

**PARTIAL CODIFICATION OF TRUSTEES' FIDUCIARY DUTIES AGAINST
THE BACKDROP OF CORPORATE LAW REFORM**

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Summary

This dissertation examines whether the lack of ready access by trustees to a codified set of their fiduciary duties is contributing to poor governance of trusts and whether setting out these duties in the Trust Property Control Act would promote good governance. Chapter 1 considers whether corporate law reform is an appropriate basis for comparison when considering the codification of trustees' fiduciary duties. It suggests that corporate law is a useful comparator because it has well-developed law in relation to fiduciary duties, which has also shaped trust law. Twenty plus years after the Trust Property Control Act was enacted, South Africa's socio-economic environment has changed dramatically and trusts are today used extensively and for many purposes. Trust law needs to keep pace with this change, as well as current thinking on good governance. It also needs to better serve today's vast number of trustees of varying skill and experience. The dissertation asks what lessons can be learned from considering the partial codification of directors' fiduciary duties in the Companies Act 2008 and whether the proposed codification will advance governance of trusts and benefit beneficiaries in fundamental ways. It uses primary and secondary sources and comparative research in considering the approach to codification of fiduciary duties in New Zealand, Australia and England. The newly enacted New Zealand *Trusts Act 38 of 2019* is particularly relevant and timely. Chapter 2 examines the theory of and rationale for codification, and the arguments of its opponents, generally, as well as specifically in relation to the Companies Act 2008. It also considers the influence of King IV. Chapter 3 examines fiduciary duties identified in trust cases with a view to formulating a body of core duties incorporated into the partial codification proposed in the subsequent chapter. These amendments are suggested as part of a multi-pronged approach to improved governance in trust law. The final chapter concludes that although the partial codification of directors' fiduciary duties in the Companies Act offers, in principal, useful guidance, it cannot serve as a template for amendments to the Trust Property Control Act. By contrast, the legislative action proposed in chapter 4 is consistent with international trends in governance and should advance the cause of good governance in trust law.

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Chapter 1: Introduction

1 1 Introductory

This chapter provides a basis for comparing codification of trustees' fiduciary duties with that of directors' duties in the Companies Act¹ and provides context for this dissertation using the backdrop of South African corporate law reform. It considers the drivers for that reform and notes whether these apply in relation to Trust Property Control Act² when considering codifying trustees' fiduciary duties.

1 2 The trustee as fiduciary

The position of a trustee is fiduciary in nature.³ Indeed, the fiduciary position of a trustee has been described as the "first core element of the trust".⁴ Essential to the office of a fiduciary is that he owes a fiduciary duty⁵ to those in whose interests he is required to act. This duty applies once the trustee has accepted his appointment⁶ and been authorised to act by the Master of the High Court⁷ or appointed by the High Court itself.⁸ The Supreme Court of Appeal noted this fundamental feature of trust law in *Land and Agricultural Bank of South Africa v Parker*⁹ in saying that a trustee "is appointed and accepts office to exercise fiduciary responsibility over property on behalf of

¹ S 76 of the Companies Act 71 of 2008.

² 57 of 1988 (the Act).

³ Cameron *et al Honoré's South African Law of Trusts* (2018) 11; *Doyle v Board of Executors* 1999 (2) SA 805 (C) paras 813A-B.

⁴ De Waal "The core elements of the trust: Aspects of the English, Scottish and South African trusts compared" 2000 *SALJ* 548 557.

⁵ *Doyle v Board of Executors* paras 813A-B; *Gowar v Gowar* 2016 (5) SA 225 (SCA) 232; see also Cameron *et al* 5.

⁶ Notwithstanding the decisions in *Simplex (Pty) Ltd v Van Der Merwe* 1996 (1) SA 111 (W) and *Lupacchini v Minister of Safety and Security* 2010 (6) SA 457 (SCA) which provide that trustees must be authorised by the Master prior to acting in relation to trust property, the Chief Master noted in the Chief Master's Directive 2 of 2017 that trustees must be able to perform acts necessary to obtain the Master's authority and to maintain and conserve trust assets while that authority is pending. In *Harris v Rees* 2011 (2) SA 294 (GSJ) paras 298E-F it was held that pursuant to his fiduciary duty to protect a trust's interests, even an unauthorised trustee is obliged to so act.

⁷ S 6(1) of the Act; see also Du Toit *et al Fundamentals of South African Trust Law* (2019) 99.

⁸ The High Court has a right, arising out of the common law, to appoint trustees. See also s 6(1) of the Act in this regard.

⁹ 2005 (2) SA 77 (SCA).

and in the interests of another”.¹⁰

A trustee’s fiduciary duty pertains to the manner in which he manages, or administers,¹¹ the trust property¹² and is the legal obligation on a person to act in the best interests of another¹³ and in “utmost good faith”.¹⁴ It is settled law that these prescripts provide the overarching framework for trustees’ conduct.¹⁵

Trustees’ duties encompass both common law and statutory duties, as well as duties set out in the trust instrument. There are, however, differing views among academic commentators as to the scope of fiduciary duties.¹⁶ Du Toit submits that a South African trustee has a “general fiduciary duty” and that:¹⁷

“... this general fiduciary duty is multi-faceted in that it is comprised of a number of specific component duties. Which component duty or duties of a trustee’s general fiduciary duty will be relevant in any given instance will depend, as indicated by the court in the *Phillips* case, on the facts at hand adduced from the substance of the relationship between the relevant parties, as well as any relevant circumstances which affect the operation of such relationship.”

This dissertation proposes that this general fiduciary duty comprises the duties to act in the best interests of beneficiaries and in utmost good faith.¹⁸ While

¹⁰ Par 20.

¹¹ Geach *Trust Law in South Africa* (2017) 216; see also Du Toit “The fiduciary office of trustee and the protection of contingent trust beneficiaries” 2007 *Stell LR* 469 469 which clarifies that this administration is for the benefit of the person or class of person designated in the trust instrument as beneficiary or beneficiaries (as the case may be), or for the achievement of the object stated in the trust instrument, in the case of a charitable trust.

¹² Cameron *et al* 4; *Hofer v Kevitt* 1996 (2) SA 402 (C) 407.

¹³ Geach 216.

¹⁴ Cameron *et al* 298-299; *Doyle v Board of Executors* par 813A-B; Geach 216; see also *Phillips v Fieldstone Africa (Pty) Ltd* 2004 1 All SA 150 (SCA) par 159E-G.

¹⁵ Du Toit 2007 *Stell LR* 469 473.

¹⁶ In this regard, see De Waal 2000 *SALJ* 548 558-559; Du Toit 2007 *Stell LR* 473 and Geach 216 *et seq.* Pace and Van der Westhuizen *Wills and Trusts* (2018) B15.1.1 64(49).

¹⁷ 2007 *Stell LR* 469 473.

¹⁸ As set out in *Sackville West v Nourse* 1925 AD 516 534, in which it was held that one in a fiduciary position must exercise greater care with his ward’s assets than he does with his own. This standard was likened to that of a *bonus et diligens paterfamilias* (a reasonable, prudent

there are, indeed, fiduciary duties identified by the courts which are subsidiary to these overarching ones,¹⁹ the duties set out in the Trust Property Control Act are distinct. These fall into two categories: (i) the duties of care, diligence and skill (taken from the common law and reiterated in section 9 of the Act);²⁰ and (ii) the strictly administrative tasks required of a trustee, including *inter alia* the duty to lodge the trust instrument,²¹ to open a separate trust account, to deposit trust monies,²² and to maintain trust records.²³ Fiduciary duties and duties of care, diligence and skill are particularly important because they serve to limit the powers of trustees by providing a framework within which these decision-makers must act.

A trustee's duties of care, diligence and skill must not be confused with a trustee's fiduciary duties.²⁴ It should be noted that in relation to directors of companies, the duties of care, diligence and skill required of them are also viewed as distinct from fiduciary duties.²⁵ These duties of care, skill and

and careful person). This was expanded upon by the court in *Administrators, Estate Richards v Nichol* 1999 (1) SA 551 (SCA) and relied upon in *Tijmstra v Blunt-Mackenzie* 2002 (1) SA 459 (T). See also Pace and Van der Westhuizen B14.2.1.

¹⁹ See ch 4. See also De Waal 2000 SALJ 548 559 in which he identifies "specific duties flowing from" the general fiduciary obligation.

²⁰ S 9 of the Act states that "A trustee shall in the performance of his duties and the exercise of his powers, act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another".

²¹ S 4 of the Act.

²² S 10 of the Act.

²³ S 17 of the Act.

²⁴ De Waal believes it to be "the essence of a trustee's fiduciary duty" - see De Waal "Die wysiging van 'n inter vivos trust" 1998 TSAR 326. English law of trusts is instructive in this regard. Du Toit's view is that the duty of care is a component of the trustee's fiduciary duty (see Du Toit 2007 *Stell LR* 474). Moffat *et al Trusts Law* (2009) 572 states that a trustee's fiduciary duty is distinct from the duty of care. He explains: "one can be loyal and therefore not in breach of one's fiduciary duty but simultaneously be careless and thus in breach of trust." In support of this statement Moffat cites Ipp J in *Permanent Building Society (in liq) v Wheeler* 1994 (14) ACSR 109 157: "... a trustee's duty to exercise reasonable care, though equitable, is not specifically a fiduciary duty." Mitchell *Hayton & Mitchell: Commentary and Cases in the Law of Trusts and Equitable Remedies* (2010) 354 *et seq* also distinguishes a trustee's duty of care and his fiduciary duty. The latter he discusses in the context of conflicts of interest and unauthorised fiduciary profits. At 646, he describes the fiduciary duties of fidelity and loyalty. See also Geach 217 and Mupangavanhu "Fiduciary Duty and Duty of Care under the Companies Act 2008: Does South African Law Insist on the Two Duties Being Kept Separate?" 2017 *Stell LR* 148 149.

²⁵ Cassim *et al Contemporary Company Law* (2012) 554. See also Blackman *et al Commentary on the Companies Act* (2012) 34 and Bouwman "An appraisal of the modification of the director's duty of care and skill" 2009 SA *Merc LJ* 509 510 which notes that corporate law commentators have identified that fiduciary duties applicable to directors arise out of Roman Dutch law and are *sui generis*, while the duties of care and skill are delictual in nature and

diligence require of a trustee a certain kind of attention and expertise that can be distinguished from the intention called for when one acts in the best interests, or in good faith, towards another.

Furthermore, the many administrative duties imposed on trustees in the Act describe actions to be taken in service of a trustee's fiduciary duties, as well as their duties of care, diligence and skill. These administrative duties go some way in ensuring that a trustee fulfils his fiduciary duties and his duties of care, diligence and skill, but they can never go all the way. There is a qualitative element and a subjective quality to these overarching duties which creates the framework in which a trustee operates. These duties describe the way a trustee must act in any given circumstance, even while what is required may change from situation to situation.²⁶

1 3 Can trustees be compared to directors for purposes of this dissertation?

Although companies and trusts are quite different under the law, the functions of those persons responsible for their administration (being directors and trustees, respectively) are quite similar. A company is a juristic person, with separate legal personality, while a trust is a legal institution *sui generis*²⁷ and has been described by our courts as an accumulation of assets and liabilities.²⁸ Even though this fundamental difference exists, companies and

derived from English law, and further that the remedies for breaches of these duties are different. The remedy for a breach of a fiduciary duty is restitution. The remedy for a breach of the duty of care is damages recoverable by the company, not restitution.

²⁶ Ch 3 explores in further detail the component duties of the general fiduciary duty.

²⁷ *Braun v Blann and Botha* 1984 (2) SA 850 (A) and *Badenhorst v Badenhorst* 2006 (2) SA 255 (SCA) par 8. S 1 of the Act defines a trust as an:

“arrangement through which the ownership in property of one person is by virtue of a trust instrument made over or bequeathed –

(a) to another person, the trustee, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument; or

(b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument.”

²⁸ See Du Toit *et al* 5: “..., the South African trust is generally not clothed with legal personality and South African courts have affirmed this in numerous judgments.” In this regard, see Land

trusts have much in common. The courts have recognized that a trust has an existence separate and apart from the founder, trustees and beneficiaries.²⁹ Both companies and trusts may be used for profit-making, on the one hand, or charitable or non-profit purposes, on the other.³⁰ Both manage assets for the benefit of others: as regards companies, assets are held in the name of the company and employed for the benefit of shareholders,³¹ while in the case of trusts legal ownership of trust assets customarily vests in the trustees from time to time,³² and trust assets are held for the benefit of beneficiaries.³³ While directors may or may not be owners (shareholders) of a company, trustees will *ex officio*³⁴ usually be co-owners of the trust assets.³⁵ Directors, in their management role, exercise control over corporate assets, while trustees exercise control over trust assets.³⁶

and Agricultural Development Bank of South Africa v Parker par 10 and *Lupacchini v Minister of Safety and Security* par 1. In *Minister of Education v Syfrets Trust Ltd* 2006 (4) SA 205 (C) par 28 and *Steyn v Blockpave (Pty) Ltd* 2011 (3) SA 528 (FB) par 8 the courts misspoke when, respectively, describing a trust as a juristic person and having legal personality. The trial judge in *Badenhorst v Badenhorst* 2005 (2) SA 253 (C) par 26 also described a trust as a separate legal entity but the Supreme Court of Appeal stated in par 8 that “Strictly speaking it is incorrect to refer to a trust as a ‘separate legal entity.’” In support, it cited *Commissioner for Inland Revenue v MacNeillie’s Estate* 1961 (3) SA 833 (A) at 840G-H.

²⁹ *Raath v Nel* 2012 (5) SA 273 (SCA). The trust is also seen as a “person” for purposes of certain legislation, such as the Deeds Registries Act 47 of 1937, the Income Tax Act 58 of 1962, the Value Added Tax Act 89 of 1992, the Consumer Protection Act 68 of 2008, the National Credit Act 34 of 2005 and the Companies Act 71 of 2008. See Du Toit *et al* 203-205.

³⁰ See Geach 491, Cameron *et al* 202 and Pace and Van der Westhuizen B4.1 21 for discussions of trading or business trusts. See Geach 23 in relation to use of trusts as family trusts and Cameron *et al* 185 and Pace and Van der Westhuizen B8.1 51 for discussions of charitable and public benefit trusts. See s 8(1) of the Companies Act 2008 which describes the two types of companies formed under that Act, namely profit and non-profit companies.

³¹ A profit company’s assets are deployed to create shareholder value.

³² See, however, s 1(b) of the Act. In a so-called “*bewind*” trust the trust estate is owned by the beneficiaries and the trustees only administer the trust.

³³ The language creating a trust must oblige trustees to deal with assets for the benefit of beneficiaries. See Cameron *et al* 8-11.

³⁴ Trusteeship is an office and a trustee administers a trust in an official capacity. See Du Toit *et al* 3. See also Abrie *et al Estate & Financial Planning* (2003) 81 and Van der Spuy and Van der Linde “Registrasie van Onroerende Trustgoed in Naam Van ‘Trustees van tyd tot tyd’ Joubert v Van Rensburg 2001 1 SA 753 (W)” 2002 THRHR 485 488.

³⁵ In a *bewind* trust the trust estate is owned by the beneficiaries and trustees are not co-owners of the trust assets. The trustees simply control the assets. On the nature of co-ownership, see De Waal “The Strange Path of Trust Property at a Trustee’s Death: Theory and Practice in the Law of Trusts” 2009 TSAR 84 and Geach 38. Additionally, if a person transfers or otherwise contributes assets to a company or a trust, that person no longer exercises full control over those assets.

³⁶ Geach 352; see also *Land and Agricultural Development Bank of South Africa v Parker* paras 19-20.

