with a gain caused by another breach of trust. Except as provided in sections 13 and 15, a trustee is not liable for a breach trust by co trustee's. In the absence of an express declaration in the trust instrument, a trustee is liable in the following situations: delivering trust property to a co-trustee without even seeing to its proper application; allowing his co-trustee to receive trust

²² *Ouchtarlony v Lord Linedoch* (1830) 7 Bli NS 448, HL.

²³ *Harvey v Olliver* (1887) 57 LT 239

²⁴ *Hallows v Lloyd* (1888) 39 Ch D 686

²⁵ [1980] 1 All E.R. 139

²⁶ [2012] EWCA Civ 1626

²⁷ [2008] EWHC 1006 (Ch)

property without due inquiry or allowing him to keep it longer than the facts of this case reasonably require; becoming a co-trustee himself.²⁸

Rights of the Trustee

A trustee is allowed to keep the trust instrument and any other documents relating to the trust property. For the benefit of the beneficiary, the trustee may pay or pay back himself for spending properly incurred in the completion of the trust, or the realization, protection or benefit of trust property. If a trustee overpays a beneficiary, he may recover the overpayment from the beneficiary's interest. If the interest fails, the trustee may sue the beneficiary personally for the overpayment. A person who has benefited from a breach of trust must help protect the trustee up to the amount actually received, and if a beneficiary, the trustee has an expense on his interest for that amount. Trustees may apply to Civil Court for its opinion or suggestion on any matters concerning the maintain of the trust-property. The trustee is entitled to an acknowledgement about the accounts for settlement.²⁹

Powers of the Trustee

A trustee may, in exercise of the powers expressly granted by this Act and the trust instrument, do anything reasonable and proper to realize, protect, or benefit the trust property, or to protect or support a beneficiary who is incapable of contracting. Unless the trust instrument specifies otherwise, the trustee may sell trust property in lots, at public auction or by private contract. Any property sold at auction by the trustee may be purchased by the trustee and resold by the trustee at any time without liability to the beneficiary. To complete a sale, the trustee may impart or otherwise throw away of the sold property as required. Trust property invested in securities may be reinvested by the trustee in securities listed in section 20. Income received by a trustee in trust for an infant or minor may be paid to guardians (if any) or used for minor's maintenance, education, advancement in life or reasonable religious expenses. When money, securities, or other moveable property is owed to a person as a result of a trust, they can give a written receipt for it. When a trustee who has been given authority to deal with trust property resigns or dies, the remaining

²⁸ The Trusts Act 1882, s 23-26

²⁹ *ibid*, s 31-35

trustees may exercise that authority, unless it is clear from the terms of the trust instrument. There can be no power exercised by the trustee other than in accordance with any decree made by a court.³⁰ But in English legal system, to invest money in the purchase of some property from which interest or profit is expected, and which property is purchased to be held for the purpose of the income it will produce. As a result, the goal of a trustee's investment powers is to generate income for the trust's beneficiaries.³¹ In another cases³², as the power of a trustee, 'A trust to apply the whole or part of the income as the trustees may think fit for the maintenance of the children is a mandatory trust and compels the trustees to maintain the children where that trust takes place in the marriage settlement to which the father is a party,' the Court of Appeal has decided, while agreeing that the criticism is well founded.³³ As per section 4 of the Trustee Act 2000, a trustee has power to invest where necessary but in time to time to trustee has to review investments and appraise whether they are still consistent with overall investment criteria.³⁴

Disabilities of the Trustee

To cancel a trust, a trustee must obtain the consent of the beneficiary, or renounce the trust by trust instrument. Delegation of trustee duties is prohibited unless the instrument of trust expressly permits it. Court may control a trustee's discretionary power if it is not exercised reasonably and in good faith. There is no right to remuneration for a trustee's effort, skill, or loss of time in executing a trust unless there is a written or oral agreement. A trustee cannot deal with trust property for personal gain or for any other purpose. No trustee or agent employed by a trustee may directly or indirectly buy trust property or any interest therein for his own or for another. In order to buy or mortgage or lease the trust property or any part of it, Civil Court must grant permission and it should be benefited for the beneficiary. A trustee who is required to invest trust funds in mortgage or any personal security cannot do that for himself.³⁵

