

vCJD MAIN TRUST

TRUSTEES' CODE OF PRACTICE

1 TRUSTEES

- 1.1 A trustee is a person who holds or controls assets for the benefit of someone else (the beneficiary) for certain specific purposes.
- 1.2 Trusts may be established in a number of ways but the law imposes various obligations on a trustee however the trust arose. The duties imposed on trustees are set out in section A below.
- 1.3 Trustees also have various powers to enable them to administer the trust. These are set out in the Trust Deed, and, to the extent that they are not expressly stated therein, by statute. The most important powers are described in section B below. The Explanatory Notes give more detail as to the interpretation of the powers specific to this trust.
- 1.4 As a trustee holds assets on behalf of the beneficiaries, they are also liable personally and collectively for their acts, both to the beneficiaries and to third parties. However, this liability is limited by the exoneration clause in the Trust Deed and by the Deed of Indemnity, which are explained in section C below.
- 1.5 As the Trustees will be keeping records of personal information about the victims and their families, they must be aware of their duties under the Data Protection Act 1988, a summary of which is set out at section D below.
- 1.6 The Trustees have a responsibility to ensure compliance with the Inland Revenue and to pay any taxes due set out in Section E. As the Trust is discretionary, inheritance tax is payable on various events. The Trustees must ensure that any inheritance tax is calculated correctly and paid when required.

A DUTIES OF TRUSTEES

2 DUTIES ON ACCEPTANCE OF THE TRUST

- 2.1 Once a trustee accepts the appointment, his first task is to read the trust document and to make sure that he understands it. If necessary, legal opinion should be sought. The trustee should also find out about the beneficiaries and the trust property. He should ensure that the trust property is vested in the trustees immediately. In this case the trust property is cash in bank accounts with the Bank of Ireland in the names of the Trustees.

3 DUTY TO ACT IN THE BEST INTERESTS OF THE BENEFICIARIES

- 3.1 Trustees are under a duty to act in the best interests of the beneficiaries by preserving the trust property and dealing with it and any income arising from it in accordance with the terms of the trust.
- 3.2 The trustees must not regard themselves as acting in their own personal capacities or for their own particular interest groups.

4 DUTY TO ENSURE FAIRNESS BETWEEN BENEFICIARIES

- 3.1 There is a general duty imposed on trustees to ensure fairness between beneficiaries.

5 DUTY TO COMPLY WITH THE TERMS OF THE TRUST

- 5.1 Trustees must comply strictly with the terms of the trust and the law relating to trusts.
- 5.2 The trust instrument requires the Trustees to review the terms of the Trust Deed at least annually in order to satisfy themselves that its provisions remain suitable for the current situation.
- 5.3 If the Trustees deem it necessary, the powers and provisions of the Trust can be varied by deed subject to the consent of the Secretary of State. The Trustees also have the power, under the terms of the Trust Deed, to vary the administrative powers of the Trust without the need for the court's approval.

- 5.4 To avoid a dispute with a beneficiary a trustee should make payments without waiting for the beneficiary to request it.

6 DUTY TO TAKE REASONABLE CARE

- 6.1 A trustee must use all the care in relation to trust business which an ordinary prudent man of business would use in relation to his own affairs and to use all the skill which the trustee possesses. For example, a trustee with a particular expertise which is used in the business of the trust may have a greater duty in respect of that area than one who has none.

- 6.2 The Trustee Act 2000 further imposes a new statutory duty of care onto trustees to exercise such care and skill as is reasonable in the circumstances having regard in particular to any special knowledge or experience he has or holds himself out as having, and if he acts as trustee in the course of a business or profession to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.

6.3 When does it apply?

- 6.3.1 **Investment:** The duty of care applies to a trustee when exercising the general power of investment or any other power of investment however conferred and when determining the suitability and investment or reviewing investments.

- 6.3.2 **Acquisition of land:** The duty of care applies to a trustee when exercising the power to acquire land either under the Trustee Act or under any other power.

- 6.3.3 **Agents, nominees and custodians:** The duty of care applies to a trustee when entering into an arrangement under which a person is authorised to function as an agent or nominee or custodian. It also applies when carrying out his duties to review an agent or nominee or custodian. Entering into an arrangement with a nominee, custodian or agent includes selecting the person who is going to act determining any terms, of the appointment.