Limited liability is an additional and important feature of private or public companies. This means that shareholders, as a general principle, are not liable for the company's debts.³⁷ Trusts also have limited liability: trust assets form part of a distinct trust estate,³⁸ and are not customarily owned by the beneficiaries and, as such, a creditor of a trust cannot claim these assets in settlement of their debts³⁹ or otherwise pursue beneficiaries unless there has been proven abuse of the trust form.⁴⁰

Trustees and directors responsible for managing trusts and companies, respectively, are from an administrative perspective also more alike than they are different. Using the phraseology of the King Report on Corporate Governance for South Africa 2016, known as King IV,⁴¹ boards of trustees or directors, as applicable, are the governing bodies of their institutions. A board of trustees, like a board of directors in relation to a company,⁴² is responsible for management of the affairs of the trust. Indeed, academic literature recognizes the concept of a trust or trustee in either a wide sense or a strict/narrow sense.⁴³ Used in the wide sense, it describes the legal arrangement or functionary responsible for such arrangement, as applicable, in terms of which there is control and management of property for and on behalf of another.⁴⁴ It is suggested that a director is a trustee in the wide

³⁷ Cassim *et al* 35. A shareholder only stands to lose the amount he contributed in acquiring his shares. See also Delpont *New Entrepreneurial Law* (2014) 15 and s 19(2) of the Companies Act 2008.

³⁸ See Du Toit *et al* 3; Geach 25; *Land and Agricultural Development Bank of South Africa v Parker* par 10 and De Waal 2000 SALJ 548 560.

³⁹ However, in a *bewind* trust the trust estate is owned by the beneficiaries and, as such, can be attached by creditors.

⁴⁰ Geach 497. See also Du Toit *et al* 201.

⁴¹ See www.iodsa.co.za.

⁴² S 66(1) of the Companies Act 2008 mandates the board to manage a company's business and affairs.

⁴³ Du Toit *et al* 1 and *Conze v Masterbond Participation Trust Managers (Pty) Ltd* 1996 (3) SA 786 794G-H. As defined in the Trust Property Control Act, a trust is a trust in the strict or narrow sense. See also Cameron *et al* 4.

⁴⁴ Du Toit *et al* 1. De Waal 2000 SALJ 548.

sense.⁴⁵ Cassim *et al* provide useful context:⁴⁶

“The legal position of a director as a fiduciary developed historically in England around the trust concept. The description of a director as a trustee thus played a useful role in English law at one stage. The *position of a director is analogous to that of a trustee* in that a director, like a trustee, stands in a fiduciary relationship to the company in the performance of his or her duties, and acts for the benefit of some other person, and not for his or her own benefit.”
[emphasis added]

However, the typical trustee as compared to the typical director has a different focus as regards their management of the assets under their control.⁴⁷ The former is tasked with preserving and growing assets without taking on unreasonable risk, and doing so within the limitations of the trust instrument.⁴⁸ Directors of companies, on the other hand, manage commercial endeavours for profit companies with a view to enhancing shareholder value without the limitations on investment to which trustees are normally subject.⁴⁹ In the final analysis, though, they both are subject to fiduciary obligations and this is central to their respective roles.

⁴⁵ Others who are trustees in the wide sense include tutors in that they administer property for their pupils, curators who do so for the mentally incapacitated and agent who act for their principals. In this regard, see De Waal 2000 SALJ 548 and Du Toit *et al* 1, which also includes executors of deceased estates in this grouping. Directors act in the same way in relation to shareholders and the property owned by the company (which, in turn, is owned by shareholders).

⁴⁶ 412.

⁴⁷ In the absence of specific contrary provisions in a trust instrument relating to investments, trustees must be prudent and not speculative in their investment strategy as it relates to trust assets. Capital growth may be required by virtue of a trust enduring for a long period but capital growth must be achieved within the framework of the limitations imposed on trustees, pursuant to the trust instrument and his duties. See *Administrators, Estate Richards v Nichol* 557-559 in this regard. See also Geach 224.

⁴⁸ See *Sackville West v Nourse* 534; *Administrators, Estate Richards v Nichol* 558 and *Tijmstra v Blunt-Mackenzie* 472-474 on this issue.

⁴⁹ See s 8(1) of the Companies Act which describes the two types of companies formed under that Act, namely profit and non-profit companies. A “profit” company is defined in s 1 as a company incorporated for the purpose of financial gain for its shareholders.

1 4 Approach taken to directors' fiduciary duties

The common law fiduciary duties of directors of companies were partially codified in the Companies Act 2008, which came into effect on 1 May 2011. Prior to this, governance prescriptions arose primarily out of common law, as well as The King Report on Corporate Governance for South Africa,⁵⁰ which was released in September 2009 to coincide with the coming into effect of the then-new Companies Act. By contrast, to date there has been no codification of the fiduciary duties of trustees, which are to be found in the common law.⁵¹

King IV sets out best practices and current thinking in relation to governance structures and mechanisms in South Africa and provides a contextual backdrop for this dissertation. The King Reports (incorporating the King Codes on Corporate Governance) have at their respective dates of publication⁵² reflected the latest and best practices internationally on corporate governance over the 25-year period since King I was introduced. The Trust Property Control Act took effect some six years prior to King I and, accordingly, reflects none of the progressed thinking on governance generally.

King IV was launched in November 2016 and is applicable to all forms of organisation, including trusts. It applies, however, on a voluntary basis, other than in the case of listed companies.⁵³ As such, unless certain recommended practices have been incorporated into statute, the King governance codes have never had the force of law. Entities comply with these governance proposals in their discretion and as their governing bodies believe best serves their particular organisation.

⁵⁰ King III.

⁵¹ See par 1 1 of ch 1 for a discussion on the divergence of views on what duties should rightly be classified as fiduciary in nature.

⁵² King I was published 29 Nov 1994. Subsequent iterations were published 26 Mar 2002 (King II) and 1 Sept 2009 (King III).

⁵³ King IV mandatorily applies to companies listed on the JSE Limited by virtue of incorporation by reference in par 3.84 of the Listings Requirements of the JSE Limited. King I and King II only applied to "affected companies", being listed companies, financial institutions and public sector enterprises. King III, in contrast, explicitly broadened the scope of its application to apply to "all entities regardless of the manner and form of incorporation or establishment and whether in the public, private sectors or non-profit sectors." King IV's scope remains similarly broad.

Those responsible for governing any institution that is a meaningful player in the economy, such as trusts, should be held to the highest standards of governance and law. Concomitant thereto is the requirement that trustees, like corporate actors, be given ready access to their legal responsibilities.

1 5 Contextualising the research question

This dissertation considers whether a similar approach to that taken in the Companies Act 2008 should be followed in relation to the fiduciary duties of trustees in the Trust Property Control Act. In this context, it explores the rationale for the codification of directors' fiduciary duties. The dissertation takes into account arguments for and against codification and grounds its analysis in broader discussions pertaining to governance in South Africa and current case law identifying trustees' fiduciary duties. This dissertation does not, however, canvas ways in which trustees are breaching their duties generally.⁵⁴ It further proposes amendments to the Act addressing a partial codification of trustees' duties.⁵⁵

While there is considerable similarity in the fiduciary duties of directors and trustees,⁵⁶ it is not necessary for this dissertation to consider the ways in which they may be different. This is because the approach taken in the Companies Act 2008 does not need to be a template for a proposed approach to codifying these duties in the Trust Property Control Act.⁵⁷ Indeed, this dissertation suggests that it should not be a template. Rather, the approach taken in the

⁵⁴ These include a trustee treating the trust as his *alter ego*; being a so-called sleeping trustee by deferring to a dominant trustee without the former *inter alia* applying his mind independently; or where a founder wishes to amend the terms of an *inter vivos* trust before beneficiaries have accepted benefits under the trust and the trustee simply concedes to this without considering his fiduciary duties and applying his mind independently and impartially as to whether or not the amendment should be made. See Du Toit *et al* 75-77 and Geach 327 and 333-334.

⁵⁵ See ch 4.

⁵⁶ See ch 4 for an overview of these duties.

⁵⁷ The partial codification of fiduciary duties in the Companies Act is viewed by many as flawed: complaints made include that it creates confusion, is poorly drafted and incomplete and lacks a coherent structure. See Havenga "Regulating directors' duties and South African company law reform" 2005 *Obiter* 609 609; McLennan "Directors' fiduciary duties and the 2008 Companies Bill" 2009 1 *TSAR* 184 184; Botha "The Role and Duties of Directors in the Promotion of Corporate Governance: A South African Perspective" 2009 *Obiter* 702; Cassim *et al* 20.

Companies Act 2008 is instructive because both directors and trustees are fiduciaries and the extensive case law on maladministration by trustees reflects a need for trustees to better fulfil their fiduciary duties.⁵⁸ In order to be able to do so, trustees need to know the scope of their duties. As such, and in light of the approach taken in the Companies Act 2008 and other legislation of interest in the development of South African law, this dissertation specifically considers trustees' fiduciary duties with a view to formulating an approach to a partially codified set of core fiduciary duties that are likely to be helpful to trustees and beneficiaries by being more readily accessible.⁵⁹

Given the scrutiny of the conduct of directors of listed companies and state-owned entities, there is an increasingly vigorous public dialogue surrounding whether directors are performing their duties as required by law.⁶⁰ The ongoing discourse surrounding how directors conduct themselves is helpful in that it educates the public, at least in a general sense, as to the duties of directors (fiduciary and otherwise), even if the precise scope of these duties is not explicitly articulated by the media. Over time, people develop expectations of directors in the context of what they learn directors should or should not do.

⁵⁸ See *inter alia* *Hoppen v Shub* 1987 (3) SA 201 (C); *Jowell v Bramwell-Jones* 2000 (3) SA 274 (SCA); *Doyle v Board of Executors*; *Tijmstra v Blunt-Mackenzie*; *Land and Agricultural Development Bank of South Africa v Parker*; *Wiid v Wiid* (Unreported N Cape HC case no 1571/2006); *Law Society of the Cape of Good Hope v Randell* 2015 All SA 173 (EC), and *Watson v Cockin* 2016 JDR 0762 (GP).

⁵⁹ This dissertation proposes a detailed, although still partial, codification of a trustees' fiduciary duties in the Trust Property Control Act.

⁶⁰ For a discussion of corporate governance issues in state owned entities, see Thabane & Snyman-Van Deventer "Pathological Corporate Governance Deficiencies in South Africa's State-Owned Companies: A Critical Reflection" 2018 *PELJ* 21. See also a sample of the commentary in relation to governance issues pertaining to the boards of the Public Investment Corporation, the South African Broadcasting Corporation, Steinhoff, KPMG and Independent Media available at the following web addresses, respectively: Nicholson "Public Investment Corporation Inquiry witnesses receive death threats" 14 Feb 2019 <https://www.dailymaverick.co.za/article/2019-02-14-inquiry-witnesses-receive-death-threats/> (accessed 05 Aug 2019); Thamm "SABC Vertigo Board appointments delay: Dysfunctional SABC could lead to challenge of election results" 22 Feb 2019 <https://www.dailymaverick.co.za/article/2019-02-22-board-appointments-delay-dysfunctional-sabc-could-lead-to-challenge-of-election-results/> (accessed 5 Aug 2019); Rose "Steinheist: The inside story behind the Steinhoff scandal" 14 Nov 2018 <https://www.dailymaverick.co.za/article/2018-11-14-steinheist-the-inside-story-behind-the-steinhoff-scandal/> (accessed 05 Aug 2019); Davis "Newsflash KPMG axes CEO after just more than a year" 3 Oct 2018 <https://www.dailymaverick.co.za/article/2018-10-03-kpmg-axes-ceo-after-just-more-than-a-year/> (accessed 5 Aug 2019).

This attention on how listed companies are managed by their boards is understandable given the impact such a board's decisions have on large numbers of shareholders and other stakeholders.⁶¹ Less attention is directed at the conduct of directors of private companies and trustees of trusts due to the less public nature of the consequences of their decisions. This does not, however, mean the fiduciary duties are any different, or less important, in these scenarios. Indeed, some 1 500 000 companies are registered in South Africa as of July 2019⁶² and, as of 2017 some 700 000 trusts⁶³ were registered.

In line with current thinking around governance, the breach of duties by governing bodies affect more than just shareholders: they affect all stakeholders (being employees, lenders and community members whose livelihoods and businesses depend on the original business). Certainly, whether emanating from the public or private sphere, decisions of fiduciaries (be they directors or trustees) have consequences at an individual level. A beneficiary of a trust is no less entitled to sound and legally compliant decision-making, than a shareholder of a company whose shares are listed on the Johannesburg Stock Exchange.

Until the Companies Act 2008 came into effect,⁶⁴ corporate directors operated in a similar environment to that of trustees.⁶⁵ As such, in the performance of their duties, they were wholly dependent on an understanding of the common law as it applies to fiduciary duties.⁶⁶ However, the common law of fiduciary

⁶¹ A listed company is necessarily sufficiently large that such an enterprise has stakeholders that extend beyond shareholders. (Par 4.28 of the JSE Listings Requirements requires that a company intending to list on the Main Board have at least 25 million equity shares in issue, and that 20% of each class in issue be held by public shareholders.) These stakeholders include employees, creditors, and the community in which the business operates. This terminology arises out of the Companies Act 2008 (see s 7) and King IV.

⁶² Sourced privately from the Companies and Intellectual Property Commission in Aug 2019, established in terms of the Companies Act 2008.

⁶³ Sourced privately from Trusteeze (Pty) Ltd in Mar 2019, who obtained this information from their engagement with the Masters' offices.

⁶⁴ On 1 May 2011.

⁶⁵ The Companies Act 61 of 1973 did not set out directors' fiduciary duties.

⁶⁶ Bouwman 2009 *SA Merc LJ* 509 509 and Cassim *et al* 507.

duties is a complex area. For a lay person, even a sophisticated business person, this area of the law may be somewhat impenetrable.

The codification of directors' duties in section 76 of the Companies Act 2008 has its critics.⁶⁷ Many corporate law practitioners and commentators nevertheless believe it to constitute a useful progression in making this critically important aspect of corporate law more accessible to directors.⁶⁸ This, in turn, enhances good governance in the corporate arena generally.

As the court stated in *Braun v Blann and Botha*⁶⁹ “[i]t is one of the functions of our law to keep pace with the requirements of changing conditions in our society.” In the same way that the Companies Act 2008 reflects current thinking around governance generally, and fiduciary duties specifically, the legislature has an obligation to heed the mandate of *Braun* and to promote and facilitate improved governance in the arena of trust law too.

1 6 Problem statement

Given the breadth of purposes for which trusts are used in South Africa,⁷⁰ those fulfilling the role of trustees are likely to be diverse in skill and experience. The problem addressed in this dissertation is whether the lack of ready access by trustees to their fiduciary duties is contributing to poor governance of trusts⁷¹ and whether and exposition of these duties in the Trust Property Control Act would promote improved governance of trusts.

⁶⁷ See Havenga 2005 *Obiter* 609 609; McLennan 2009 *TSAR* 184 184; Botha 2009 *Obiter* 702 702; Cassim *et al* 20.

⁶⁸ Esser and Coetzee “Codification of directors’ duties” 2004 *JBL* 26 30; Havenga 2005 *Obiter* 257 267; Bekink 2008 *SA Merc LJ* 115; Botha 2009 *Obiter* 702 714; Bouwman 2009 *SA Merc LJ* 509; and Cassim *et al* 20.

⁶⁹ *Braun v Blann and Botha* par 866H.

⁷⁰ See Geach 491, Cameron *et al* 202 and Pace and Van der Westhuizen B4.1 21 for discussions of trading or business trusts. See Geach 23 in relation to use of trusts as family trusts and Cameron *et al* 185 and Pace and Van der Westhuizen B8.1 51 for discussions of charitable and public benefit trusts. See also Du Toit *et al* ch 9 for a discussion of the wide-ranging uses of trusts.