³⁰ *ibid*, s 36-45

³¹ *Wragg V Palmer* [1919] 2Ch 58

³² *Thompson v Griffi n* (1841) Cr & Ph 317

³³ *Wilson v Turner* (1883) 22 Ch D 521

³⁴ *Jeffrey v Gretton* [2011] WTLR 809

³⁵ The Trusts Act 1882, s 46-54

3.3 Removal of Trustees

When a trustee dies or is discharged from his or her position, the office of trustee becomes vacant. The trustee may be relieved of his or her duties under the trust by the extinction of the trust, the completion of his or her duties under the trust, or by any other means prescribed by the trust instrument; by the appointment of a new trustee in his or her place under this Act; by the consent about himself and then the beneficiary, as well as, where there are even more beneficiaries than that one, all the beneficiaries who are competent to contract, or by the Court to which an application for his or her removal has been filed. The beneficiary may, without the necessity of instituting a suit, petition a principal Civil Court of judicial power for the appointment of either a new trustee or another trustee whenever a vacancy or removal from office occurs and it is determined that it is unworkable to appoint a new trustee pursuant to section 73. The petition will be considered by the Court, and the Court will make the appointment of either a new trustee or another trustee.³⁶ Everyone appointed as a new trustee under this Act, as well as anyone appointed by a court before or after the passage of this Act, shall be given the same powers, authorities, and discretions, and shall act in the same manner, as if he had been nominated as a trustee by the trust's author. In English legal system, a trustee can be removed by a trust instrument, by section 36 of the Trustee Act 1925, under section 39 of this Act when such trustee as aforesaid by deed, discharge with appointing new trustee³⁷ under section 41 of the said Act and also by the inherent jurisdiction by the court.³⁸

³⁶ *ibid*, s 71,74

³⁷ *Re Harison's Settlement Trusts* [1965] 3 All ER 795

³⁸ *Titterton vs Oates* [2001] WTLR 319

Chapter Conclusion:

Bangladesh Trusts Act, 1882. This Act establishes guidelines for private trusts and trustees in Bangladesh. A trustee who has been instructed to sell within a specific time must prove to the beneficiary that the extension does not disadvantage him. An auctioneer can buy and resell property sold by a trustee to a trust beneficiary. Unsolicited purchases of trust property or interests by trustees or their agents are prohibited. Trustees may ask the Civil Court for advice on matters relating to the trust-property.

Chapter 4: Trusteeship in English Legal System

Duties of the Trustee

A trustee cannot be forced to accept the office, but once accepted. So long as he is a trustee, he must perform his duties. Even if the co-trustee is the trust's solicitor, the law does not distinguish between passive or active trustees.³⁹ However, in practice, it would normally be possible and more simple to elect a new trustee in his place. Before accepting a trusteeship with discretionary power, a trustee must specify any conditions in his or her life that might lead him to abuse that power. So long as the trust is not abused, he cannot use the discretion for his own advantage.⁴⁰ Trustees have the right and duty to verify their appointment,⁴¹ as well as the trust property they are to hold.⁴² The trust documents and papers should be examined for notices of encumbrances and other matters affecting the trust. This can be done effectively by a trustee producing to his heirs in office entries linked to the trust administration recorded in a diary or other document, or by two or more trustees producing the minutes of their meetings. A retiring trustee must carefully respond to his successor's inquiries about the trust and its affairs. If he negligently misleads his successor, he faces a common law negligence action. Similarly, in the situation of a corporate trustee, a new trustee may be able to demand the production of internal correspondence and memoranda. However, knowledge does not affect a trustee solely because a former trustee or a co-trustee acquires knowledge.⁴³ It is the responsibility of the trustees to ensure that they receive legal title to the trust property in a timely manner and, if this is not possible, that their equitable rights are appropriately protected, whether through notice to the legal owners or in some other manner. In accordance with Section 15 of the Trustee Act 1925⁴⁴, trustees are responsible for ensuring that the legal title to the trust property is properly transferred into their possession. If any part of the trust property is still owed to them, it is their responsibility to pursue payment or transfer of such trust property to them and they

³⁹ *Bahin v Hughes* (1886)

⁴⁰ *Peyton v Robinson* (1823)