6.3.4 **Insurance:** The duty of care applies to a trustee when exercising the power to insure a property either under the Trustee Act or under a corresponding power.

6.4 The duty of care does not apply if in so far as it appears from the trust document that duty is not meant to apply. In this trust deed there are no such exclusions.

7 **DUTY TO ACT JOINTLY**

7.1 All the trustees must give receipt for capital although one trustee can give receipt for income.

7.2 In relation to decisions, the trust deed empowers the trustees to act upon majority decision (see paragraph 14 below). The trustees also have the powers of delegation, as discussed at paragraph 15 below.

8 **DUTY NOT TO MAKE PROFITS FROM THE TRUST**

8.1 A trustee must not profit in any way from being a trustee. Any profit made by a trustee personally arising out of the trusteeship belongs automatically to the trust.

8.2 This duty has very wide application and it applies to any property added to the trust. A trustee must not make a personal profit from the trust.

9 **DUTY NOT TO PURCHASE TRUST PROPERTY**

9.1 Trustees have a duty not to purchase trust property for themselves. Such purchase is voidable at the insistence of a beneficiary even if the market price was paid for the property.

9.2 The duty can also extend to purchases by spouses of trustees and purchases by companies in which a trustee has an interest. Such a transaction is not always voidable. It will be however if the purchase is really a purchase for the trustee.

9.3 The rule applies to a sale to a third party if there is an understanding that the trustee will then purchase the property from the third party. However the rule does not apply if there is no such understanding.

10 DUTY TO ENSURE THAT ASSETS ARE DISTRIBUTED TO THE CORRECT BENEFICIARIES

10.1 Trustees are under a duty to ensure that the assets of the trust are distributed and the income paid to the correct beneficiaries. This duty is very onerous and it is no defence to prove that payments were made as a result of a mistake as to the construction of the trust deed. Similarly, it is no defence to prove that payments were made relying upon a forged document.

10.2 If trustees overpay a beneficiary they can reclaim the overpayment from subsequent payments.

10.3 When a trust has come to an end the trustees are entitled to present the accounts to the beneficiaries and request a formal discharge.

11 DUTY TO KEEP ACCOUNTS

11.1 Trustees must keep clear and accurate accounts and produce them to any beneficiary when required (copying to be the beneficiary's cost).

11.2 Under the terms of the Trust Deed, accounts for the Trust will be prepared at the end of each financial year, starting in April 2003.

11.3 The accounts need only give information about capital and income received and payments, the aim being to produce simple accounts easily comprehensible by beneficiaries. Full accounts will not be prepared because of the simple structure of the Trust.

11.4 Moreover, the accounts must be independently audited, and must comply with the Department of Health minimum audit requirements.

11.5 The Trustees must provide a set of accounts to the Department of Health.

11.6 The costs of preparing accounts are a proper capital expenditure of the trust and a trustee or beneficiaries can apply to the Public Trustee for an audit and investigation of the trust accounts. The costs of preparing the accounts are borne by the trust unless otherwise ordered by a court (for example in hostile litigation).

**12 DUTY TO PROVIDE INFORMATION TO BENEFICIARIES:
CONFIDENTIALITY**

- 12.1 A Trustee must also keep clear and accurate records of the trust property and investments and at all times, at the request of a beneficiary, give him full and accurate information as to the amount and state of the trust property.
- 12.2 A beneficiary is also entitled to see all reasonable information about the administration of the trust, including all trust documents and title deeds, even if there is no allegation by the beneficiaries of impropriety on behalf of the trustees. Beneficiaries would, therefore, also be entitled to see Counsel's opinions to the Trustees (on areas not concerned with the exercise of the Trustees' discretion) and any aide-memoires penned by Trustees summarising the state of the fund, or of the beneficiaries concerned, and reminding the Trustees of past distributions and future possibilities. This is because a beneficiary is the ultimate owner of the trust fund and, therefore, pays for the trust documents and so he has a proprietary right to these documents. Furthermore, as a beneficiary, he is entitled to know what the trust fund consists of, in what it is invested, what distributions have been made and so on. This right extends to beneficiaries of a discretionary trust.
- 12.3 Trustees are not, however, bound to give reasons why they have exercised their discretion in a particular way and so are not bound to disclose documents, such as minutes of trustees' meetings, which contain this confidential information. Beneficiaries do not have an absolute right to disclosure. Beneficiaries do not have the right to see:
- 12.3.1 Agenda of trustee meetings;
- 12.3.2 Any documents (including minutes of meetings) which relate to the deliberations in which they engaged before taking their decisions, or disclosing their reasons for taking them or the material on which those reasons were or might have been based;
- 12.3.3 Where Trustees have power, subject to the consent of certain appointors, to appoint shares of capital to beneficiaries, communications between