⁷¹ Numerous cases reflect a breach of fiduciary duties by trustees, including *inter alia* *Hoppen v Shub*; *Jowell v Bramwell-Jones*; *Doyle v Board of Executors*; *Tijmstra v Blunt-Mackenzie*; *Land and Agricultural Development Bank of South Africa v Parker*; *Wiid v Wiid*; *Law Society of Cape of Good Hope v Randell*, and *Watson v Cockin*.

1 7 Research questions

The specific questions posed in this dissertation are:

1 7 1 what lessons can be learned from considering the partial codification of directors' duties in the context of the Companies Act 2008 for purposes of proposing a partial codification of trustees' fiduciary duties?;⁷² and

1 7 2 whether such a codification advance good governance of trusts, and benefit beneficiaries?⁷³

1 8 Aim/value of study

Trusts are increasingly used, including to conduct business operations.⁷⁴ This is likely due to the flexibility they offer.⁷⁵ This speaks to the fact that a trust is easily formed and exists in a regulatory environment far simpler than a company's.⁷⁶ It is likely also attributable, to some degree, to the confidentiality that trusts offer.⁷⁷ Notwithstanding the *laissez faire* attitude of many trustees to their legal responsibilities, the flexibility of a trust has never extended to trustees' fiduciary duties.⁷⁸ These duties apply to the conduct of trustees in the same way that they apply to the functioning of directors. While directors'

⁷² See ch 5.

⁷³ See ch 5.

⁷⁴ Pace and Van der Westhuizen B4.2 notes that although the Chief Master's Directive 17 of 2017 attempts to define a "family business trust", there are no objective criteria distinguishing a business trust from a personal trust and as such a "business" or "trading" trust is not a separate kind of trust. Rather this speaks to the use of the trust i.e. for carrying on a business for profit. See also *Land and Agricultural Development Bank of South Africa v Parker* 87 "... trusts have increasingly been used to transact business." See Du Toit *et al* 200-202.

⁷⁵ See *Land and Agricultural Development Bank of South Africa v Parker* 87 par 23. The court held that "[T]he great virtue of the trust form is its flexibility, and the great advantage of trusts their relative lack of formality in creation and operation".

⁷⁶ Delpont 297; Geach ch 13; and Du Toit *et al* 201. See also *Land and Agricultural Development Bank of South Africa v Parker* 87 par 23.

⁷⁷ Du Toit *et al* 201. A company's memorandum of incorporation is lodged with the Companies and Intellectual Property Commission (CIPC) and, as such, is publicly available on demand by any person to CIPC, in contrast to the trust instrument, which is private and cannot be obtained by unrelated third parties.

⁷⁸ *Land and Agricultural Development Bank of South Africa v Parker* 87 par 24, and 88 par 29 emphasizes the importance of good governance and that it flows from a separation of the "functions of trusteeship" and beneficial interests.

duties are owed to the company, representing the shareholder body, trustees' duties are owed to beneficiaries. Since trusts are playing an increasing role in corporate life, governance of trusts must be given greater priority.⁷⁹ Trusts must be recognized as reliable counterparties to contracts and legitimate guardians of assets. In light hereof, the purpose of this research is to explore whether legislative action should play a role in promoting good governance of trusts. Such analysis will advance the development of trust law by addressing the value of clear guidance on this foundational aspect of a trustee's responsibilities.

1 9 Research methodology

The dissertation, utilising desktop research, is based on primary and secondary sources. It considers wide-ranging academic commentary, corporate law treatises, journal and internet articles, as well as case law, codes, legislation and explanatory memoranda published in relation to enactment of such statutes. In addition to South African sources, the dissertation uses Australian company law,⁸⁰ as well as New Zealand and English company and trust law as a basis for comparative research.

1 10 Chapter outline

1 10 1 Chapter 2: Codification in the context of local and international governance trends

Chapter 2 considers the theory of codification generally. It canvasses the academic literature on codification of fiduciary duties in the context of the Companies Act 2008 and analyses the arguments for and against codification at the time. It investigates developments in governance in South Africa since the Trust Property Control Act came into effect, comprising primarily the iterations of what is now King IV.

⁷⁹ Refer to the number of registered trusts referenced in par 1 4 of ch 1.

⁸⁰ There is no single trust statute in Australia comparable to the *Australian Corporations Act 50 of 2001*. Rather, each state and territory has enacted its own trust statute.

It also considers English⁸¹ law developments⁸² in governance, as well as that of New Zealand and Australia, as this relates to explicit statements of fiduciary duties. New Zealand's new *Trusts Act*⁸³ which codifies trustees' fiduciary duties, is of particular interest. Corporate law has been utilised as a point of reference for codification of fiduciary duties given that no such codification of trustees' fiduciary duties has been undertaken in the Commonwealth jurisdictions examined, except very recently in New Zealand.⁸⁴ Additionally, corporate law, like trust law, has a well-developed set of fiduciary duties and, as such, serves as a useful comparison. Indeed, trust law jurisprudence as it relates to trustees' duties has been shaped by cases involving companies.⁸⁵

1 10 2 Chapter 3: Review of trustees' fiduciary duties

Chapter 3 examines fiduciary duties as revealed through case law in relation to trusts. Breaches of such duties are also discussed.

1 10 3 Chapter 4: Proposed partial codification of trustees' duties

Chapter 4 proposes amendments to the Trust Property Control Act, positioning South Africa as a market leader in governance in this area, as it has been in developing the King Codes. The amendments do not mimic the approach taken in the Companies Act 2008, which in its specific formulation, is not a useful template. A detailed, although still partial, codification of a trustees' fiduciary duties is suggested.

It is argued that in order to effect real change, codification of fiduciary

⁸¹ Reference herein is made to "English law" although it is more accurately "the law of England and Wales" as English law is the applicable law in England and Wales. However, for ease of reading references will be made to "English law".

⁸² Directors' fiduciary duties have been codified in Australia, New Zealand and the United Kingdom, although trustees' fiduciary duties have only received the same attention in New Zealand.

⁸³ *38 of 2015*.

⁸⁴ The *New Zealand Trusts Act 38 of 2019* will come into effect in January 2021.

⁸⁵ *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 18; *Phillips v Fieldstone (Pty) Ltd* 2004.

duties should not be done in isolation. A multi-pronged approach is ideal. For example, inclusion of a “business judgment rule” akin to that in section 76(4) of the Companies Act 2008 and increased emphasis on training prior to the Master issuing letters of authority to prospective trustees and amendments to trustee appointment forms are likely to advance the cause of improved governance.

1 10 4 Chapter 5: Conclusion

This final chapter concludes the dissertation by synthesising the previous discussions and summarizing how South Africa, from the perspective of educating trustees about their fiduciary duties, can enhance the governance environment in which trusts are administered.

Chapter 2: Codification in the context of local and international governance trends

2 1 Introduction

This chapter considers the arguments of both proponents and opponents of codification and why drafters of the South African Companies Act 2008 thought it advantageous to codify directors' duties. It explores the impact of the South African governance framework that is King IV on our commercial and legislative environment and looks specifically at how partial codification was undertaken in the Companies Act 2008. Finally, codification of fiduciary duties in Australia, New Zealand and the United Kingdom is briefly assessed.

2 2 Arguments for and against codification

A "code" is defined as a set of rules that are accepted as general principles, or a set of written rules on a particular subject.⁸⁶ Accordingly, to codify a topic is to set out the rules pertaining to same. This is in contrast to the essential nature of common law, being judge-made law which accumulates over time.⁸⁷ English law, which forms the basis of South African corporate regulatory regime,⁸⁸ has long used codification as an instrument of law reform.⁸⁹

A legal code can take different forms.⁹⁰ In civil law jurisdictions and in relation to some legal subject matters in common law jurisdictions, a code reflects a comprehensive and definitive statement of an area of law and comprises the principal source of law on a topic.⁹¹ Recent examples of this in the United

⁸⁶ *The Cambridge Dictionary* 2019 <https://dictionary.cambridge.org/dictionary/english/code> (accessed 15 July 2019); *Merriam Webster Online Dictionary* 2019 <https://www.merriam-webster.com/dictionary/code> (accessed 24 Aug 2019); *The Concise Oxford Dictionary*.

⁸⁷ Skinner "Codification and the common law" 2009 *EJLR* 225 227.

⁸⁸ The Companies Act 2008 is similar to the *UK Companies Act*, the JSE Listings Requirements are substantially similar to the *UK Listing Authority's Listing Rules* and we share a similar approach to governance.

⁸⁹ Skinner 2009 *EJLR* 225 226, in which she describes efforts in the 16th century to draft an "authoritative statement of the law which would reconcile conflicting case law and discard obsolete sources". Skinner cites Baker *An Introduction to English Legal History* (2002) 217 on this issue.

⁹⁰ Skinner 2009 *EJLR* 225 228.

⁹¹ Skinner 2009 *EJLR* 225 228.

Kingdom are the *Arbitration Act of 1996* and the *Companies Act of 2006*.⁹² Alternatively, codification can take the form of a consolidation or restatement of existing laws, customarily for the sake of clarity and accessibility.⁹³ In both scenarios, in common law jurisdictions, a statute or code will be interpreted in the context of the common law.⁹⁴ To the extent the statute or code conflicts with case law, the legislature will have intended to create new law.⁹⁵ However, when the statute is not in conflict with the common law, the enactment exists alongside case law.⁹⁶ Indeed, any statute enacted in a common law jurisdiction is a type of codification of applicable law and, as such, South African law, like other modern common law or mixed jurisdictions, is a combination of judge-made and statutory, or codified, law. Common law commentators, of course, view judge-made law as the primary source of law.⁹⁷

In considering codification of trustees' fiduciary duties in trust law, this dissertation promotes a partial codification of this narrow topic within the framework of the Trust Property Control Act, by way of a proposed amendment. A partial codification is one that is not an "exhaustive, comprehensive or fully self-contained" summary.⁹⁸ Accordingly, the proposed amendment does not seek to set out all law on the topic, but rather to identify,

⁹² The drafters of the *UK Arbitration Act* intended it to be a clear, logical exposition of the main principles of the English law of arbitration. It restates and reconciles principles and rules found in statute and judge-made law and attempted to clarify issues that were previously so deeply embedded in English case law that they were effectively unknown. See Skinner 2009 *EJLR* 226 234 and Saville "The Arbitration Act 1996: What we have tried to accomplish" 1997 *Construction Law Journal* 410. The *UK Companies Act* aims to set out all the main principles and rules of company law arising out of statutory and case law. (See Keay "Section 172(1) of the Companies Act 2006: an Interpretation and Assessment" 2007 *Company Lawyer* 106).

⁹³ Esser and Coetzee "Codification of directors' duties" 2004 *Juta's Business Law* 26 28; Cassim *et al Contemporary Company Law* (2012) 19 and 508.

⁹⁴ S 158(a) of the Companies Act 2008; Cassim *et al* 509; Delpont *New Entrepreneurial Law* (2014) 140; and Coetzee and Van Tonder "Advantages and disadvantages of partial codification of directors' duties in the South African Companies Act 71 of 2008" 2016 *JJS* 1. See also *Mthimunya-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited* 2015 (6) SA 338 (WCC) paras 15-25 where the court acknowledged that if s 75 of the Companies Act 2008 (codifying directors' duties related to financial interests in matters before the board) had to be interpreted, recourse may be had to the common law.

⁹⁵ Cassim *et al* 554; Coetzee and Van Tonder 2016 *JJS* 1 3-4.

⁹⁶ Companies Act Bill cl 91(6); Bouwman "An appraisal of the modification of the director's duty of care and skill" 2009 *SA Merc LJ* 509 513; Cassim *et al* 523 and 525; Delpont 140; and Coetzee and Van Tonder 2016 *JJS* 1 3.

⁹⁷ Skinner 2009 *EJLR* 225 227.

⁹⁸ Cassim *et al* 507.

for the sake of clarity and accessibility, the key aspects of trustees' fiduciary duties.

Codification has been described as a human rights issue, especially in light of a body of decisions of the European Court of Human Rights recognizing a right to clarity and accessibility in the law.⁹⁹ It is also intended to provide a framework for ongoing development of the law, rather than being a temporary fix.¹⁰⁰ Those in favour of codification of the law generally, in contrast to those against it, represent modern versus traditional approaches to the law, respectively.¹⁰¹ Modernists view a traditional approach as out of line with current social philosophy, while traditionalists see codification as being superfluous and always falling short.¹⁰² Proponents of codification favour its value in law reform, with accessibility of the law on the relevant topic being the most oft cited.¹⁰³ Opponents of codification complain of its "rigidifying effect", arguing that it impedes legal development.¹⁰⁴ The argument of opponents is that setting out the law by way of a code impedes development of the legal principles arising out of or related to the rule.¹⁰⁵ A further complaint is that a code does not capture the complexity of judge-made law and will inevitably be either overbroad or too narrow.¹⁰⁶ In truth, little other than a comprehensive analysis can capture judge-made law on a topic and a statute or code does not necessarily seek to achieve this. Ultimately, it is suggested, the law must serve society's needs and if members of society are not sufficiently aware of the laws that govern a legal arrangement they use regularly, an effort should be made to make the law more readily available to them. Access to the law cannot be the domain of the academic elite.

⁹⁹ Steiner "Codification in England: The Need to Move from an Ideological to a Functional Approach" 2009 *Stat L Rev* 209; Skinner 2009 *EJLR* 225 227.

¹⁰⁰ Skinner 2009 *EJLR* 225 228.

¹⁰¹ Bekink "An historical overview of the director's duty of care and skill: from the nineteenth century to the Companies Bill of 2007" 2008 *SA Merc LJ* 95 115.

¹⁰² Bekink 2008 *SA Merc LJ* 95 115.

¹⁰³ The Department of Trade and Industry. South African Company Law for the 21st Century – Guidelines for Corporate Law Reform. GG 26493 of 23 Jun 2004 38 (hereafter *Corporate Guidelines*); Cassim *et al* 508.

¹⁰⁴ Skinner 2009 *EJLR* 226 230.

¹⁰⁵ Skinner 2009 *EJLR* 226 249.

¹⁰⁶ Skinner 2009 *EJLR* 226 230.

The arguments against codification seem somewhat outdated. Codification and partial codification, as was ultimately employed in the Companies Act 2008, is widely used to clarify and edify and, as such, appears to be here to stay.¹⁰⁷ Furthermore, if the approach taken is like that in Companies Act 2008 in terms of which instructions for interpretation are given,¹⁰⁸ there can be no argument that codification will retard legal development by making interpretation of the duties less flexible. A pragmatic – or functional¹⁰⁹ - approach to communicating legal principles and rules can be enormously helpful. It is easy to be deterred by the obstacles to a perfect result while failing to recognize the political and social imperative demanding progress.¹¹⁰ If in trust law, trustees know what their duties are (while knowing also that the code is not intended to be an exhaustive statement of all fiduciary duties), what their duties mean and how to discharge them, real progress will have been made. Breaches by trustees will also more likely be intentional than inadvertent, since trustees will at least be apprised of their fundamental duties.

Codification is a tool used to provide “structure and coherence to the law”¹¹¹ where there is confusion or the law is inaccessible. An understanding of the common law principles applicable to trustees’ duties will still be necessary to determine the full scope of the fiduciary duties in modern trust law. As with the Companies Act 2008, however, a helpful starting point will have been provided.

¹⁰⁷ Further examples of codification of directors’ duties include: South African Banks Act 1990 (s 60(1A) contains a statement of directors’ duties); *UK Companies Act*, *Australian Corporations Act 2001*; the *New Zealand Companies Act 1993* and per Cassim *et al* 508, the companies acts of Ghana, Malaysia and Singapore.

