

A COMPARATIVE PERSPECTIVE ON THE “JOINT-ACTION RULE” IN THE CONTEXT OF BUSINESS TRUSTS

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Before we commence our discussion of the topic, we want to acknowledge the quality and value of David Butler’s work on the business trust. For 32 successive years, David taught a module in corporate law to commerce students and in later years a significant portion of that module was devoted to the business trust. David’s notes on the topic became legendary. Our Faculty’s Department of Mercantile Law regularly received requests from former students for copies of David’s notes on the business trust. Only after entering practice did they realise the wealth of insight and knowledge captured in these notes.

It was an enormous privilege to have worked with David Butler. His friendship, intellect, sense of humour and, above all, the way in which he cares for people, have always been an inspiration to both of us.

1 Introduction

Numerous examples in recent case law illustrate both the importance and the practical relevance of the so-called “joint-action rule” in South African trust law.¹ The exact meaning of this rule, as well as the principle on which it is founded, will be addressed in the proper context below.² By way of introduction it would be sufficient to say that the rule implies that, outside of provisions in the trust deed to the contrary, co-trustees of a trust must act jointly if they want to bind the trust. Already this brief formulation can explain why the rule has proved to be of practical significance. Non-compliance with the rule could (and most often would) result in the invalidity of a contract

* The part of this article which deals with comparative research draws on a chapter in I du Plessis’s LLD dissertation

¹ For reported cases, see for example *Van der Merwe NO v Hydraberg Hydraulics CC* 2010 5 SA 555 (WCC); *Steyn v Blockpave (Pty) Ltd* 2011 3 SA 528 (FB); *Pascoal v Wurdeman* 2012 3 SA 422 (GSJ); *O’Shea NO v Van Zyl* 2012 1 SA 90 (SCA) para 23; *Lynn NO v Coreejes* 2012 1 All SA 620 (SCA) For a discussion of and references to quite a number of unreported cases, see MJ de Waal “The Law of Succession (Including the Administration of Estates) and Trusts” (2010) *Annual Survey of South African Law* 1170 1199-1202; MJ de Waal “The Law of Succession (Including the Administration of Estates) and Trusts” (2011) *Annual Survey of South African Law* 1033 1066-1069; MJ de Waal “The Law of Succession (Including the Administration of Estates) and Trusts” (2012) *Annual Survey of South African Law* 831 850-852

² See part 3 1 below

entered into between the trustees and an outsider, probably with detrimental results on one or both sides.³

It has been suggested that the joint-action rule is “generally unproblematic” with regard to charitable trusts or trusts where the trustees’ main function is the conservation of property for beneficiaries; but that the rule has posed “numerous challenges” with regard to trusts used to conduct business or to undertake commercial activities (that is, business trusts).⁴ Of course, it is not difficult to see why this is so. The nature of trusts in a business or commercial environment normally dictates an active role for the trustees in the day-to-day running of the particular business. Strict adherence to the joint-action rule would therefore require very regular meetings of (or at least communication between) the trustees. As most businesses could not be run effectively in this way, there are practical means available to soften the application of the rule under such circumstances. One possibility is that a provision allowing a deviation from the joint-action rule can be inserted in a trust deed – for example by stipulating that decisions can be taken by a majority of the trustees.⁵ However, trustees often misunderstand the operation and limitations of such a provision, and they therefore do not realise that it would not necessarily address the problem at hand adequately.⁶ An alternative – and in our view more effective – approach would be to employ the normal principles of the law of agency in this context. A trust deed could therefore contain a provision stipulating that the trustees can delegate certain defined duties or powers (also generally referred to as trustee “functions” in this article) to one of their co-trustees or even to an outsider.⁷ This trustee could then (and bearing compliance with the principles of delegation and apposite statutory provisions in mind), for example, enter into valid contracts with outsiders without the necessity of prior trustee meetings (even ones at which a majority vote is allowed).