individual trustees and appointors or between any of the trustees or appointors and an individual beneficiary.

- 12.4 However, a disgruntled beneficiary could bring proceedings alleging bad faith, and then documents relevant to the exercise of the Trustee's discretions could become available on disclosure in court proceedings.
- 12.5 If a beneficiary thinks he is entitled to a class of documents or to a specific document, the beneficiary should name that class or specific document and then the Trustees will decide whether they should disclose them. In addition, if the beneficiary requires a copy of an account or trust document, he must pay the necessary expense of copying himself.
- 12.6 If a beneficiary is dissatisfied by the documents and accounts disclosed by the Trustees, he may bring an action for an account, whereby the court will decide which documents he is entitled to see.
- 12.7 Any medical records of Beneficiaries that are obtained are confidential to the victim. Therefore, Trustees cannot disclose them to anyone unless they have the consent of the victim.

B POWERS OF TRUSTEES

13 APPOINTMENT

- 13.1 The existing Trustees may appoint replacement trustees, in accordance with the machinery and consultation provisions set out in clause 19 of the Trust Deed.
- 13.2 Trustees must note that the maximum number of Trustees is 7, and the minimum is 5.

14 DECISIONS BY MAJORITY

- 14.1 The Trust Deed allows the Trustees to act by majority in a meeting, but the quorum is 5 (other than in respect of the appointment of new Trustees at a time when there are less than 5 Trustees, when the Trustees must act unanimously).

14.2 Decisions are to be made by majority, with the person chairing the meeting having a casting vote.

14.3 Trustees can participate in meetings by way of conference telephone call. Moreover, resolutions of the Trustees can be effected in writing where all the Trustees agree. This means that if the Trustees are not able to meet, a resolution can be signed by being circulated to all the Trustees by post.

15 **DELEGATION**

15.1 **Delegation by an individual trustee**

15.1.1 An individual trustee has powers of delegation, which are provided by the Trustee Delegation Act 1999. These allow a trustee by a trustee power of attorney to delegate the execution or exercise of all or any of the trusts, powers and discretions vested in him as trustee either alone or jointly. However, the power of attorney may only last for a maximum of 12 months from its date of commencement. Moreover certain formalities must be complied with. A prescribed format must be used for the power of attorney, so that it reflects the Act. Furthermore, the donor must give written notice to each of the other trustees and to anyone who has power to appoint a new trustee within 7 days of delegation setting out the details of how, when, why and to whom the power of attorney was granted.

15.1.2 The individual trustee must note that even if he delegates his power in this way, he is liable for any breaches of trust or defaults carried out by his attorney in the same manner as if they were his own acts or defaults.

15.1.3 The attorney will have the same powers under statute and the trust instrument as the trustee, except that he himself will not be able to delegate his power conferred by this Act.

15.2 **Collective delegation**

15.2.1 Collectively, trustees may authorise any person to exercise any or all of their delegable functions as their agent, their delegable functions being:

- (a) Any function relating to whether or in what way any assets of the trust should be attributed;
- (b) Power to appoint a person as a trustee of the trust;
- (c) Any power to delegate any of the functions or to appoint a person to act as a custodian or nominee (the agent cannot delegate again);
- (d) The power to decide whether any fees or payment to be made out of the trust fund should be made out of income or capital.

15.2.2 The rationale is that trustees should be able to delegate powers relating to the administration of the trust, but not to those relating to the distribution of trust property.