⁴¹ *Harvey v Olliver* (1887) 57 LT 239

⁴² *Nestle v National Westminster Bank* [1994] 1 All ER 118

⁴³ *Re Miller's Deed Trusts* [1978]

⁴⁴ As amended by the Trustee Act 2000

should not be deterred by concerns about delicacy. Under s 1(1) of the Trustee Act 2000, it appears that they will not be held liable in any case where the failure to sue is the result of a passive attitude of leaving things alone.⁴⁵ If the trust property includes a lease that contains a promise that the tenant will personally occupy the demised premises at all times, the covenant appears to bind the trustees.⁴⁶ So, it should be noted that no trustee can be obliged by a previous holder of the office's release of a power, even if the power is releasable, which is not always the case.⁴⁷

The Act⁴⁸ creates a new duty of care for trustees when performing their duties under the Act. The term duty of care in the law refers to an obligation to prevent causing harm or loss. The new obligation is meant to clarify and standardize trustee competence and behavior. It is in addition to existing fundamental duties such as acting in the best interests of beneficiaries and according to trust rules. The trust's conditions may exclude or modify this default provision. The Privy Council recently evaluated the scope of a beneficiary's right to request disclosure of trust records in *Schmidt v Rosewood Trust Limited*⁴⁹. Of course, the Board's decision is not legally binding in England, but it is expected to be implemented. An exclusive right claim has been made. To this effect, Lord Wrenbury stated in *O'Rourke v Darbishire*⁵⁰. In this sense, they are his. According to the Board's judgment, a beneficiary's entitlement to disclosure of trust documents or information must always be based on a transmissible interest in trust property, but this was not a reasoned or binding determination, according to Lord Walker. Now, under section 137(8) of the Law of Property Act of 1925, any person with an equitable interest may make a request. the trustees to produce all written notices of dealings with the equitable interest. But trustees are not required to provide information or advice to their beneficiaries simply because they are trustees for them and they know they are dealing with a person or organization connected to the trustees in some way, such as a firm in which the trustees possess beneficial shares. Exceptionally, a defendant who is not ordinarily a proper party to the

⁴⁵ *Re Greenwood* (1911) 105 LT 509

⁴⁶ *Temple v Thring* (1887) 56 LT 283

⁴⁷ *Muir v IRC* [1966]

⁴⁸ The Trustee Act 2000

⁴⁹ [2003] UKPC 26

⁵⁰ [1920] AC 581,

proceedings may be ordered to identify the name and address of a third party. In *Re Murphy's Settlements*⁵¹, the court directed the settlor (who reserved the right of appointment of trustees) to provide the plaintiff with the names and addresses of the settlement trustees.

To the extent that the nature of the trust or any special dealings with the trust property make a more frequent exercise of the right reasonable, trustees may need an independent accountant to examine or audit their accounts.⁵² If the trustees have doubts about a claimant's title, such as if he claims under an appointment that may be a power fraud, they should seek to the court for guidance. *Re Benjamin*⁵³ orders allow trustees to distribute on the basis that a hypothetical beneficiary predeceased a testator, or as the case may be. A feasible answer to a missing beneficiary situation, especially for a small trust, may be to purchase missing beneficiary insurance.⁵⁴ In general, a trustee cannot require a release by deed from beneficiaries when transferring trust property. According to Kindersley VC in *King v Mullins*⁵⁵, a trustee paying either the income or the capital of a proclaimed trust has no authority to request a release under seal if he pays it in strict conformity with the trusts. He is entitled to a receipt for the monies transferred and an acknowledgement of the accounts cleared. He cannot, however, refuse to pay funds to a beneficiary under one trust because of a dispute under the other.⁵⁶

Rights and Liabilities of the Trustee

A trustee is personally accountable for the trust's contracts. In *Marston Thompson Evershed plc v Bend*⁵⁷, the plaintiff lent money to build a new rugby clubhouse. The loan was backed by a mortgage⁵⁸ on the club's property held by the four trustees. The defendants signed the loan arrangement as trustees and agreed to reimburse the capital and interest on demand. The club failed to return the amount, and the defendants were individually accountable. To avoid personal risk, liability must be explicitly stated. But a broad exclusion of liability

⁵¹ *Re Murphy's Settlements* [1998] 3 All ER 1

⁵² 22(4) of the Trustee Act 1925

⁵³ [1902] 1 Ch723

⁵⁴ *Re Evans (decd)* [1999] 2 All ER 777.