¹⁰⁸ S 158 of the Companies Act 2008 states: “When determining a matter brought before it in terms of this Act, or making an order contemplated in this Act (a) a court must develop the common law as necessary to improve the realisation and enjoyment of rights established by this Act; and (b) the Commission, the Panel, the Companies Tribunal or a court – (i) must promote the spirit, purpose and objects of this Act; and (ii) if any provision of this Act, or other document in terms of this Act, read in its context, can be reasonably construed to have more than one meaning, must prefer the meaning that best promotes the spirit and purpose of this Act, and will best improve the realisation and enjoyment of rights.”

¹⁰⁹ Steiner 2004 *Stat L Rev* 209.

¹¹⁰ Skinner 2009 *EJLR* 226 254.

¹¹¹ Skinner 2009 *EJLR* 226 228.

While the presentation in a code such as the one proposed may be simple, it is unlikely that any such exercise will simplify the law.¹¹² The law cannot be made simpler than its subject matter allows.¹¹³ But that does not mean that there is not much to be gained. As Skinner puts it, codification “can strive to ensure that complexity derives from the law’s content and not from the presentation of its rules”.¹¹⁴

In the last fifteen some years, enormous progress has been made in modernising legislation integral to corporate South Africa. These include the Financial Markets Act¹¹⁵ (which replaced the Securities Services Act),¹¹⁶ the Competition Act,¹¹⁷ the Broad-Based Black Economic Empowerment Act,¹¹⁸ the National Credit Act¹¹⁹ (which replaced the Usury Act),¹²⁰ the Consumer Protection Act,¹²¹ the Insurance Act¹²² (which replaces parts of the Long-term Insurance Act,¹²³ and the Short-term Insurance Act,¹²⁴ the Protection of Personal Information Act,¹²⁵ Promotion of Access to Information Act¹²⁶ and various pieces of environmental legislation, including the National Environmental Management Act.¹²⁷ Given the extensive use of trusts in the South African economy, there is every reason that trust law should keep pace with such progress.

112 Skinner 2009 *EJLR* 226 256.
113 Skinner 2009 *EJLR* 226 256.
114 Skinner 2009 *EJLR* 226 256.
115 19 of 2012.
116 36 of 2004.
117 89 of 1998.
118 53 of 2003.
119 34 of 2005.
120 73 of 1968.
121 68 of 2008.
122 18 of 2017.
123 52 of 1998.
124 53 of 1998.
125 4 of 2013.
126 2 of 2000.
127 107 of 1998.

2 3 What did South African corporate law reform seek to achieve in relation to directors' duties?

When considering the codification of trustees' duties, the treatment of fiduciary duties in South African corporate law reform is instructive. When corporate law reform was first tabled in 2004,¹²⁸ the then Minister of Trade and Industry noted that it was overdue in that it was necessary to bring South African corporate law "in line with international trends and to reflect and accommodate the changing environment for business, both in South African and globally".¹²⁹ This dissertation suggests that this statement is equally applicable today in relation to the reform of aspects of trust law and in particular to the treatment of trustees' duties.

It was noted in the introduction to the policy paper on corporate law reform issued by the Department of Trade and Industry in 2004, that the "objective of the review is to ensure the new legislation is appropriate to the ... context of South Africa as a constitutional democracy and an open economy."¹³⁰ One of the key ways the drafters felt that the new company law should "promote competitiveness and development of the South African economy"¹³¹ was by "encouraging transparency and high standards of corporate governance recognizing the broader social role of enterprises".¹³² One of the three elements of reforming corporate governance in the South African corporate context was identified as being "the responsibilities of the board of directors".¹³³ While corporate law reform undertaken addressed the regulatory frameworks for close corporations and non-profits, it overlooked trusts. This may be because the Trust Property Control Act had in 1988 been relatively recently enacted. Certainly, though, the drivers of good governance and transparency are not particular to corporate law and apply equally in the area of trust law. It is worth noting, however, that the South African Law

¹²⁸ See the Corporate Guidelines generally.

¹²⁹ Corporate Guidelines 3.

¹³⁰ Corporate Guidelines 7.

¹³¹ Corporate Guidelines 9.

¹³² Corporate Guidelines 9.

¹³³ Corporate Guidelines 35.

Commission which performed the work preparatory to and including submission of the Bill drafted in contemplation of what was to become the Trust Property Control Act, recommended that no codification of trust law be undertaken. It stated that “only aspects that cause problems [should] be remedied by legislation and statutory provisions which are merely declaratory should be avoided”.¹³⁴ As reflected in chapter 3, the 31 years since promulgation of the Act have revealed problems with trustees’ understanding of their fiduciary duties to a degree that this dissertation argues is worth remedying.

In the first formal articulation of the framework of corporate law reform, it was specifically identified as a deficit that the previous Companies Act¹³⁵ did not contain clear rules regarding corporate governance and the duties and liabilities of directors.¹³⁶ The goal sought to be achieved in the Companies Act 2008 was that directors would be “as accountable to shareholders as is practicable”.¹³⁷ This can equally be expressed as a goal for trustees in relation to beneficiaries. The policy paper published by the Department of Trade and Industry, entitled South African Company Law for the 21st Century – Guidelines for Corporate Law Reform, identified as relevant to duties of directors the same issue as applies to those of trustees: that they are “found in the common law, more particularly case law that stretches as far back” as centuries.¹³⁸

It is noted that there is unfortunately a dearth of written commentary on specific concerns informing the codification of directors’ duties. The Corporate Guidelines are general in nature and nothing more specific appears to have been recorded.¹³⁹ There also has been no subsequent commentary on

¹³⁴ Wunsh “The Trust Property Control Act” 1988 *De Rebus* 547 547.

¹³⁵ 61 of 1973.

¹³⁶ Corporate Guidelines 17.

¹³⁷ Corporate Guidelines 19.

¹³⁸ Corporate Guidelines 37-38.

¹³⁹ Sutherland “The state of company law in South Africa” 2012 *Stell LR* 157 also comments on the lack of “sufficient contextual information.” See also the high level “Memorandum on the Objects of the Companies Bill, 2008”, which accompanied the final Bill introduced into Parliament.

whether the partial codification of directors' duties is having the desired effect, but that may well be because insufficient time has passed since the Companies Act came into effect in 2011.

In contemplating the benefits and disadvantages of partial codification in the Companies Act 2008, many commentators favoured partial codification for the reason that it gives directors clear guidelines of their duties by means of an accessible statutory statement.¹⁴⁰ Their view was that such a statement would save directors time, effort and money in establishing, advising on, and complying with the law.¹⁴¹ The same logic applies to trustees, who arguably have even less access than directors to legal advice as to the scope of their duties as most trusts are used for personal purposes, operating outside of a well-funded corporate environment with ready access to skilled advisors.

Unfortunately, the Companies Act 2008 was preceded only by the Corporate Guidelines (which set out broad goals of the reform process) and the Memorandum on the Objects of the Companies Bill, 2008 (which gives directors' duties short shrift).¹⁴² This is in contrast to the comprehensive work done by the Van Wyk de Vries Commission leading up to the Companies Act of 1973 and which serves as useful background to that Act. As such, in determining the goals of a partial codification of directors' duties, one has to rely on limited legislative statements, analysis of commentators and legislative trends generally and in other jurisdictions in order to understand what was sought to be achieved.

¹⁴⁰ Esser and Coetzee 2004 *JBL* 26 30, Bekink 2008 *SA Merc LJ* 115; Bouwman 2009 *SA Merc LJ* 509; Havenga "Regulating directors' duties and South African company law reform" 2005 *Obiter* 257 267; Botha "The Role and Duties of Directors in the Promotion of Corporate Governance: A South African Perspective" 2009 *Obiter* 702 714; and Cassim *et al* all favoured the partial codification of directors' fiduciary duties in the Companies Act 2008.

¹⁴¹ Coetzee and Van Tonder 2016 *JJS* 4.

¹⁴² Sutherland 2012 *Stell LR* 157 158.

2 4 Influence of the King Report on Corporate Governance for South Africa

Governance speaks to the structures and processes¹⁴³ that enable members of governing bodies to discharge their duties effectively and ethically. It has been said that management is about running a company, but governance is about seeing that it is done properly.¹⁴⁴ Like other jurisdictions around the world,¹⁴⁵ South Africa has a governance framework in the King Reports and Codes¹⁴⁶ that have existed and continue to exist alongside legislation, promoting best practices and thereby influencing the legal *status quo*.

King IV applies to all organisations, including trusts,¹⁴⁷ and sets out principles and practices that are intended to guide organisations to ensure good governance.¹⁴⁸ It is a voluntary code, meaning that there are no legal sanctions for non-compliance.¹⁴⁹ Nevertheless, the King drafters believe that governance codes generally inform standards of conduct for members of governing bodies: the more established certain governance standards become, the more a court is likely to view conduct that conforms to this, as meeting the relevant legal standards applicable to governing bodies.¹⁵⁰ Indeed, certain recommendations of King II were incorporated into the Companies Act.¹⁵¹

¹⁴³ King III, Introduction and Background par 4.

¹⁴⁴ Naidoo *Corporate Governance: An Essential Guide for South African Companies* (2016) 47.

¹⁴⁵ The *UK Corporate Governance Code*, *Australia's Corporate Governance Principles and Recommendations*, and the *NZX Corporate Governance Code*.

¹⁴⁶ See the King Report on Corporate Governance for South Africa – 2016 (“King IV”). Previous iterations were the King Report on Corporate Governance for South Africa – 1994 (“King I”), King Report on Corporate Governance for South Africa – 2002 (“King II”) and the King Report on Corporate Governance for South Africa – 2009 (“King III”). See www.iodsa.co.za.

¹⁴⁷ King IV definition of “organisation”. Additionally, one of the distinguishing features of King IV, as compared to its predecessors, is that it introduced the principle of proportionality. This means that the drafters recognized that the tenets of King IV are not a one-size-fits-all and that governance looks different in different kinds and sizes of organisations. This approach will assist trustees in employing the principles set out in King IV. With that in mind, King IV even incorporated sector supplements in an effort to tailor King IV’s application to certain kinds of organisations. These included sector supplements for small and medium enterprises, municipalities, non-profit organisations, retirement funds and state-owned entities. Unfortunately, no specific supplement was prepared in relation to trusts.

¹⁴⁸ Pace and Van der Westhuizen B14.2.3.

¹⁴⁹ Listed companies are, however, required to comply with King IV in terms of the JSE Listings Requirements.

¹⁵⁰ See King IV – The Legal Status of King IV 35.

¹⁵¹ The King I Report recommended a codification of a director’s duty of care and skill as a potential solution to ensure proper performance by directors. This set the stage for later developments,

That the King Codes have seen four iterations since the Trust Property Control Act was promulgated speaks to the increasing importance of governance in the commercial arena, as well as the idea that thinking about the way organisations are managed is dynamic. Governance is an evolving discipline.¹⁵² From a societal perspective, good governance, and the ethical leadership it seeks to achieve, is seen as being profoundly impactful on a number of levels in that each organisation is seen as being an integral part of society, contributing to and being relied upon in different ways.¹⁵³

Much of King IV addresses the way governing bodies should be constituted and how they should conduct themselves.¹⁵⁴ Principle 1 states that “the governing body should lead ethically and effectively.” A recommended practice in support of this states that “members of the governing body must act in good faith and in the best interests of the organisation,”¹⁵⁵ in brief stating the overarching fiduciary duties that apply to trustees. In other words, to lead ethically is to act in accordance with overarching fiduciary duties, in good faith and in the best interests of, in the case of trusts, trust beneficiaries.¹⁵⁶ The recommended practices also states that members of governing bodies must act with “due care, skill and diligence.”¹⁵⁷ As such, the common law duties of trustees are addressed at a high level in King IV.

The King committee (as constituted from time to time) has actively advanced good governance in South Africa by setting out essential principles, promoting them and making governance part of the public discourse.¹⁵⁸ The drafters of

culminating in the codification of this duty in s 76 of the Companies Act 2008. See Bekink 2008 *SA Merc LJ* 95 108. See also King III – Introduction and background par 4.

¹⁵² Naidoo 47.

¹⁵³ King IV – The Underpinning Philosophies of King IV 24.

¹⁵⁴ See specifically Principles 1 – 10 (inclusive), 13 and 16.

¹⁵⁵ Principle 1 of King IV, Recommended Practice 1.a.i.

¹⁵⁶ Pace and Van der Westhuizen B14.2.3.

¹⁵⁷ Principle 1 of King IV, Recommended Practice 1.b.ii.

¹⁵⁸ Some examples of recent newspaper articles referencing King IV include: Magubane “Governance body warns against Mabuza’s dual role at Eskom” 31 July 2019 <https://www.fin24.com/Economy/governance-body-warns-against-mabuzas-dual-role-at-eskom-0190731-2> (accessed 06 Aug 2019); T Bulbulbia “Organisations call on Eskom to speedily conclude appointment of a permanent CEO” 30 July 2019 <https://www.engineeringnews.co.za/article/organisations-call-on-eskom-to-speedily-conclude->

the Companies Act 2008 took up the baton in support of good governance in numerous ways, including by specifically making directors' duties and liabilities more accessible by codifying them. Given the number of trusts in South Africa today, and their range of uses,¹⁵⁹ similar attention should be given to amending the Trust Property Control Act in support of good governance. Partial codification of trustees' fiduciary duties is a necessary part of any such endeavour.

2 5 Partial codification of directors' fiduciary duties in the Companies Act 2008

In furtherance of the mandate of King IV, section 7 of the Companies Act 2008 states as one of its purposes promoting development of the South African economy¹⁶⁰ by "encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation".¹⁶¹ It has been said that the paramount duty of directors, individually and collectively, is to exercise their powers *bona fide* in the best interests of the company.¹⁶² The codification of these and other fiduciary duties in the Companies Act 2008 is referred to as a partial codification because it is not an exhaustive statement of all directors' common law fiduciary duties. To the extent the Companies Act 2008 is not in conflict with the common law, the common law still applies.¹⁶³

appointment-of-a-permanent-ceo-2019-07-30 (accessed 06 Aug 2019); Anonymous "A risk-based approach to procurement" 30 July 2019 <https://it-online.co.za/2019/07/30/a-risk-based-approach-to-procurement/> (accessed 06 Aug 2019); Anonymous "Trouble at Cell C CEO publishes open letter" 11 July 2019 <https://www.moneyweb.co.za/news/companies-and-deals/trouble-at-cell-c/> (accessed 06 Aug 2019).

¹⁵⁹ See Du Toit *et al* *Fundamentals of South African Trust Law* (2019) ch 9 for a discussion of the wide-ranging uses of trusts.

¹⁶⁰ S 7(b) of the Companies Act 2008.

¹⁶¹ S 7(b)(iii) of the Companies Act 2008.

¹⁶² Pretorius *Hahlo's South African Company Law through the Cases* (1999) 279.

¹⁶³ Delport 140. To the extent the common law is not amended by statute, it continues to apply.

Section 76(3) codifies the main fiduciary duties.¹⁶⁴ It provides that:

“... a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director – (a) in good faith and for a proper purpose; (b) in the best interests of the company;”.

Section 76 also introduces provisions which speak to directors’ common law duties of avoiding conflicts of interest and acting for a proper purpose. Specifically, section 76(2) states that:

“A director of a company must – (a) not use the position of director, or any information obtained while acting the capacity of a director – (i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or (ii) to knowingly cause harm to the company or a subsidiary of the company”.