15.2.3 The trustees may appoint one of their number as agent, but may never appoint a beneficiary, even if that beneficiary is also a trustee.

15.3 Delegation of Asset Management

15.3.1 The trustees may also authorise a person to exercise any of their asset management functions as an agent as long as it is in an agreement which is evidenced in writing. At the moment the trust fund is in cash in a bank account but that may change in the future if the Trustees decide it should be invested in a different way. There are further limitations to delegating asset management functions to an agent:

15.3.2 The trustees must prepare a statement (known as a policy statement) that gives guidance as to how a function should be carried out.

- (a) The agreement with the agent must include a term that states the agent will comply with the policy statement or any revised or replacement statement.
- (b) The policy statement must be in writing.

15.3.3 Asset management functions of trustees include:

- (a) the investment of assets of the trust

- (b) the acquisition of property which is to be held under the trust
- (c) managing property which is held under the trust, including creating or disposing of an interest in such property

15.4 Nominees and Custodians

15.4.1 The trustees may appoint a person to act as a nominee or custodian in relation to the assets of the trust. A person acts a custodian of an asset if he undertakes safe custody of the asset or the documents or records regarding the asset. The appointment of a nominee or custodian must be in writing. A person may not be appointed as a nominee or custodian unless one of several conditions are satisfied. These conditions are:

- (a) the person carries out the business which consists of or includes acting as nominee or custodian or
- (b) the person is a company which is controlled by the trustees.

15.4.2 The trustees may appoint a person to act as their nominee or custodian in relation to any of the assets of the trust as they decide and may take such steps that are necessary to hand over these assets as they are vested in the person so appointed. The appointment must be evidenced in writing.

15.4.3 They may appoint one of their own number but not a beneficiary even if he is a trustee. A person may be appointed as a nominee or custodian on such terms as to remuneration and all matters as the trustees decide. The trustees may remunerate the agent nominee or custodian out of the trust funds for services, if he is entitled to be remunerated for those services and the amount of remuneration is reasonable. The trustee may also reimburse the agent nominee or custodian out of the trust fund for any expenses.

15.4.4 The same limitations on appointing an agent apply to appointing a custodian or nominee e.g. permitting the nominee or custodian to appoint a substitute.

15.4.5 There are further limitations relating to the following:

- (a) Delegation by a trustee who is also a beneficiary.

(b) Delegation to a beneficiary

(c) Delegation by a sole trustee

16 **INSURANCE**

16.1 Trustees may insure any property which is held under the trust against risk or loss or damage in any event. The premiums for the insurance may be paid out from the trust funds.

17 **INVESTMENT**

17.1 **General Power of Investment**

17.1.1 A trustee may make any kind of investment that he could make if he was absolutely entitled to the assets of the trust. This is called a general power of investment.

17.2 **Standard Investment Criteria**

17.2.1 The general power of investment is subject to various restrictions. In exercising any power of investment a trustee must have regard to the standard investment criteria. This applies whether the trustees are acting under express clauses in the trust as regards investment or are acting under their powers under Trustees Act 2000. A trustee must from time to time review the investments of the trust and consider:

(a) the suitability of the investments for the trust; and

(b) the need for diversification of investments if it is appropriate for the trust.

17.2.2 If the investments are not suitable or diverse enough they should be varied.

17.3 **Obtaining Advice**

17.3.1 A trustee is also under a duty to obtain advice whether investing under the Trustees Act or on an express power of investment. Before exercising any power of investment a trustee must obtain and consider proper advice about

the way in which the power should be exercised. The duty to obtain such advice also applies to the trustees reviewing the investments of the trust as to suitability and diversity.

17.3.2 Trustee however need not obtain such advice if he reasonably concludes that in the circumstances it is not necessary or appropriate to do so.

17.3.3 Advice should be sought from a person who is reasonably believed by the trustee to be qualified to give it by his ability and experience of financial and other matters relating to the investment.

17.3.4 The General power of investment is in addition to powers given to a trustee through the trust deed. It is subject to any restriction contained in the trust deed or in any other legislation.

17.4 Acquisition of Land

17.4.1 Trustees may acquire freehold or leasehold land in the United Kingdom as an investment for occupation by a beneficiary or for any other reason.