⁵⁵ (1852) 1 Drew 308

⁵⁶ *Price v Loaden* (1856) 21 Beav 508

⁵⁷ *Perring v Draper* [1997] EGCS 109

may not be upheld.⁵⁸ Generally, a trustee can sue and be sued on behalf of the property he manages. A beneficiary can only sue a third party if the trustees fail to preserve the trust estate or the beneficiary's interests in the trust estate.⁵⁹ For example, in *Field v Finnenich & Co.*⁶⁰, a plaintiff was allowed to sue on behalf of personal representatives who refused to sue, and there was no one else interested in the estate but the plaintiff and the deceased's widow. Neither the trust estate nor the beneficiaries are directly liable to creditors. Trustees may also be held personally accountable in tort for their acts or omissions in administering the trust, including vicarious liability for their employees or agents. Thus, in *Benett v. Wyndham*,⁶¹ a trustee's legitimately employed woodcutters negligently let a bough fall on and hurt a passer-by, who was entitled to seek damages from the trustee.

Where a beneficiary can sue, he sues on behalf of the trustees, who should be joined as defendants. He is not enforcing a responsibility owed to him directly by a third party.⁶² Waller LJ delivered the Court of Appeal judgment in *Shell UK Ltd v Total UK Ltd*⁶³. According to the ruling, a defendant who can fairly foresee that his negligent activity will damage a beneficiary's property owes that beneficiary a duty of care. If the defendant damages such property, he is accountable not only for the physical loss, but also for the anticipated consequences, such as the extra expense or loss of profit incurred by the beneficial owner. The beneficial owner could recover its loss. According to Lord Brandon in *Leigh & Sullivan Ltd v Aliakmon Shipping Co Ltd*⁶⁴, if the beneficial owner agrees, he must join the trustee as legal owner as claimant, otherwise as defendant. '[The trustee] can collect the amount [the beneficiary] has lost but will keep the monies so recovered as trustees for [the beneficiary]', said Waller LJ. However, there is substantial evidence suggesting that in extreme instances the joinder of trustees may be dispensed with.

⁵⁸ *Watling v Lewis* [1911] 1 Ch 414

⁵⁹ *Hayim v Citibank NA* [1987] AC 730

⁶⁰ [1971] 1 All ER 1104

⁶¹ 1862) 4 De G F & J 259

⁶² *Parker-Tweeddale v Dunbar Bank plc* [1991]

⁶³ [2010] EWCA Civ 180

⁶⁴ [1986] AC 785

Powers of the Trustee

All of the powers of an absolute owner are available to trustees in connection to their lands for the purpose of carrying out their responsibilities as trustees. This power of sale must be among those available to trustees.⁶⁵ There may be an express trust for or power of sale, or there may be an implied trust or power of sale, as in the case of *Howe v Earl of Dartmouth*, for example. A power may also exist under statutory provisions, such as section 4(2) of the Trustee Act 2000, in other situations. It must be mentioned that trustees' have an overwhelming obligation to acquire the highest price possible for their beneficiaries', even if accepting a higher offer may imply withdrawing from an existing offer at a late stage in the discussions, which would violate commercial ethics. Trustees must, however, exercise prudent judgment and may accept an existing lesser offer if probing for a higher one would involve a significant risk of both bids collapsing.⁶⁶

While a payment under s 15(f) must be given in settlement of a claim, this does not mean that in order to justify a compromise payment, it must be proven that the claim would have succeeded in the absence of the compromise. As the judge noted, if this were the case, the court's power of compromise would be reduced to a nullity. Additionally, it appears that the clause protects a trustee only if he has taken some action, or at the very least exercised some active discretion, and not if he has taken a passive attitude of letting affairs alone⁶⁷. The only criterion for utilizing the power is if the compromise is acceptable and equitable for all recipients.⁶⁸ It is no longer necessary to include specific powers of maintenance, and it is not recommended to discuss them in detail, as much depends on the wording employed. The major concern is whether the purported power is not an essential trust to apply the money, or a portion thereof, for or towards the minor's maintenance. In *Re Peel*⁶⁹, the Court of Appeal decided that a trust to apply the whole or part of the income as the trustees may think fit for the maintenance of the children is an obligatory trust and compels the trustees to maintain the children where that trust occurs in the marriage settlement to

⁶⁵ The Trustee Act 2000, s 8(4).