The statutory fiduciary duties have been described as not being “a proper” codification of the common law duties.¹⁶⁵ This is likely because there is no obvious coherent structure in the presentation of the duties in section 76 of the Companies Act 2008.¹⁶⁶ By way of explanation, the somewhat haphazard design first sets out duties relating to avoiding a conflict of interest without using this well-known, and therefore helpful, terminology.¹⁶⁷ Rather, the concept of a director not gaining an advantage from his position is employed and section 76 couples it with that of not “knowingly causing harm” to the company, a concept that is not well-recognized and, it is suggested, self evident. These mandates are also set out in the same clause and apply in

¹⁶⁴ Mupangavanhu 2017 *Stell LR* 148 152. This dissertation does not consider the duties of care, skill and diligence also addressed in the Companies Act 2008, nor other ancillary duties imposed on directors by the Companies Act 2008, such as in s 75 (disclosure of personal financial interests).

¹⁶⁵ Delpont 140. No explanation is provided for this statement.

¹⁶⁶ Others have said the approach taken in the Companies Act 2008 creates confusion, is poorly drafted and incomplete. In this regard, see Havenga “Regulating directors’ duties and South African company law reform” 2005 *Obiter* 609 609; McLennan “Directors’ fiduciary duties and the 2008 Companies Bill” 2009 1 *TSAR* 184 184; Botha “The Role and Duties of Directors in the Promotion of Corporate Governance: A South African Perspective” 2009 *Obiter* 702 702; Cassim *et al* 20.

¹⁶⁷ Refer to quoted s 76(2)(a) above.

relation to subsidiaries¹⁶⁸ of companies, which is a new concept. This extension of duties to subsidiaries, and nuances likely to arise in respect thereof, might have been more clearly set out in a separate section.¹⁶⁹

Next, section 76 requires a director¹⁷⁰ to share information with the company on whose board he serves if he reasonably believes it not to be “immaterial”. The wording is clumsy and unclear and the principle, along with that of not causing harm to the company, is likely already covered in the core duties to act in good faith, for a proper purpose and in the best interests of the company. The latter fiduciary duties are also only set out subsequent to the aforementioned ones, potentially creating the impression that they are not as foundational as jurists know them to be.

Nevertheless, while a more thorough and orderly statement would have been preferable, the formulation provided serves as a helpful starting point for directors by explicitly stating their duties, which had not been done before.¹⁷¹

2 6 Codification of fiduciary duties in Commonwealth jurisdictions

Legislative trends in other Commonwealth jurisdictions are instructive. Over the past couple of decades, the United Kingdom,¹⁷² Australia¹⁷³ and New Zealand¹⁷⁴ have all set out directors’ duties in their respective corporate law statutes by way of codification. Importantly, New Zealand has also recently

¹⁶⁸ In some instances, referring simply to “subsidiaries” (s 76(2)(a)(ii)) and in others to “wholly-owned subsidiaries” (s 76(2)(a)(i)) with no explanation for the distinction. This causes the reader to query whether this distinction was intended or in error.

¹⁶⁹ This was effectively done in s 131 of the *Australian Corporations Act 50 of 2001*.

¹⁷⁰ S 76(2)(b) states that “A director must – communicate to the board at the earliest practicable opportunity any information that comes to the director’s attention, unless the director- (i) reasonably believes that the information is- (aa) immaterial to the company; or (bb) generally available to the public, or known to the other directors; or (ii) is bound not to disclose that information by a legal or ethical obligation of confidentiality.”

¹⁷¹ This dissertation proposes a more detailed, although still partial, codification of a trustees’ fiduciary duties in the Trust Property Control Act.

¹⁷² *Companies Act 2006*.

¹⁷³ See primarily ss 181, 182 and 183 of the *Australian Corporations Act 50 of 2001*.

¹⁷⁴ See primarily ss 131 and 133 of the *New Zealand Companies Act 95 of 1993* for a statement of directors’ duties.

enacted a new *Trusts Act*¹⁷⁵ which overhauls the previous act¹⁷⁶ in an effort to modernise New Zealand trust law,¹⁷⁷ and includes a partial codification of trustees' fiduciary duties. This endeavour started in March 2009 and culminated in a comprehensive report reviewing the law of trusts in New Zealand. This report was preceded by six issues papers canvassing in detail different aspects of trust law.¹⁷⁸

Both the *Australian Corporations Act* and the *New Zealand Companies Act* utilise a simple approach of setting out the core fiduciary duties of acting in good faith and in the best interests of the company without going into much detail. In this way, both these Acts take a similar approach to the *Companies Act 2008*. Section 181(1) of the *Australian Corporations Act* states that:

“A director ... of a corporation must exercise their powers and discharge their duties: (a) in good faith in the best interests of the corporation; and (b) for a proper purpose.”

In the subsequent sections, the *Australian Corporations Act* uses a formulation very similar to, and which likely informed, that used in section 76(2) of the *Companies Act 2008*. It is suggested, for the reasons articulated above, that the approach taken is not all that helpful. Specifically, section 182(1) states that in relation to the use by a director of his position:

“A director ... of a corporation must not improperly use their position to: (a) gain an advantage for themselves or someone else; or (b) cause detriment to the corporation.”

¹⁷⁵ 38 of 2019.

¹⁷⁶ It replaces the *New Zealand Trustee Act 61 of 1956*. See Foote “New Zealand: A new Trusts Act for New Zealand” 26 July 2019 <https://www.Mondaq.com/NewZealand/x/830224/Trusts> (accessed 8 Oct 2019).

¹⁷⁷ New Zealand Law Commission's website www.lawcom.govt.nz.our-projects/law-trusts (accessed 9 Oct 2019).

¹⁷⁸ The Fourth Issues Paper (IP26) focused on trustees' duties and powers and the office of trustee. See www.lawcom.govt.nz.our-projects/law-trusts.

Section 183 states that in relation to the use by a director of information of which he becomes aware, that:

“A person who obtains information because they are, or have been, a director ... of a corporation must not improperly use the information to: (a) gain an advantage for themselves or someone else; or (b) cause detriment to the corporation.”

The equivalent provisions of the *New Zealand Companies Act 95 of 1993* state merely, in section 131:

“..., a director of a company, when exercising powers or performing duties, must act in good faith and in what the director believes to be in the best interests of the company.”

Section 133 is the only other relevant section and it states simply that “[a] director must exercise a power for a proper purpose.”

The approach taken in both these statutes, it is argued, is too high level to be of any real assistance to directors. It is also of no real assistance in formulating trustees’ statutory fiduciary duties in South Africa, except to the degree it highlights some fundamental duties. The *New Zealand Trusts Act* which was enacted on 30 July 2019 is, however, very helpful in informing the question posed in this dissertation as to whether a codification of duties can advance good governance of trusts.¹⁷⁹ The new Act is intended to modernise and clarify trust law and *inter alia* partially codify the duties of trustees.¹⁸⁰ The Fourth Issues Paper informing the review of trust law in relation to trustees’ duties specifically identified the need to bring “greater clarity on what the obligations of trustees are”.¹⁸¹ Practitioners note that the new law’s purpose is to make

¹⁷⁹ It will come into effect on 30 January 2021.

¹⁸⁰ Anderson Lloyd “The arrival of the Trusts Act 2019” 6 Aug 2019 [https:// www.al.nz/updates](https://www.al.nz/updates) (accessed 8 Oct 2019).

¹⁸¹ Par 1.1 “The duties, office and powers of a trustee: review of the law of trusts - Fourth Issues Paper” Jun 2011 *The New Zealand Law Commission*.

trust law more accessible to both trustees and beneficiaries.¹⁸² In determining to proceed with a partial codification of trustee duties, the Law Commission noted that

“[e]ncapsulating every single element of each duty in statutory form would not be possible and risks inhibiting judicial development. Nevertheless, the Commission believes that the general themes reflected in the case law can be stated simply and broadly in trust legislation in a way that would assist trustees in better understanding their role and give the principles a prominence which they currently lack.”¹⁸³

The *New Zealand Trusts Act* sets out mandatory¹⁸⁴ trustee duties as well as so-called “default”¹⁸⁵ trustee duties which may be modified or excluded in the trust instrument. This new *Trusts Act* provides a very useful precedent for South African trust law in terms of its organisation and exposition of fiduciary duties. It is clearly and simply drafted. It is noteworthy, though, that no interpretive guidelines akin to those found in the Companies Act 2008¹⁸⁶ and the United Kingdom’s *Companies Act 2006*¹⁸⁷ have been included.

The mandatory duties applicable to trustees are¹⁸⁸ (a) to know the terms of the trust;¹⁸⁹ (b) to act in accordance with the terms of the trust;¹⁹⁰ (c) to act

¹⁸² Foote 26 July 2019 <https://www.Mondaq.com/NewZealand/x/830224/Trusts> (accessed 8 Oct 2019).

¹⁸³ Par 1.8. It goes on to say that “[a]ny proposed list of duties in the legislation would, therefore, be only a summary. They would not be intended to replace the common law, but would concisely summarise the duties that generally apply to trustees. It is desirable that the list should be brief and straightforward as complex provisions are less likely to be read and understood by many lay trustees.”

¹⁸⁴ See ss 22-27 of the *New Zealand Trusts Act*.

¹⁸⁵ See ss 28-38 of the *New Zealand Trusts Act*.

¹⁸⁶ S 158.

¹⁸⁷ S 170(4).

¹⁸⁸ Although not a direct quote, the language is substantially the same as that used in the *Trusts Act*. The plain-English nature of the language used is evident.

¹⁸⁹ S 23.

¹⁹⁰ S 24.

honestly and in good faith;¹⁹¹ (d) to hold or deal with trust property and otherwise act – (i) for the benefit of the beneficiaries, in accordance with the terms of the trust, and (ii) in the case of a trust for a permitted purpose, to further the permitted purpose of the trust, in accordance with the terms of the trust;¹⁹² and (e) to exercise the trustee’s powers for a proper purpose.¹⁹³

The default duties include that a trustee must (a) not exercise a power directly or indirectly for the trustee’s own benefit;¹⁹⁴ (b) consider actively and regularly whether he should be exercising one or more of his powers;¹⁹⁵ (c) not bind or commit trustees to a future exercise or non-exercise of a discretion;¹⁹⁶ (d) avoid a conflict between the interests of the trustee and the interests of beneficiaries;¹⁹⁷ (e) act impartially in relation to beneficiaries and must not be unfairly partial to one beneficiary or group of beneficiaries to the detriment of others;¹⁹⁸ (f) not make a profit from the trusteeship of a trust;¹⁹⁹ and (g) if there are more than one trustee, act unanimously.²⁰⁰

Due to its influence over South African trust law, a closer look at the position in the United Kingdom is also worthwhile. Specifically, an objective of corporate law reform in the United Kingdom, which culminated in the *Companies Act 2006*,²⁰¹ was to address the finding that company directors seemed to be unaware of their legal duties and to whom they were owed.²⁰² Prior to the *Companies Act 2006*, directors were wholly reliant on judicial

¹⁹¹ S 25.

¹⁹² S 26.

¹⁹³ S 27.

¹⁹⁴ S 31.

¹⁹⁵ S 32.

¹⁹⁶ S 33.

¹⁹⁷ S 34.

¹⁹⁸ S 35. This section clarifies that it does not require a trustee to treat all beneficiaries equally, but that they must all be treated in accordance with the terms of the trust.

¹⁹⁹ S 36.

²⁰⁰ S 38.

²⁰¹ The *UK Companies Act 2006* came into full effect in 2008.

²⁰² Goddard “Directors’ duties” 2008 *ELR* 468 468.

precedent to understand the scope and nature of their duties.²⁰³ In the United Kingdom, drafters sought to facilitate identification of directors' duties, their meaning and how they are to be discharged.²⁰⁴

Although it also used broad principled language, the approach to codification taken in the United Kingdom in relation to directors was, however, quite different to that taken in South Africa.²⁰⁵ In the United Kingdom, the codified duties of directors expressly replaced the common law.²⁰⁶ However, the *Companies Act 2006* explained that the codified directors' duties were to be interpreted and applied in the same way as common law rules or equitable principles,²⁰⁷ meaning that they should be interpreted consistently with these rules and principles. As such, on the matter of interpretation, the approach taken in the United Kingdom is the same as the South African approach and also seeks to ensure this area of law continues to develop consistently with past court decisions.

Certain aspects of those sections of the *Companies Act 2006* that set out directors' fiduciary duties are helpful in informing the codification proposed in chapter 4 in light of the aspects of these duties that are highlighted, namely, the duties to act in terms of the founding document, for a proper purpose, to avoid a conflict of interest, in good faith and in a way most likely to promote the success of the company, and not to benefit unduly. Specifically, section 171 states that

²⁰³ As previously indicated in this dissertation, this was also the case in South Africa prior to the Companies Act 2008 coming into effect and continues to be the case in relation to South African trust law.

²⁰⁴ Dobbie "Codification of Directors' Duties: An Act to Follow?" 2008 *TCLR* 15 18.

²⁰⁵ The approach in New Zealand and in Australia is like the South African approach in that the codified rules are to be read with the common law; see also Bouwman 2009 *SA Merc LJ* 509 517.

²⁰⁶ S 170(3) of the *UK Companies Act* states that "The general duties are based on certain common law rules and equitable principles as they apply in relation to directors and have effect in place of those rules and principles as regards the duties owed to a company by a director."

²⁰⁷ S 170(4) of the *UK Companies Act*. This section further stated that regard was to be had to the corresponding common law rules and equitable principles in interpreting and applying the general duties.

“A director of a company must (a) act in accordance with the company's constitution, and (b) only exercise powers for the purposes for which they are conferred.”

Section 172 combines the concepts of acting in good faith and in the best interests of the company in a formulation that is consistent with current stakeholder inclusive language of governance.²⁰⁸ It states that:

“A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to – (a) the likely consequences of the decision in the long term; (b)”²⁰⁹

Section 173(a) provides that “A director of a company must exercise independent judgment”, and section 175(1) states that:

“A director of a company must avoid a situation in which he has, or can have, a direct or indirect interest that conflicts, or possibly may conflict, with the interests of the company”

and section 175(2) states that:

“This applies in particular to the exploitation of any property, information or opportunity (and it is immaterial whether the company could take advantage of the property, information or opportunity).”

The *Trustee Act 2000* was enacted shortly after its South African counterpart. Like the Trust Property Control Act, the *Trustee Act 2000* only codifies the duty of care and skill²¹⁰ and the duty only applies in relation to those limited

²⁰⁸ This refers to language in governance codes globally that call for companies to be managed in ways that serve their broader communities of employees, creditors, communities and shareholders.

²⁰⁹ Ss (b) – (f) reference other stakeholders and considerations to which directors must have regard.

²¹⁰ This codified the common law principle termed the “prudent man of business standard”, which

functions specified in Schedule 1 to the *Trustee Act 2000*.²¹¹ Moffat notes that the *Trustee Act 2000* does not abolish the common law “prudent man” rule and so assumes that it will continue to apply in circumstances where the statutory duty does not apply.²¹² The English Law Commission²¹³ had suggested statutory inclusion of “acting in good faith”, but this was rejected as being “too undemanding.”²¹⁴ Accordingly, notwithstanding the developments in governance in the United Kingdom as regards company law and the *UK Corporate Governance Code*²¹⁵ (which like King IV is based on a set of guiding principles in its emphasis on effective and transparent leadership), no codification of the duty of trustees’ fiduciary duties has been undertaken.

was apart from a trustee’s fiduciary obligations. Moffat *et al* 48, 461 and 465. See also Mitchell *Hayton & Mitchell: Commentary and Cases in the Law of Trusts and Equitable Remedies* (2010) 355. This duty is not set out in any further detail than its South African counterpart’s s 9 formulation.

²¹¹ Moffat *et al* 463. The specified functions include: the exercising of any power of investment; the exercise of any power in relation to land; the appointment and review of agents and custodians; the power to insure; and the exercise of any powers of compromise.