C LIABILITY OF TRUSTEES

18 LIABILITY FOR BREACH OF TRUST

18.1 A trustee acting outside the powers given by the trust instrument is said to commit a breach of trust.

18.2 This can be a fundamental breach eg paying trust funds to someone who is not a beneficiary or a technical breach eg failure to review investments periodically.

18.3 In any event if it results in a loss to the trust fund it is the duty of the trustee to restore the funds of the trust to the condition they would have been in had the breach not taken place. In addition, a trustee who is liable for a breach of trust is also liable for interest on any compensation which has to be paid.

18.4 The trustee is also required to account for any incidental personal profit he may have realised, as a trustee is under a duty not to profit from the trust.

- 18.5 If a trustee commits a breach of trust innocently, the trustee may be relieved from liability, by Section 61 of the Trustee Act 1925 if he has acted honestly, reasonably and ought fairly to be excused.
- 18.6 A trustee is not normally liable for the acts of his co-trustees. However, a trustee must keep himself informed as to the acts of his co-trustees. If he does not, and the co-trustee commits a breach of trust, the trustee may himself be guilty of a breach of his own personal duties as a trustee, as he may be deemed to have sanctioned the co-trustee's act, albeit unconsciously. Under the Limitation Act 1980 trustees have two years within which to claim contributions from co-trustees if this is appropriate. There is no period of limitation in respect of any fraud or fraudulent breach of trust to which the trustee is party or privy.
- 18.7 A trustee may be liable for a breach of trust which took place before he became a trustee if there were suspicious circumstances which that trustee failed to investigate, or for a breach occurring after he retired if that resignation enabled the breach to take place.

19 **LIABILITY TO THIRD PARTIES**

- 19.1 If a trustee incurs liabilities to third parties on behalf of the trust, for example to a bank for a loan, then, so far as these cannot be met out of the funds of the trust the trustee can be personally liable even if he or she is acting within the appropriate powers. A trustee incurring liabilities when acting beyond those powers may not be entitled to reimbursement from the trust property.
- 19.2 In any of these cases, unless the trustee has been negligent or acting in breach of trust, the funds of the trust will meet any such claim in the first instance but if these are insufficient the trustee could be personally liable for the balance.

20 **EXONERATION CLAUSE**

- 20.1 There is an exoneration clause restricting liability to where the loss or damage to the trust fund has been caused by the trustee's own actual fraud or dishonesty. The means that the trustees would not be liable for losses as a result of their honest mistake. An example would be if the trustees take proper steps to appoint an investment manager

for long term investment of the trust fund (if applicable) and follow his advice on investments but they still go down in value.

21 DEED OF INDEMNITY

21.1 The Secretary of State for Health has now signed a deed of indemnity for each of the Trustees and their personal representatives.

21.2 The Indemnity is limited to cover any shortfall in the value of the Main Fund caused by the Secretary of State failing to pay to the Trustees on demand sufficient funds to meet the entitlements of the first 250 beneficiaries in accordance with the terms of the Settlement and any amounts due by way of expenses, costs, tax and other fiscal liabilities. Secondly the indemnity covers any claim by the Secretary of State or a government body against the Trustees for the exercise of their discretion made in good faith.

21.3 Therefore, the Trustees will only be personally liable for any loss caused by their own actual fraud or dishonesty.

21.4 Any claim by beneficiaries can be defended using the trust fund, with the consent of the court, and only to the extent of the value of the trust fund at the time.

D DATA PROTECTION COMPLIANCE

22 DATA PROTECTION ACT 1988

22.1 The Act applies to any organisation that “processes” personal data. Personal data covers both facts and opinions about the individual. It also includes information regarding the intentions of the data controller towards the individual, although in some limited circumstances exemptions will apply. With processing, the definition is far wider than before. For example, it incorporates the concepts of 'obtaining', holding' and 'disclosing'.