⁶⁶ *Buttle v Saunders* [1950]

⁶⁷ *Re Greenwood* (1911) 105 LT 509.

⁶⁸ *Re Earl of Strafford*

⁶⁹ [1936] Ch 161

which the father is a party⁷⁰. So, regardless of his ability to support his children, the father can compel the trustees to devote a sufficient percentage of the revenue to this purpose. But it was made plain that this caseload would not be extended. Trustees are personally accountable for trust contracts; creditors cannot directly sue the trust estate or the beneficiaries. The Trustee Act 2000 specifies that a trustee is entitled to be compensated from the trust funds⁷¹ for expenses properly incurred when operating on behalf of the trust. This clause applies to a trustee who has been properly authorized to act as an agent, nominee, or custodian.⁷² An indemnification for liabilities legitimately incurred in carrying out the trust is stated to constitute the general concept, and that right goes beyond the trust property to sui juris beneficiaries. The principle states that the trust's beneficiary should face the burdens unless the beneficiary can prove a good reason for the trustee to bear them. In *Jervis v Wolferstan*⁷³, Jessel MR stated that "I understand it to be an usual rule that where individuals accept a trust at the request of the other, and that other is a cestui quo trust, they are personally liable to indemnify the trustees for any damages resulting in the due execution of the trust." A cestui que trust's personal duty to indemnify his trustee is not relieved by an assignment of his beneficial interest.⁷⁴ If a trustee is a party to a proceeding in that role, he is entitled to recover his expenses from the trust funds if no one else pays them. Concerning the trust's administration, it doesn't matter if he is defending himself against charges brought against him personally.⁷⁵ All powers of an absolute owner under the Trusts of Land and Appointment of Trustees Act⁷⁶. They have this power simply to perform their duties as trustees. The Act grants trustees of land permission to buy land for investment, occupation by a beneficiary, or for any other cause⁷⁷.

⁷⁰ *Wilson v Turner* (1883)

⁷¹ The Trustee Act 2000, s 31(1)

⁷² The Trustee Act 2000, s 31(2)

⁷³ (1874) LR 18 Eq 18

⁷⁴ *Mathews v Rugles-Brice* [1911] 1 Ch 194

⁷⁵ *Walters v Woodbridge* (1878) 7 Ch D 504

⁷⁶ The Trustee Act 2000, s 6(1)

⁷⁷ The Trustee Act 2000, s 6(3)

Control the power of Trustees

A trustee's duties must be performed and failure to do so results in a breach of trust. Concerning the exercise of discretionary powers, he is only required to evaluate whether he should exercise them and to consider requests from those who are entitled to them.⁷⁸ A trustee who examines whether or not to exercise a power is unlikely to be overruled. The beneficiaries are entitled to be treated as registered shareholders in respect of trust shares, with all the advantages and disadvantages that entails, and they can compel the trustee directors to use their votes as the beneficiaries or the court, if the beneficiaries are not in agreement see fit, even to the extent of amending the trust shares' articles of association.⁷⁹ In *Sieff v Fox*⁸⁰, Lloyd LJ noted that trustees' apparent use of discretionary power may be invalidated for many reasons. Using a document under hand instead of a deed, or failing to secure a required prior consent are examples of formal or procedural flaws. The power may have been used in ways it does not authorize, such as unauthorized delegation or inclusion of non-power beneficiaries. The exercise may violate a general law norm, such as the rule against perpetuities. The trustees may have misused their power, committing a power fraud. Trustees acting capriciously, for example choosing beneficiaries based on their height or complexion, would also constitute an improper exercise of power. As in *Turner v Turner*⁸¹, a factually extreme and exceedingly exceptional case described as equitable non est factum, the trustees may not have known they had any discretion. Also, if trustees present justifications for their decisions, the court can assess their soundness⁸². If a trustee's decision is directly challenged in court, the trustees may be forced to explain the rationale behind their decision, either legally through discovery or practically to avoid unwanted assumptions.⁸³