²¹² Moffat *et al* 465.

²¹³ The Law Commission is the statutory independent body created by the *Law Commissions Act 1965* to keep the law of England and Wales under review and to recommend reform where it is needed. See www.lawcom.gov.uk.

²¹⁴ Moffat *et al* 465.

²¹⁵ Published Sept 2014.

Chapter 3: Review of trustees' fiduciary duties

3 1 Introduction

This chapter considers the nature of a trustee's fiduciary duties and analyses South African cases which identify a trustee's duty to act in good faith and its duty to act in the best interests of beneficiaries, as well as the fiduciary duties subsidiary to these core duties.

3 2 A closer look at fiduciary duties

The trustee is in a fiduciary relationship *vis-à-vis* trust beneficiaries.²¹⁶ As discussed in chapter 1,²¹⁷ fiduciary duties regulate the conduct of persons who administer the affairs of others.²¹⁸ Their principal focus is the manner in which a trustee conducts the administration and disposal²¹⁹ of trust property.²²⁰ Cassim *et al* describe fiduciary duties in relation to directors to be "protective of the company and its shareholders, and indeed even of the public interest."²²¹ This can be said *mutatis mutandis* of trusts: these duties are protective of the trust and its beneficiaries and, indeed, even of the public

²¹⁶ Cameron *et al Honoré's South African Law of Trusts* (2018) 3. De Waal "The core elements of the trust: Aspects of the English, Scottish and South African trusts compared" 2000 *SALJ* 548 557 says that "the fiduciary position of the trustee should be stated as the first core element of the trust"; in *Land and Agricultural Development Bank of South Africa v Parker* 86 par 20 the court said that the separation of ownership (or control) from enjoyment "provided the foundation for this Court's major decisions over the past century in which the trust form has been adapted to South African law: That the trustee is appointed and accepts office to exercise fiduciary responsibility over property on behalf of and in the interests of another". It held further that "the duties imposed on trustees and the standard of care exacted of them, derive from this principle" (see 87 par 22); Du Toit *et al Fundamentals of South African Trust Law* (2019) 99-101 and 130-139. It is worth noting that Kernick disagrees with the explanation given in *Land and Agricultural Development Bank of South Africa v Parker* that it is the separation of enjoyment and control that is the origin of a trustee's fiduciary duties, arguing that these duties arise out of the fiduciary nature of the institution of trusts. See Kernick "Declaration of independence" 2007 *De Rebus* 27. Kernick views the aforementioned court's declaration as an attempt to ensure compliance with fiduciary duties by suggesting that control and enjoyment be separate.

²¹⁷ See par 1 1 of ch 1.

²¹⁸ Geach *Trust Law in South Africa* (2017) 216; Du Toit *et al* 99-101 and 130-139.

²¹⁹ Du Toit "The fiduciary office of trustee and the protection of contingent trust beneficiaries" 2007 *Stell LR* 469 469.

²²⁰ Van der Linde "Protection of trust beneficiaries through the application of basic trust principles" 2018 *Ars Docendi et Scribendi: Essays in honour of Johan Scott* 181 186.

²²¹ Cassim *et al Contemporary Company Law* (2012) 507.

interest. This statement of Cassim *et al* speaks to the ripple effect of good governance and echoes the aims of King IV.²²²

Trusteeship is an office²²³ and a trustee administers a trust in his official, and not private, capacity.²²⁴ Fiduciary duties of trustees arise out of this office.²²⁵

Section 19 of the Trust Property Control Act provides that if any trustee fails to perform any duty imposed on the trustee by the trust instrument *or the law*,²²⁶ the Master or any person with an interest in the trust property may apply to court for an order directing the trustee to perform the duty. The duties imposed “by law” encompass all common law duties,²²⁷ in addition to statutory duties set out in that Act. As such, through section 19, the Trust Property Control Act reminds trustees and beneficiaries that trustees’ duties extend beyond those set out in the Act. This dissertation proposes that section 19 will be more impactful as relates to fiduciary duties if the latter are set out specifically in the Act. As is the case for directors,²²⁸ trustees’ foundational duties should be clearly stated in the governing statute.

In *Phillips v Fieldstone (Pty) Ltd*,²²⁹ the Supreme Court of Appeal held that the nature and extent of fiduciary duties depends on the actual relationship between the relevant parties.²³⁰ The court held further that “the essential

²²² King IV “Fundamental Concepts – Objectives of King IV” 22.

²²³ This means that a trust has a public element. See *Doyle v Board of Executors* 813 where Slomovitz AJ states “it appears to me to be unquestionable that a trustee occupies a fiduciary office”. See De Waal “The core elements of the trust: Aspects of the English, Scottish and South African trusts compared” 2000 *SALJ* 548 559 and Van der Linde 2018 “Protection of trust beneficiaries through the application of basic trust principles” 181 191; as noted by Du Toit 2007 *Stell LR* 469 469, ss 6(1), 10 and 11(1)(a) of the Act all refer to the “capacity” of a trustee.

²²⁴ Du Toit 2007 *Stell LR* 469 469; Du Toit *et al* 3.

²²⁵ See also De Waal “Die wysiging van ’n inter vivos trust” 1998 *TSAR* 326 331; *Doyle v Board of Executors* 812-813B and Du Toit “*Beyond Braun: An examination of some interesting issues from recent decisions on trusts*” *J S Afr Law* 2001 123 127.

²²⁶ Emphasis added.

²²⁷ Geach 216.

²²⁸ See s 76 and s 75 of the Companies Act 2008.

²²⁹ 2004 (1) All SA 150 (SCA).

²³⁰ *Phillips v Fieldstone (Pty) Ltd* par 27. This case dealt with the liability of an employee to his employer for secret profits made by the employee out of an opportunity which arose in the course of his employment. The court said at par 27 that “there is no magic in the term fiduciary duty”.

requirement for the establishment of a fiduciary duty is that one party must stand towards another in a position of confidence and good faith which he is obliged to protect.”²³¹ South African case law has, however, expanded the meaning of fiduciary duties beyond this, so that it is not a single duty but a multi-faceted duty with component parts.²³² The discussion of case law below supports the position that any of a number of specific component duties can arise in any given factual scenario.²³³

While this dissertation disagrees with the view²³⁴ that a trustee’s section 9 duties²³⁵ are one of his fiduciary duties, it concurs with the emphasis on the importance of such section 9 duties.²³⁶ Certainly, they are integral to a performance by a trustee of his duties generally. This chapter, however, considers those duties more narrowly related to the duty to act in good faith and in the best interests of trust beneficiaries as identified by our courts.²³⁷

3 3 Specific duties

The fundamental fiduciary duties, being to act in good faith and in the best interests of those to whom the duty is owed, are set out below with the component duties which this dissertation argues are subsidiary to these primary ones.²³⁸ Courts are inclined to use the component duty when describing the nature of a duty (in the context of its breach) as this specificity

²³¹ *Phillips v Fieldstone (Pty) Ltd* par 27; see also *Robinson v Randfontein Estates Gold Mining Co Ltd* 177.

²³² Du Toit “The fiduciary office of trustee and the protection of contingent trust beneficiaries” 2007 *Stell LR* 469 473; Geach 216; Du Toit *et al* 100.

²³³ Du Toit *et al* 130; *Phillips v Fieldstone (Pty) Ltd* par 27; Du Toit 2007 *Stell LR* 469 473.

²³⁴ Du Toit *et al* 101; Du Toit 2007 *Stell LR* 469 473 474; see par 1 1 of ch 1.

²³⁵ The duties to act with care, diligence and skill set out in s 9(1) of the Act.

²³⁶ Du Toit 2007 *Stell LR* 469 473.

²³⁷ Du Toit 2007 *Stell LR* 469 474 who notes that an analysis of case law reveals that South African courts have attributed an “essential fiduciary quality to a number of specific trustee duties”, being the component duties of a trustee’s general fiduciary duty.

²³⁸ Du Toit 2007 *Stell LR* 469 476 describes a formulation of fiduciary duties as being the duty of care, impartiality, independence and accountability. This dissertation has in ch 1 addressed his inclusion of the duty of care as a fiduciary duty. Geach 217 states that “A fiduciary duty requires a person to act honestly and genuinely in someone else’s interest and does not necessarily demand competence or skill”. In this regard, see *Sackville West v Nourse* 533 where the court said that a trustee must use greater care in managing trust property than in dealing with his own property.

is appropriate. This dissertation proposes that it is helpful in the context of proposing a partial codification to group component duties under these broader banners. As Du Toit states in relation to his classification of fiduciary duties, the list set out below does not comprise a finite list.²³⁹ Notwithstanding any partial codification proposed herein, fiduciary duties of trustees will continue to evolve as our courts expand on or, indeed, articulate duties they see evidenced in cases brought before them.²⁴⁰ Additionally, the scope of a fiduciary duty is also subject to change over time.²⁴¹ The cases discussed or referenced in the remainder of this chapter set out where the courts have identified certain duties as being fiduciary duties. They also provide detail and colour to these duties and thereby assist in formulating the body of core fiduciary duties.

3 3 1 The duty to act in good faith²⁴²

This dissertation proposes that the following duties fall under the umbrella of the duty to act in good faith²⁴³ in carrying out a trustee's duties: the duty not to exceed powers and the duty to account to beneficiaries.

3 3 1 1 The duty not to exceed powers encompasses the requirement that a trustee must familiarize herself with and to give effect to the trust instrument, being the trust's constitutive charter.²⁴⁴ Without having

²³⁹ 2007 *Stell LR* 469 476.

²⁴⁰ Du Toit *et al* 130; and Du Toit 2007 *Stell LR* 469 476. It is important to keep in mind that not all duties of trustees are, to quote Du Toit 2007 *Stell LR* 469 476 "fundamentally possessive of a fiduciary quality". Some are simply administrative duties.

²⁴¹ *Bellairs v Hodnett* 1978 (1) SA 1109 (A) 1128A-1134D; *Gherssi v Tiber Developments (Pty) Ltd* 2007 (4) SA 536 (SCA) par 9.

²⁴² Cameron *et al* 263, 298-299. See amendment proposed in 4 2 (A)(a) of ch 4.

²⁴³ The court in *Doyle v Board of Executors* 813A said of a trustee, that by virtue of his fiduciary office "alone he owes the utmost good faith towards all beneficiaries whether actual or potential"; see also *Gross v Pentz* 1996 (4) SA 617 (A) 628J in this regard, and Geach 216.

²⁴⁴ *Land and Agricultural Development Bank of South Africa v Parker* par 10. If a power is not given in the trust instrument, it will not be inferred. See *Tijmstra v Blunt-Mackenzie* 468 in this regard where the court held that if a trustee is unaware of the terms of the trust deed, they are not fit to remain in office: "One cannot be a trustee without ascertaining what the rights and obligations of that office entail". See also *Liebenberg v MGK Bedryfsmaatskappy (EDMS) Bpk* 2002 (4) All SA 322 (SCA) par 15 – the power to sell a property does not grant the power to mortgage a property.

undertaken this exercise, he will not be able to exercise his discretion appropriately.²⁴⁵ Trustees must not exceed the powers granted them by the trust instrument,²⁴⁶ the Trust Property Control Act and the common law.²⁴⁷

3 3 1 2 The duty to give an accounting²⁴⁸ to beneficiaries extends even to contingent beneficiaries in terms of a discretionary trust.²⁴⁹ Trustees are not accountable to the person or organisation that appointed them²⁵⁰ as the trustee does not owe a fiduciary duty to that person.

3 3 1 3 Trustees are accountable in relation to all aspects of trust administration.²⁵¹ This means they must provide to beneficiaries a proper account when requested to do so and must also keep proper

²⁴⁵ As the Master needs to exercise oversight of the administration of a trust, he is also given access to the trust instrument by virtue of the requirements in ss 4(1) and 4(2) of the Act instructing a trustee to lodge the trust instrument with the relevant Master's office, or any amendment thereof.

²⁴⁶ A trust is a creature of document (Pace and Van der Westhuizen *Wills and Trusts* (2018) B10). The trust instrument is the definitive source of the prescripts regarding the administration of a particular trust (see *Hanekom v Voight* 2016 (1) SA 416 (WCC) par 13) and Du Toit *et al* 63-64 and 134. For example, in *Watson v Cockin* 2016 2, 5 and 24, for example, the trust deed made it clear that if there were fewer than two trustees, the remaining trustee had no power to act in relation to the trust property. The first respondent's actions were thus invalid.

²⁴⁷ See amendment proposed in 4 2 (A)(a)(i) of ch 4.

²⁴⁸ This phraseology was used by the court in *Doyle v Board of Executors* 813G-H to describe this duty which it further clarified was a "substantive legal duty."

²⁴⁹ In *Doyle v Board of Executors* 813I-J and 814A-B the court held that this duty is owed to all beneficiaries, whether actual or potential. Further, at 815C-G the court distinguished the accounting owed to capital versus income beneficiaries. The former, it held, are entitled to the "full and true trust capital, no more and no less" meaning that in discharging his duty of good faith, a trustee must show, in his accounting, that what the income beneficiary receives was the correct product of the initial capital, properly administered. On the other hand, an income beneficiary is entitled to an accounting of the income arising from the corpus, and "merely as an incident thereof, the manner of its administration." See also Cameron *et al* 417 and Lacob "Doyle v Board of Executors: confirming the contingent beneficiary's right to an accounting" 2000 *SALJ* 441 443. Lacob (449) also notes that "in the absence of special circumstances requiring confidentiality, any blanket provision in a trust deed purporting to prohibit a beneficiary's right of access to accounts would be void, being contrary to the tenor of the trustee-beneficiary relationship."

²⁵⁰ In *PPWAWU National Provident Fund v Chemical Energy Paper Printing Wood and Allied Workers Union* 2008 (2) SA 251 (W) the court said that the unions could not give mandates to trustees they had appointed in relation to trustee meetings.

²⁵¹ Geach 217.

records of all transactions.²⁵² This does not, however, mean that trustees have a duty to consult with beneficiaries.²⁵³

3 3 1 4 In *Watson v Cockin* the first, second and third respondents breached this duty to account to beneficiaries by deliberately withholding information regarding the trust from the applicant (who was also a beneficiary).²⁵⁴ The court also held in *Law Society of the Cape of Good Hope v Randell* that the respondent breached his fiduciary duty by deliberately withholding information from the trust beneficiary as regards the extent and value of the trust property.²⁵⁵

3 3 1 5 An extension of this duty to account is that trustees must be in a position to provide reasons to beneficiaries who ask for an explanation or justification of a trustee decision.²⁵⁶ By accounting in this way to beneficiaries, trustees show how they have fulfilled their duties, applied their mind²⁵⁷ and given effect to the trust instrument. This duty is akin to the duty imposed on administrators in terms of administrative law, to provide a clear and reasoned statement, so as to ensure the constitutional requirement of an open and accountable administration is observed.²⁵⁸ This, in turn, arises out of section 33 (Just administrative action) of the South African Constitution²⁵⁹ which states that “Everyone has the right to administrative action that is ..., reasonable and procedurally

²⁵² *Doyle v Board of Executors* 816G-H.

²⁵³ See Geach 226 where he argues that such a duty would be contrary to the separation of control and enjoyment. However, he suggests that obtaining “input from beneficiaries in circumstances where the trustees have a discretion as to the distribution of income and/or capital of the trust” may well be appropriate.

²⁵⁴ 11 par 30.

²⁵⁵ 187 par 62.

²⁵⁶ See amendment proposed in 4 2 (A)(a)(ii) of ch 4.