It is thus clear that certain mechanisms can be put into place in order to ameliorate the problematical practical effects of the joint-action rule. However, it is also clear that pitfalls remain for trustees and other trust practitioners, and that our courts still face challenges in developing trust law in this particular area.⁸ It has therefore been submitted, rightly in our view, “that the joint-action rule in regard to co-trusteeship will remain a focal point of future judicial development of South African trust law”.⁹ The primary aim of this article is to illustrate that in this process of judicial development our courts can derive much benefit from also looking further afield to other trust law jurisdictions. This is because even a relatively brief comparative exercise will show that there

³ For examples, see the cases referred to in n 1 above and in nn 5 and 7 below

⁴ F du Toit “Co-Trusteeship and the Joint-Action Rule in South African Trust Law” (2013) 27 *Trust Law International* 18-19

⁵ See, for example, *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) para 15; Du Toit (2013) *Trust Law International* 22-23

⁶ See part 3 1 below

⁷ See, for example, *Nieuwoudt v Vrystaat Mielies (Edms) Bpk* 2004 3 SA 486 (SCA) paras 6 and 23; Du Toit (2013) *Trust Law International* 23-24

⁸ See Du Toit (2013) *Trust Law International* 19

⁹ 29

is indeed much common ground, but also instructive differences, between South Africa and a number of other trust jurisdictions regarding both the joint-action rule and the delegation of trustee functions. Solutions generated in these jurisdictions could therefore also guide South African courts when they are confronted with challenges in this area of trust law. For purposes of this comparative exercise we have chosen two common-law jurisdictions,¹⁰ namely English and Canadian trust law, and two mixed legal jurisdictions,¹¹ namely Scotland and Quebec. The two common-law jurisdictions have been chosen to show that, despite certain fundamental differences in approach to trust law,¹² there are indeed many important and useful points of contact to be found in this particular context. The two mixed legal jurisdictions have been chosen in order to provide a direct analogy with South Africa, another prime example of such a jurisdiction. Note, however, that both Scotland and Quebec are parts of larger political entities (the United Kingdom and Canada, respectively) and that they do not constitute independent states as is the case with South Africa. We will therefore refer to “England” and “the rest of Canada” when we deal with the purely common-law component of each broader jurisdiction.

We have already emphasised that the joint-action rule is of particular significance with regard to business trusts. It is therefore first necessary to give some perspective on the use of trusts in a business environment and, especially, to explain why trusts have proved to be effective and popular institutions in this context.

2 The use of trusts in a business environment: context and rationale

In what is still regarded as a seminal contribution on the topic of business trusts in South Africa, Wunsh defined this type of trust as follows:

“A trust will be regarded as a business trust if it is used for carrying on a business for profit, including the owning and letting of property, as distinguished from one designed to protect and conserve assets.”¹³

Although trusts of this description are no doubt quite common in South Africa, it is surprising how little they have featured in case law. Earlier examples include *Goodricke & Son (Pty) Ltd v Registrar of Deeds, Natal*¹⁴

¹⁰ Meaning, systems based on the English common law

¹¹ J du Plessis “Comparative Law and the Study of Mixed Legal Systems” in M Reimann & R Zimmermann (eds) *The Oxford Handbook of Comparative Law* (2006) 477–478 describes a mixed legal system as a “group of legal systems or jurisdictions which have been shaped so significantly by both the civil law and common law traditions that they cannot be brought home comfortably under either”

¹² Certainly the most fundamental difference is the idea that in the common law, trust ownership of the trust property is, according to the principles of equity, “split” or “divided” between the trustee and the trust beneficiary: the trustee thus holds “legal” (or common-law) ownership and the trust beneficiary “beneficial” (or “equitable”) ownership. For the significance of this in the legal comparative context, see in general MJ de Waal “The Core Elements of the Trust: Aspects of the English, Scottish and South African Trusts Compared” (2000) 117 *SALJ* 548; GL Gretton “Trusts without Equity” (2000) 49 *ICLQ* 599