22.2 Anyone processing personal data (ie information from which a living individual can be identified) must comply with the eight enforceable principles of good practice. They say that data must be:

- 22.2.1 fairly and lawfully processed;
 - 22.2.2 processed for limited purposes;
 - 22.2.3 adequate, relevant and not excessive;
 - 22.2.4 accurate;
 - 22.2.5 not kept longer than necessary for the purpose for which it is processed;
 - 22.2.6 processed in accordance with the data subject's rights;
 - 22.2.7 secure;
 - 22.2.8 not transferred to countries without adequate protection.
- 22.3 Sensitive Personal Data
- 22.3.1 This includes data relating to physical or mental health.
 - 22.3.2 Such information cannot be processed unless one of a number of criteria is satisfied. The most significant of these is processing with the explicit consent of the individual concerned.
- 22.4 Data Controllers
- 22.4.1 The Act applies to all and any processing which is undertaken by data controllers. A "data controller" is defined as any person who determines the purposes for which and the manner in which personal data are, or are to be, processed.
 - 22.4.2 All data controllers, unless exempt, must notify their processing to the Office of the Information Commissioner which we will do for you. There will be a fee of £35 to pay for registration.
- 22.5 Obtaining data from the data subject
- 22.5.1 When requesting personal data from a data subject, data controllers must inform the data subject of a number of factors including:

- (a) the identity of the data controller;
- (b) the purposes(s) for which the data are to be processed;
- (c) other “fairness” requirements, such as the types of persons to whom the data are likely to be disclosed.

22.6 Obtaining data from third parties

22.6.1 Where a data controller obtains personal information from someone other than the data subject to whom they relate, the relevant data subject must be informed that the data controller holds such information and the purpose for processing it.

E TAX LIABILITIES

23 INHERITANCE TAX ON THE CREATION OF THE TRUST

23.1 There will be no initial inheritance tax charge on the creation of the Trust as the Government is the Settlor and is an “exempt person”.

24 INHERITANCE TAX ON PAYMENTS TO BENEFICIARIES WITHIN THE FIRST TEN YEARS

24.1 On each payment out of the Trust, an inheritance tax “exit charge” is due on the value of the distribution.

24.2 These are calculated by using the following steps:

24.2.1 The maximum rate is 6%.

24.3 There will be no IHT payable on payments made within three months of the setting up of the Trust (ie. between 15th March 2002 and 14th June 2002). However, IHT will be payable on distributions made after the completion of the first quarter after the signing of the Deed.

25 INHERITANCE TAX ON TEN YEAR ANNIVERSARIES

- 25.1 A charge to inheritance tax is made on the value of the property in the Settlement the day before the tenth anniversary of the creation of the Settlement. The relevant date for the first ten-year charge will be 14th March 2012.

26 INHERITANCE TAX ON PAYMENTS TO BENEFICIARIES AFTER THE FIRST TEN YEARS

- 26.1 These “exit charges” are brought about by further distributions to Beneficiaries. IHT is charged on the fall in the value of the Trust property at a rate based on the rate at the previous ten year anniversary charge. The number of quarters will again be relevant.

27 ADDED PROPERTY

- 27.1 When calculating exit charges in the first ten years of the settlement, the tax on property added after 15th March 2002 will be calculated pro rata according to the number of quarters that property has been in the settlement.

- 27.2 A similar rule applies for the ten year charge.

- 27.3 For subsequent exit charges, added property is again taken account of by reference to the number of quarters it has been in the settlement, but this time whether or not it has remained comprised in the settlement since the relevant ten year anniversary.

28 TIME OF PAYMENT OF INHERITANCE TAX

- 28.1 There will be no IHT payable on transfers made before 6th April 2002, as this will be within the first quarter of the Trust’s existence.

- 28.2 IHT on payments made between 6th April and 30th September 2002 is due by 30th April 2003.

- 28.3 IHT on payments made between 1st October 2002 and 5th April 2003 is due 6 months after the end of the month in which the relevant chargeable transfer was made, and so on.

29 INCOME TAX

- 29.1 As the Trust was created in the tax year 2001-2002, the first Tax Return for the Trust must be submitted before 31st January 2003.
- 29.2 The Trust funds are held in Bank of Ireland bank accounts with interest being paid net of tax at 20%. Interest is paid into a separate account to make it easier to trace for accounting and tax purposes.
- 29.3 The remainder of the interest up to 34% (ie 14%) will be accounted for on the Tax Return.

Charles Russell

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