²⁵⁷ Per Du Toit *et al* 199 a trustee must exercise his discretionary powers *inter alia* by applying his mind to the exercise of the discretion by “actively and conscientiously giving it real and genuine consideration”, noting that this requires a wider and more comprehensive inquiry into the matter at hand than what is reasonably expected of a person who exercises discretion in relation to his own affairs. See also Pace and Van der Westhuizen (B14.2.1) in this regard.

²⁵⁸ Devenish *et al Administrative Law and Justice in South Africa* (2001) 154.

²⁵⁹ The Constitution of the Republic of South Africa 1996.

fair.”²⁶⁰ Section 33, it is suggested, also reinforces the entitlement to an accounting by trust beneficiaries in section 2 where it states that “Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.”²⁶¹

3 3 1 6 This dissertation concurs with Geach’s suggestion that regular and proactive accounting to beneficiaries of the business and affairs of the trust is a sensible approach in service of fulfilment of this duty.²⁶²

3 3 2 The duty to act in the best interests of all beneficiaries²⁶³

In this dissertation the view is expressed that the following duties fall under the umbrella of the duty to act in the best interests of beneficiaries: the duty to avoid a conflict of interest, or to act impartially, and the duty to act independently.

3 3 2 1 The duty of a trustee to act impartially incorporates the duty to avoid conflicts of interest²⁶⁴ between his personal interests and those of beneficiaries²⁶⁵ and arises out of the fact that such a conflict will affect a trustee’s ability to act independently. *Robinson v Randfontein Estates Gold Mining Co Ltd*²⁶⁶ is held up as the seminal statement of the fiduciary duty in South African law²⁶⁷ and

²⁶⁰ Ss 1.

²⁶¹ Section 3 requires that national legislation must be enacted to give effect to the rights set out in ss 1 and 2.

²⁶² Geach 226.

²⁶³ *Cameron et al* 262-263; *PPWAWU National Provident Fund v Chemical Energy Paper Printing Wood and Allied Workers Union* paras 19, 25 and 30; *Law Society of the Cape of Good Hope v Randell* par 47; Nel “Unfettered, but not unbridled: the fiduciary duty of the trustee” 2016 *Obiter* 436 443; Geach 216. See amendment proposed in 4 2 (A)(b) of ch 4.

²⁶⁴ *Du Toit et al* 131 and *Du Toit* 2007 *Stell LR* 469 474.

²⁶⁵ *Jowell v Bramwell-Jones* 284G-285A where the court acknowledged a trustee’s conflict as being a breach of his fiduciary duties; *Cameron et al* 315. See also *Hoppen v Shub* 210A-B; *Tijmstra v Blunt-Mackenzie* 476I; *African Bank Ltd v Weiner* 2003 (4) All SA 50 (C) 54b-c; *Phillips v Fieldstone Africa (Pty) Ltd* 166d; *Daewoo Heavy Industries (SA) (Pty) Ltd v Banks* 2004 (2) All SA 530 (C) 533c-d.

²⁶⁶ 1921 AD 18.

²⁶⁷ *Du Toit* 2007 *Stell LR* 469 472; Nel 2016 *Obiter* 2016 436 436.

deals with the issue of a conflict and a fiduciary making an undue profit.²⁶⁸

3 3 2 2 In *Watson v Cockin*,²⁶⁹ the trustees administered the trust's assets (such as alienating assets,²⁷⁰ utilising the trust account as if it was the fourth respondent's own business account,²⁷¹ making loans²⁷²) in a way that was influenced by their own interests and needs, with no regard to the trust property needing to be administered for the benefit of all the beneficiaries. In *Law Society of the Cape of Good Hope v Randell*, the respondent allowed himself (without the knowledge of the existing beneficiary) to become a beneficiary, thereby creating a fundamental conflict.²⁷³

3 3 2 3 An additional aspect of this duty to act impartially is that a trustee must not make an unauthorised profit from administering the trust.²⁷⁴ Reasonable remuneration, as contemplated by the trust instrument is obviously permissible, but benefiting in other ways is not.²⁷⁵ So, unless properly authorised, a trustee cannot buy trust property, sell his private property to the trust, borrow money from the trust or lend money to the trust.²⁷⁶ In *Hoppen v Shub*²⁷⁷ it was

²⁶⁸ In this regard, see also *African Bank Ltd v Weiner* 54d-e; *Phillips v Fieldstone Africa (Pty) Ltd* 166d; *Daewoo Heavy Industries (SA) (Pty) Ltd v Banks* 533c-d; and De Waal 2000 SALJ 548 558.

²⁶⁹ 2016 JDR 0762 (GP).

²⁷⁰ 6 par 15.

²⁷¹ 10 par 27.

²⁷² 9 par 24.

²⁷³ Applying the principal explained in *Robinson v Randfontein Estates Gold Mining Co Ltd*, the only way such conduct could be permissible is if the beneficiary had been made aware of all relevant facts and then consented to such appointment.

²⁷⁴ Unless the trust instrument expressly permits trustees to benefit from the trust assets, they may not do so. See Pace and Van der Westhuizen in this regard B15.1.7. See also Du Toit 2007 *Stell LR* 469 474; see also De Waal 2000 SALJ 548 558; *African Bank Ltd v Weiner* 54d-e; *Phillips v Fieldstone Africa (Pty) Ltd* 166d; *Daewoo Heavy Industries (SA) (Pty) Ltd v Banks* 533c-d; *Watt Trusts and Equity* (2018) 337 which describes the prevention of conflict with his personal interests and the prohibition against unauthorised personal profit as being the two principal obligations of a trustee in English law.

²⁷⁵ In *Law Society of the Cape of Good Hope v Randell*, Randell devised a complex scheme to create wealth for himself and others to the detriment of the original beneficiary.

²⁷⁶ *Robinson v Randfontein Estates Gold Mining Co Ltd* 178; De Waal 2000 SALJ 548 558.

²⁷⁷ 1987 (3) SA 201 (C).

held that transactions where a trustee's private interests conflicted with his duties as a trustee or with the interests of trust beneficiaries were voidable.²⁷⁸

3 3 2 4 A further element of the duty relates to a trustee's duty to treat trust beneficiaries impartially.²⁷⁹ This means that in making distributions to beneficiaries of trust capital and income, none should be unduly favoured.²⁸⁰ This, however, does not mean that they must necessarily be treated equally: the circumstances should inform a trustee's independent decision.²⁸¹

3 3 2 5 The duty to act independently²⁸² refers to the requirement that trustees make decisions that are not unduly influenced by others – be that by co-trustees, beneficiaries or the founder.²⁸³ In *Land and Agricultural Development Bank of South Africa v Parker*²⁸⁴ the court held that the separation of ownership (or control) from enjoyment “tends to ensure independence of judgment on the part

²⁷⁸ 203.

²⁷⁹ Du Toit *et al* 133; Pace and Van der Westhuizen B15.1.7 and *Jowell v Bramwell-Jones* 284G-285H.

²⁸⁰ Du Toit *et al* 133.

²⁸¹ *Schaefer and Nagel v Estate Petzall* 1966 (3) SA 789 (W). See amendment proposed in 4 2 (A)(b)(ii) of ch 4.

²⁸² There is a distinction to be drawn between an independent trustee (one with no loyalty to any particular party – the so-called “independent outsider” referred to in *Land and Agricultural Development Bank v Parker* 90) and the duty to act independently, which applies to every trustee. The court's decision in *Hoppen v Shub* (which involved a situation where a conflict existed but the facts and circumstances surrounding it were brought to the attention of the other trustees who were able to apply their minds independently to the matter) is instructive in that the ability of unconflicted trustees to act independently caused the court to determine that the conflict which existed would not cause the affected decision to be overturned. See also Pace and Van der Westhuizen B15.1.7.

²⁸³ In *PPWAWU National Provident Fund v Chemical Energy Paper Printing Wood and Allied Workers Union* par 30, the court held that the trustee had to exercise an independent judgment irrespective of the view of the trade union that appointed him. By not doing so, the trustee acted in breach of the common duty shared by all the trustees (being the members' trustees and the employers' trustees) to act in the best interests of the fund, its members and beneficiaries. See also *Tijmstra v Blunt-Mackenzie* 474E. Additionally, where a founder wishes to amend the terms of an *inter vivos* trust before beneficiaries have accepted benefits, the trustee should not simply concede to this without taking his fiduciary duties into account and applying his mind independently and impartially as to whether or not the amendment should be made. See Du Toit *et al* 75-77 and Geach 327 and 333-334.

²⁸⁴ 87 par 22.

of the trustee – an indispensable requisite of office²⁸⁵ A trustee will often have the power to weigh up different possibilities in deciding on the best option under the particular circumstances – within the parameters of the terms of the trust instrument²⁸⁶ – and doing so in the best interests of trust beneficiaries.²⁸⁷ Trustees should be able to justify their decisions.²⁸⁸

3 3 2 6 In *Wiid v Wiid*²⁸⁹ it was held that a majority of trustees had not exercised their discretion in an independent way and applied their minds properly, but rather had allowed themselves to be manipulated by the founder in that they had failed to consider whether their decision to enter into a rental agreement with a tenant farmer was at a below-market rate²⁹⁰ were in the best interest of the trust and its beneficiaries.²⁹¹ This had resulted in a lost opportunity to increase the trust capital.²⁹²

3 3 2 7 In *Tijmstra v Blunt-Mackenzie*²⁹³ the trustees were described by the court as “puppets of their father” who was a co-trustee, meaning that the trustees simply “endorsed without question whatever he had done and is doing.”²⁹⁴ In both this case and *Wiid v Wiid* the trustees were removed as trustees of the trust for breach of their

²⁸⁵ It is worth noting that Kernick disagrees with the explanation given in *Land and Agricultural Development Bank of South Africa v Parker* that it is the separation of enjoyment and control that is the origin of a trustee’s fiduciary duties, arguing that these duties arise out of the fiduciary nature of the institution of trusts. See Kernick 2007 *De Rebus* 27 27. Kernick views the aforementioned court’s declaration as an attempt to ensure compliance with fiduciary duties by suggesting that control and enjoyment be separate.

²⁸⁶ Pace and Van der Westhuizen 53.

²⁸⁷ Nel 2016 *Obiter* 436 443. In *Watson v Cockin*, the first, second and third respondents acted (albeit invalidly) repeatedly in a way that favoured certain trust beneficiaries over the applicant (who was also a beneficiary) without any justification for such conduct. There was no awareness among the trustees as to this aspect of their duties.

²⁸⁸ Geach 218 who suggests that trustees should record not only their decisions but their thinking informing such decisions.

²⁸⁹ Case No 1571/2006 NCHC (13 Jan 2012).

²⁹⁰ 3 par 4. That the tenant was also a beneficiary was not relevant.

²⁹¹ 2 and 3 par 4.

²⁹² Par 15.4. See also Nel 2016 *Obiter* 436 441.

²⁹³ 2002 (1) SA 459 (T).

²⁹⁴ 472B.

fiduciary duties because they failed to exercise independent judgment.²⁹⁵

3 4 Other common law duties

Although this dissertation considers the partial codification of fiduciary duties, other common law duties exist that are not fiduciary in nature²⁹⁶ but which are key in supporting a trustee's carrying out of his fiduciary duties and should be considered for inclusion in any partial codification. These duties appear also not to be as well known to trustees as they should be. They are the duty to act jointly and the duty not to delegate.

3 4 1 The duty to act jointly

Because (a) trustees share a common fiduciary duty arising out of the single office of trustee,²⁹⁷ (b) the office vests trust administration in each co-trustee individually²⁹⁸ but the trustees hold the office jointly,²⁹⁹ and (c) they are co-owners of the trust property,³⁰⁰ when making decisions in relation to a trust's affairs, trustees must act jointly.³⁰¹

²⁹⁵ 474E. See amendment proposed in 4 2 (A)(b)(iii) of ch 4.

²⁹⁶ Geach 219.

²⁹⁷ *Gowar v Gowar* par 23 and Du Toit *et al* 102.

²⁹⁸ *Lupacchini v Minister of Safety and Security* par 2 and Du Toit *et al* 101.

²⁹⁹ *Desai-Chilwan v Ross* 2003 (2) SA 644 (C) par 21; in *Land and Agricultural Bank of South Africa v Parker* par 11, the court described the provision in a trust instrument which sets out that a minimum number of trustees must hold offices as "a capacity-defining condition". The court explained that when fewer than the prescribed minimum number of trustees hold office, the trust suffers from an incapacity that precludes action on its behalf. See also Du Toit *et al* 101.

³⁰⁰ The Supreme Court of Appeal in *Land and Agricultural Bank of South Africa v Parker* par 15 held that the joint action rule of co-trusteeship is fundamental to South African trust law. It said specifically at par 15 that "in the absence of contrary provision in the trust deed the trustees must act jointly if the trust estate is to be bound by their acts." De Waal "The strange path of trust property at a trustee's death" 2009 *TSAR* 84 87. See also *Lupacchini v Minister of Safety and Security* par 2; and Geach 8 where he explains that co-owners of trust property own the property in undivided shares such that no co-owner is the sole owner of any particular portion of the property, but together they own the trust's assets as a whole. This is not ownership in a beneficial sense. See further Du Toit *et al* 4 and 101 *et seq.* This does not apply to *bewind* trusts where the beneficiaries are the owners.

³⁰¹ Geach 147 and 220. See *Land and Agricultural Bank of South Africa v Parker* par 17. See also *Steyn v Blockpave (Pty) Ltd* paras 14, 15, 19 and 40 where the trust's third trustee was neither consulted nor did she participate in the meeting in question. The court held that all trustees must be notified of a meeting and all must participate.

One or more trustees cannot be marginalised.³⁰² Unless the trust instrument says otherwise, the trustees must also act unanimously.³⁰³ However, where a trust instrument permits majority decision-making, the trustees must all have the opportunity to participate in the decision.³⁰⁴

3 4 2 The duty not to delegate

A trustee cannot delegate the exercise of his fiduciary duties to another.³⁰⁵ Trustees can, however, where the trust instrument permits this,³⁰⁶ delegate the implementation of their decisions to another, including an outsider,³⁰⁷ although the trustee remains ultimately responsible for the agent's actions.³⁰⁸ This delegation is temporary and revocable.³⁰⁹ For example, in *Nieuwoudt v Vrystaat Mielies (Edms) Bpk* the trust deed provided that the trustees could empower one of their number to sign documents on their behalf, thereby implementing any transaction arising out of the trust's affairs.³¹⁰

³⁰² Du Toit *et al* 106; *Land and Agricultural Bank of South Africa v Parker* par 17; *Steyn v Blockpave (Pty) Ltd* par 16.

³⁰³ *Coetzee v Peet Smith Trust* 2003 (5) SA 674 (T); *Land and Agricultural Development Bank v Parker* par 15; *Steyn v Blockpave (Pty) Ltd* par 16. Pursuant to *Van der Merwe v Hydraberg Hydraulics CC* 2010 (5) SA 555 (WC) such a provision is not an exception to the rule to act jointly, and all trustees are bound by such a decision and must act together to implement same. See also *Nieuwoudt v Vrystaat Mielies (Edms) Bpk* 2004 (3) SA 486 (SCA) par 21 and *Investec Bank Ltd v Adriaanse* 2014 (1) SA 84 (GNP) paras 27-32 where the trust instrument empowered a sub-minimum number of trustees to bind the trust as surety. See also Geach 31 and 221.

³⁰⁴ This does not necessarily require a trustee's physical presence at a meeting; each trustee must simply be given a chance to apply their mind to the issue at hand. See *Land and Agricultural Bank of South Africa v Parker* par 17 and *Steyn v Blockpave (Pty) Ltd* paras 9 and 16. See also Du Toit *et al* 107. See amendment proposed in 4 2 (B) of ch 4.