¹³ B Wunsh “Trading and Business Trusts” (1986) 103 *SALJ* 561

¹⁴ 1974 1 SA 404 (N)

(where trust funds were used to provide a loan on interest) and *Pretorius v CIR*¹⁵ (where tenants of flats in a building set up a trust in order to enable them to obtain ownership of the flats).¹⁶ More recently business trusts featured in decisions of the Supreme Court of Appeal in *Nieuwoudt v Vrystaat Mielies (Edms) Bpk*¹⁷ (“*Nieuwoudt*”), *Land and Agricultural Bank of South Africa v Parker*¹⁸ (“*Parker*”) and *Badenhorst v Badenhorst*¹⁹ (“*Badenhorst*”) (where the trusts in question were used to conduct farming businesses), and in *Lupacchini NO v Minister of Safety and Security*²⁰ (where a trust conducted the business of a nightclub). In *Badenhorst*, for example, the court described the situation as one in which the respondent used the particular trust “as a vehicle for his business activities”.²¹ Note also that in both *Nieuwoudt* and *Parker* non-compliance with the joint-action rule was central to the issues at hand.

Of course, on a scale of complexity, size and sophistication the examples of business trusts mentioned above find themselves at the modest end, often in the context of families or business partners conducting relatively small enterprises (although at times with considerable sums of money involved).²² But studies have argued that the real (in fact, “secret”)²³ life of the business trust is really at the other end of the scale. Here one finds complex and sophisticated trust structures in which, generally speaking, assets of great value are held. In an oft-quoted study focusing on the United States of America, Langbein identified numerous trust structures falling into this category.²⁴ Examples include pension trusts, investment trusts (in the guises of, for example, mutual funds, real estate investment trusts (“REITs”) and asset securitisation) and regulatory compliance trusts.²⁵ Probably the best example of this type of business trust in South Africa is the so-called unit trust, regulated in terms of the Collective Investment Schemes Control Act 45 of 2002.²⁶ Other examples include trusts in Broad Based Black Economic Empowerment structures (“B-BBEE” structures)²⁷ and trusts as “special purpose institutions”, especially in the securitisation business.²⁸

¹⁵ 1984 2 SA 619 (T)

¹⁶ See *Wunsh* (1986) *SALJ* 564-568 for an analysis of these two cases

¹⁷ 2004 3 SA 486 (SCA)

¹⁸ 2005 2 SA 77 (SCA)

¹⁹ 2006 2 SA 255 (SCA)

²⁰ 2010 6 SA 457 (SCA)

²¹ Para 10

²² See, for example, *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) where the trust conducting the farming business at one stage borrowed R30 million from the bank (para 4) and eventually allegedly owed the bank R16 million (para 1)

²³ See the reference in n 24 below

²⁴ JH Langbein “The Secret Life of the Trust: the Trust as an Instrument of Commerce” (1997) 107 *Yale LJ* 165

²⁵ 167-175 See also TE Rutledge & CE Schaefer “The Trust as an Entity and Diversity Jurisdiction: is *Navarro* Applicable to the Modern Business Trust?” (2013) 48 *Real Property, Trust and Estate LJ* 83 90:

“Today, the business trust may be used for a variety of applications, although they are best known for use in the structuring of mutual funds, in real estate investment trusts, and in asset securitization ”

²⁶ This Act repealed and replaced the Unit Trusts Control Act 54 of 1981

²⁷ RP Pace & WM van der Westhuizen *Wills and Trusts* (RS 17 2013) B4 2 2 1, who point out that B-BBEE trust deeds in South Africa are mostly structured as “bewind” trusts (where ownership vests in the trust beneficiaries) in order to meet with the ownership requirements in codes of conduct

²⁸ E Nel, V Lawack & A van der Walt “The Trust as Special-Purpose Institution” (2013) 34 *Obiter* 111