⁷⁸ *Re Ministy's Settlement* [1974] Ch 17

⁷⁹ *Butt v Kelson* [1952] Ch 197

⁸⁰ [2005] EWHC 1312 (Ch)

⁸¹ [1984] Ch 100

⁸² *Wilson v Law Debenture Trust Corp* [1995]

⁸³ *Scott v National Trust for Place of Historic Interest or Natural Beauty* [1998]

Chapter Conclusion:

English courts are anticipated to enforce the Privy Council's ruling. The Act imposes a new responsibility of care on trustees. By law, trustees must ensure that they receive legal title to trust property. If a trustee has reservations about a claimant's title, such as if he claims under a power fraud appointment, they should consult the court. When a trust provides for the sustenance of children, the Court of Appeal ruled that it is an obligatory trust. If so, the court's power of compromise would be nullified.

Chapter 5: Recommendations & Conclusion

Recommendations and Findings

The core argument in my paper finds out inconsistency regarding issues between two countries. In my findings, we can see about general trusteeship and their consequences where there is lacking of the provisions in our country so that a trustee can be appointed or revoked and also even about the types of trusteeship. The perspective of our country regarding trusteeship and the provisions about duties, powers of trustees. Bangladesh follow the Trust Act, 1882 and there are no other laws regarding the trusteeship system and for such reason we are facing a lot of problems. English legal system is enriched enough compare to our legal system about trusteeship. There must be the solution, Bangladesh can amend the laws regarding issues like the English Law. When they amend the existing provision regarding issues in Trusteeship Law they can consider English laws regarding issues. Besides that, I have managed to give some recommendation regarding these issues. There should be added some provision as if a trustee can be appointed in a more specific way. Provisions that the court can declare the trustee revoked or make any declaration for the betterment of the trust. The provisions of punishment should be incorporated in The Trust Act, 1882 if any person violates the provisions written in the Law. The provisions related public trust and the things about public trustees should be incorporated in this law. These must be mandatory for the all the people who wanted to make even a small trust. The provisions related to duty to care and also duty to unanimously for the trust property should be more specific way in this law like the English legal system. Skill related provisions for incorporating the trust by a trustee should be added on the law. Provisions related to delegations of power should be incorporated thus there would not be any misuse. There should be added some specific provisions thus a trustee can use trust property or invest the portion of the property for make profit which can use for the betterment of the trust in a whole. There should also be some more specific provisions about the duty of a trustee thus he/she cannot use the benefit for his own and he has to work on it impartially. The duties related to work as a safeguard and duty related to consult,

consent, directions should be added on the Law in a specific way. There should be added some more specific laws in the Act thus in every trust in our country there is a check and balance. In the case of a property purchased by trustee in the name of trust, the court should apply the equitable doctrine if there arise any dispute related to that property and for proper use of that. The Trust Act 1882 should be amended and strongly deterrent law like English legal system should be enacted to effectively stop misuse of powers and duties of trustees in Bangladesh.

Conclusion

After researching the Act of our country, the Act of the English Legal system, and numerous examples, it is obvious that our legal system is inferior to the English Legal system. In 1882, the Trusteeship Act was enacted. After that, we did not attempt to improve the trusteeship system, although the English legal system continues to improve theirs. They have a well-established legal framework concerning trusteeship. After researching our system and the English legal system, I am making the following recommendations. There must be greater regulations regarding the authority and responsibilities of trustees. The government should assume responsibility for these duties. The trustees' powers should be clarified. Similar to the English Trusteeship system, the authority to sell the property, maintain it, advance, invest, and determine the cost of numerous investments should be stated. Court and governmental involvement should be specified so that trustees cannot abuse their authority. Both public and private trusts should adhere to the same rules and regulations. The Trust Act of 1882 does not include public trust in our trusteeship institutions. These measures should also be incorporated into charity trusts so that no one can abuse any trusteeship system in our country. According to my research, In my findings, Bangladesh legal system requires several laws on Trusteeship like English legal system. Trusts Act, 1882 is not adequate enough.

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