³⁰⁵ *Hoosen v Deedat* 1999 (4) SA 425 (SCA) 432 paras 26-28. The court addressed the inability to delegate decisions that involve a "fundamental discretionary power" and founded their decision in the collective nature of trustees' duties. See also Geach 148 in this regard.

³⁰⁶ *Goolam Ally Family Trust v Textile, Curtaining & Trimming (Pty) Ltd* 1989 (4) SA 985 (C) 988D-E; *Hoosen v Deedat* paras 23 and 28. Further, at par 29 the court indicated that the ability to delegate could be implied by the terms of the trust instrument, although it held that was not the case in these circumstances. See also par 25 in this regard.

³⁰⁷ This effectively means that only administrative tasks can be delegated. See *Hoosen v Deedat* par 24. See also *Nieuwoudt v Vrystaat Mielies (Edms) Bpk* par 6.

³⁰⁸ The delegee acts as agent of the trustees(s) – see *Goolam Ally Family Trust v Textile, Curtaining & Trimming (Pty) Ltd* 988D-E. See also Du Toit *et al* 136.

³⁰⁹ Du Toit *et al* 136.

³¹⁰ Paras 6 and 7. See amendment proposed in 4 2 (B) of ch 4.

In *Hoosen v Deedat*, the court considered the ability of a trustee to delegate in the context of the common law principle in the law of agency which speaks to the issue that where the personal attributes, identity and skills of the performer of the act are of material importance, delegation is not permissible.³¹¹ This is certainly the case with trustees who are appointed for their character and particular abilities.

³¹¹ Par 26. See also *Du Toit et al* 22.

Chapter 4: Proposed partial codification of trustees' duties

4 1 Introduction

The case law canvassed in chapter 3 indicates that there is widespread lack of understanding among trustees of their fundamental fiduciary duties. In light of this, and as an aid to trustees in fulfilling their duties required by law, the partial codification of a trustee's fiduciary duties set out below in paragraph 4 2 is suggested.

4 2 Proposed amendment

Section 9 of the Trust Property Control Act, 1998, is hereby amended –

(A) by the insertion in section 9 as new subsection (2), after existing subsection (1), of the following words:

“A trustee shall, when acting in that capacity, in the performance of his duties and the exercise of his powers at all times –

(a) act in good faith, meaning inter alia that he shall:

(i) not exceed those powers given him in terms of this Act, the trust instrument (with which he must familiarize himself) and the common law, and shall only exercise his powers for the purposes for which they are conferred; and

(ii) provide a proper accounting to both actual and potential beneficiaries upon request and at all other relevant times, and such duty includes, upon request, the provision of explanations for actions taken; and

(b) act in the best interests of all beneficiaries, meaning inter alia that he shall:

- (i) *act in a way most likely to benefit the trust and its beneficiaries as a whole;*
- (ii) *act impartially, avoiding any conflict between his personal interests and those interests arising in his capacity as trustee, not benefiting from his trusteeship unless provided for in the trust instrument, and treating beneficiaries impartially;*
- (iii) *apply his mind independently of any influence.”*

(B) by the insertion as subsection 9(3), after new subsection (2), of the following words:

“A trustee shall furthermore, act jointly with his co-trustees (if any), unless the trust instrument provides otherwise, and not delegate his duties set out in this section 9, although the trust instrument may permit the delegation of administrative tasks to a single trustee or a third party.”

(C) by the insertion as section 9(4), after new subsection (3), of the following words:

“When determining a matter brought before it in terms of sections 9(2) and 9(3) of this Act, a court must develop the common law as necessary to improve the realisation and enjoyment of rights established by this Act.”

(D) by renumbering existing subsection (2) as subsection 9(5).

4 3 Additional considerations

While this dissertation suggests there is enormous value in partially codifying trustees' fiduciary duties,³¹² codification alone will only take trustees so far. Ideally, it should be part of a multi-pronged approach that emphasises good governance of trusts generally. This can take the form of:

- 4 3 1 amendments to form J417 (Acceptance of Trusteeship by Trustee) inserting language along the lines of "I am aware of the duties required of me in terms of the Act (specifically, section 9 (as amended)), the trust instrument and the common law. I know that as a fiduciary I have duties that are particular to, and arise out of, that office, and in fulfilling these duties I must act with care, skill and diligence",³¹³
- 4 3 2 one or more directives of the Chief Master on a trustee's fiduciary duties and duties of care, skill and diligence;³¹⁴
- 4 3 3 making training available to new trustees on their duties and on governance generally.³¹⁵ This could even be made a requirement of trusteeship. Specifically, before issuing letters of authority, a potential trustee must confirm in writing to the Master that he has undertaken basic training, or otherwise educated himself, in relation to his legal duties as trustee;³¹⁶ and/or

³¹² Geach *Trust Law in South Africa* (2017) 422 where he notes the law of trusts not being codified as a disadvantage of a trust.

³¹³ See Kernick "Declaration of independence" 2007 *De Rebus* 27 29 where he suggests that the Master could refuse to dispense with provision of security unless each trustee makes a statement to this effect – perhaps in the form of an affidavit – which statement could include an acknowledgment that he could be exposing himself to criminal action.

³¹⁴ To date no directives have been issued dealing with these topics.

³¹⁵ New directors of AltX listed companies are required to attend an educational induction programme before on-boarding. Attendance at same has become the norm for directors joining the boards of JSE main board-listed companies. See Kernick 2007 *De Rebus* 27 "[Trustees] must be made aware of the seriousness of the duties they have taken on and of the consequences of falling down on their duties." Kernick 2007 *De Rebus* 27 28 also references the oftentimes "plain ignorance" of trustees who breach their duties.

³¹⁶ See Kernick 2007 *De Rebus* 27 29 where he suggests that the Master could refuse to dispense with provision of security unless each trustee makes a statement to this effect – perhaps in the

4 3 4 requiring that trust deeds include a section that more comprehensively describes these fundamental duties imposed on a trustee in his capacity as fiduciary.

4 4 Business judgment rule

In section 76(4)(a), the Companies Act 2008 introduced provisions³¹⁷ that have come to be referred to as the “business judgment rule”. Essentially, they provide that if a director conducts himself in a certain way in carrying out his duties, he will have fulfilled his duty to act in the best interests of the company and with the necessary degree of care, skill and diligence.

Incorporating similar language, by way of amendment, into the Trust Property Control Act would both guide trustees in the performance of their duties and give them comfort that they have acted in a way that is expected of them in terms of the law. In short, the concepts arising out of section 76(4) of the Companies Act 2008 that this dissertation argues could be of use in qualifying the Act (as amended as proposed in paragraph 4.2 above) in relation to those amendments addressing a trustee’s duty to act in the best interests of beneficiaries³¹⁸ are the following:

4 4 1 if a trustee has taken reasonably diligent steps in becoming informed about a matter at hand; and

form of an affidavit – which statement also identifies the scope of the s 9 duties, as amended, and includes an acknowledgment that he could be exposing himself to criminal action.

³¹⁷ The relevant sections of s 76(4) of the Companies Act 2008 provides “In respect of any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director of a company – (a) will have satisfied the obligations of subsection (3)(b) and (c) if – (i) the director has taken reasonably diligent steps to become informed about the matter; (ii) either – (aa) the director has no material financial interest in the subject matter of the decision and had no reasonable basis to know that any related person had a personal financial interest in the matter; or (bb) the director complied with the requirements of section 75 with respect to any interest contemplated in subparagraph (aa); and (iii) the director made a decision or supported a decision of a committee or the board, with regard to that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company; and ...”.

³¹⁸ This may be extended to qualify the duty to act with care, diligence and skill. It is argued that this framework is not helpful in relation to the duty to act in good faith and in this way concur with the thinking of drafters of the Companies Act 2008 who employed the business judgement rule to qualify only the duty to act in the best interests of the company and the duty to act with care, skill and diligence.

4 4 2 he either has no conflicting interest in the matter or if he has, he has disclosed this and all relevant information regarding that conflict to his fellow trustees and he conducts himself in a way so as not to attempt to inappropriately influence their decision(s); and

4 4 3 the trustee has a rational basis for believing his decision is in the best interests of the trust's beneficiaries as a whole.

4 5 External advice

Relying on the concepts in sections 76(4)(b)³¹⁹ and 76(5)³²⁰ of the Companies Act 2008, this dissertation further suggests that the Trust Property Control Act expressly permits trustees to seek the advice of appropriately skilled professionals where necessary, provided that it is made clear that they cannot delegate their decision-making to any of these advisors. The authority to make decisions is by its fiduciary nature one that is personal to the trustee.³²¹

³¹⁹ S 76(4)(b) provides that "In respect of any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director of a company – ... (b) is entitled to rely on – (i) the performance by any of the persons – (aa) referred to in subsection (5); or (bb) to whom the board may reasonably have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law; and (iii) any information, opinions, recommendations, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (5)".

³²⁰ S 76(5) provides that "To the extent contemplated in subsection (4)(b), a director is entitled to rely on – (a) one or more employees of the company whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinions, reports or statements provided; (b) legal counsel, accountants, or other professional persons retained by the company, the board or a committee as to matters involving skills or expertise that the director reasonably believes are matters – (i) within the particular person's professional or expert competence; or (ii) as to which he particular person merits confidence; or (c) a committee of the board of which the director is not a member, unless the director has reason to believe that the actions of the committee do not merit confidence."

³²¹ *Hoosen v Deedat* paras 26-28.

Chapter 5: Conclusion

In *Land and Agricultural Bank of South Africa v Parker*³²² the court said that a trustee should be someone

“... who with proper realisation of the responsibilities of trusteeship accepts office in order to ensure that the trust functions properly that the provisions of the trust deed are observed, and that the conduct of trustees who lack a sufficiently independent interest in the observance of substantive and procedural requirements arising from the trust deed can be scrutinised ...”.

This dissertation suggests that codification of trustees’ fiduciary duties will advance governance of trusts. There are at least half as many registered trusts in South African as there are registered companies.³²³ This speaks to the far-reaching use of trusts today, be they for estate planning or business purposes, or a combination of the two. This number of trusts also speaks to the vast reach of real consequences for real people. There is no justification for fiduciary duties being more accessible to directors and shareholders than to trustees and beneficiaries.

The proposed partial codification set out in chapter 4 is of more than academic interest. On a practical level it will impact how trusts are administered daily. It is harder for trustees to act properly as fiduciaries if they have to source complex research conducted by costly professionals in order to understand their fundamental common law duties. It is that much harder for beneficiaries to hold trustees accountable if beneficiaries also do not have ready access to trustees’ duties.

This dissertation refers several times to these fiduciary duties being “fundamental”. This identifies these duties as the starting point for trustees’

³²² Par 36.

³²³ See par 1 4 of ch 1.

duties. The duty to act in good faith and in the best interests of beneficiaries informs everything trustees do in their official capacity. These duties have certain specific implications discussed in chapter 3, but they also provide a framework within which trustees must perform all their other duties. As such, when a trustee carries out his duties provided for in the Trust Property Control Act related, by way of example, to operating the trust account³²⁴ or keeping the trust property separate from his own,³²⁵ he takes these and related actions while keeping in mind that he must act in good faith and in the beneficiaries' best interests. It is for this reason that it is so important to make this framework abundantly clear. It is incumbent on the legislature to heed the *Braun* court and respond to the needs of a changed (democratic) and changing society.³²⁶

Codification or partial codification of directors' duties has over the past two decades become the norm in those Commonwealth jurisdictions³²⁷ to which we compare aspects of our legal system. These changes were made because the respective legislators saw the value in making their common law more accessible to citizens. Many also have governance codes like our King Report on Corporate Governance for South Africa which, although not necessarily legally binding, set the standard for current thinking in relation to good governance.³²⁸ The four iterations of the King Codes emphasize the need to keep engaging with issues related to governance and to look for ways to ensure that the corporate commercial part of society better serves its stakeholders. The King process encourages us to ask the question: how can we do better?

South Africa, in its development of corporate governance codes, has been a market leader in setting governance standards internationally³²⁹ and so it was

³²⁴ S 10 of the Act.

³²⁵ S 12 of the Act.

³²⁶ See par 1 5 of ch 1.

³²⁷ See par 2 6 of ch 2.

³²⁸ The *UK Corporate Governance Code*, *Australia's Corporate Governance Principles and Recommendations*, and the *NZX Corporate Governance Code*.

³²⁹ See Roman "King III Report: How South African Revolutionised Corporate Governance May 2014 www.azeusconvене.com/articles/south-africa-revolutionize-corporate-governance;

especially appropriate that SA's corporate law regime joined other Commonwealth jurisdictions in undertaking codification of duties of directors. While trust law is often overlooked as the "poor cousin" of corporate law, this should not be the case. It is, indeed, heartening that New Zealand has modernised its trust law and, in relation to trustees' duties, for the very reasons suggested in this dissertation.³³⁰ Although other jurisdictions may not yet have codified their trustees' fiduciary duties, it would be consistent with South Africa's historical approach to promoting good governance to be the market leader in this arena too.

In chapter 1, this dissertation poses the question as to what lessons can be learned from considering the partial codification of directors' fiduciary duties in the Companies Act 2008 for purposes of proposing the form a partial codification of trustees' duties should take? As explained, this undertaking would be consistent with international trends in governance. Additionally, the partial codification (as opposed to attempting a complete codification) used in the Companies Act 2008 is instructive for trust law in that it is conducive to developing the common law in line with the instructions for interpretation given in section 158 of that Act. As a result, the approach is not unduly restrictive and does not have a rigidifying effect on the development of the law on these topics. Thus, employing a partial codification is an approach it is suggested is utilised, as well as coupling it with interpretive guidelines that serve as an aid to the judiciary.³³¹

A further learning is that the approach taken in section 76(2) and (3) of the Companies Act 2008 lacks coherence. The haphazard ordering of old and new duties, core duties with arguably less significant ones (while leaving others out altogether) is not assisted by language that is unclear.³³² In light of this, it is

www.iodsa.co.za; Blanpain *et al* (eds) *Rethinking Corporate Governance: From Shareholder Value to Stakeholder Value* (2011) 343 n 40.

³³⁰ The *New Zealand Trusts Act 38 of 2019* will come into effect in January 2021.

³³¹ See amendment proposed in 4 2 (C) of ch 4.

³³² See 2 5 of ch 2 for a fuller discussion of these shortcomings.

argued that a more orderly approach be taken to partial codification in the Trust Property Control Act: subsidiary duties should be grouped under overarching fiduciary duties (as suggested in chapter 4) and they should be set out in a way that provides enough clarity and some degree of detail that an average person can employ common sense in interpreting their meaning.

This dissertation posed the further question in chapter 2 as to whether the proposed codification will advance good governance of trusts and benefit beneficiaries in a fundamental way. This dissertation suggests this is certainly the case. Partial codification of trustees' fiduciary duties will help educate trustees and beneficiaries. Knowledge empowers all affected stakeholders.

I - List of abbreviations

CLJ – Cambridge Law Journal

Co LN – Company Law Newsletter

Comp Law – Competition Law Journal

EBOR – European Business Organization Law Review

EJLR – European Journal of Law Reform

ELR – Edinburgh Law Review

ICCLR – International Company and Commercial Law Review

JBL – Juta's Business Law

JCCL&P - Journal of Corporate and Commercial Law & Practice

JJS – Journal for Juridical Science

LQR – Law Quarterly Review

Mod L Rev – Modern Law Review

PELJ – Potchefstroom Electronic Law Journal

SALJ – South African Law Journal

SA Merc LJ – South African Mercantile Law Journal

Stat L Rev – Statute Law Review

Stell LR – Stellenbosch Law Review

TCLR – Trinity College Law Review

THRHR – Tydskrif vir Hedensdaagse Romeins-Hollandse Reg

TSAR – Tydskrif vir die Suid Afrikaanse Reg

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