However, for present purposes the main question remains: why is the trust such an effective and popular institution in the business environment? At what has been called “the more modest end of the scale” above, the less stringent regulation of business trusts (including the general absence of disclosure obligations) as opposed to the position in other formal business structures may prove attractive.²⁹ But in our view the heart of the matter is the fact that – regardless of where on the scale the trust in question is situated – all the fundamental trust law principles are drawn into that particular context and find application for the protection of, especially, the beneficiaries of the trust. In a wide-ranging comparative and economic analysis of the functions of trust law, Hansmann and Mattei have put this idea in the following terms:

“So long as the parties characterize the relationship they wish to establish as a ‘trust’, or even if they just make clear their intention to create a trust-like relationship, the law of trusts automatically inserts a variety of standard terms into their agreement. These terms comprise the core of the trust relationship.”³⁰

These “standard terms” or “standard features” – which partly correspond with what has elsewhere been termed the “core elements” of a trust³¹ – are by way of summary (and as far as relevant here):³²

- (i) The “protective regime of trust fiduciary law”³³ is activated. This entails that the trustee, being in a fiduciary position, must act in a particular fashion with regard to the trust and its beneficiaries. Much can be said on this topic,³⁴ but Langbein captures the idea well insofar as he emphasises two specific trustee duties:³⁵ the duty of loyalty (meaning that the trust must be administered solely in the interest of the beneficiaries); and the duty of prudent administration (meaning that the trustee must exercise special care and skill in his or her dealings with trust property).
- (ii) A regime of separation of estates is activated. This entails that trust assets must be kept separate from the trustee’s personal assets in order to protect them from the trustee’s personal creditors should the trustee become insolvent. This idea is sometimes expressed by saying that the trust assets are “ring-fenced”;³⁶ that the trust is “bankruptcy remote”;³⁷ or “insolvency remote”.³⁸
- (iii) The trust’s “flexibility of design in matters of governance and in the structuring of beneficial interests”³⁹ is imported. This feature is significant for two reasons: first, it explains why the trust can be employed

²⁹ See in general Wunsh (1986) *SALJ* 568-573. See also L Theron “Die Besigheidstrust” (1991) *TSAR* 268 272-282.

³⁰ H Hansmann & U Mattei “The Functions of Trust Law: A Comparative Legal and Economic Analysis” (1998) 73 *NYU L Rev* 434 447.

³¹ See De Waal (2000) *SALJ* 557-567.

³² Langbein (1997) *Yale LJ* 179. See also Hansmann & Mattei (1998) *NYU L Rev* 447-448.

³³ Langbein (1997) *Yale LJ* 179.

³⁴ See also De Waal (2000) *SALJ* 557-559 and the references there.

³⁵ Langbein (1997) *Yale LJ* 182.

³⁶ E Dirix & V Sagaert “Trusts in European Civil Law: on Building Bridges and Trojan Horses” in H Mostert & MJ de Waal (eds) *Essays in Honour of CG van der Merwe* (2011) 275 280.

³⁷ Hansmann & Mattei (1998) *NYU L Rev* 468; Langbein (1997) *Yale LJ* 173.

³⁸ Nel et al (2013) *Obiter* 119.

³⁹ Langbein (1997) *Yale LJ* 179.

in such a variety of contexts, including this wide spectrum of business uses; second, it gives the parties to a trust great scope in tailoring their particular trust deed in such a way that specific needs or requirements can be addressed. An example falling in the second category (and which is, of course, relevant for present purposes) is the ability of parties to deviate from the joint-action rule or to delegate certain powers to one of the co-trustees.

The use of a trust for business purposes thus brings with it – through the importation of these standard features – important advantages that need not be specifically bargained for. But at the same time the parties to a trust cannot escape the other normal principles of trust law. For example, the normal requirements for the establishment of a valid trust remain applicable and they must be satisfied before a trust can come into existence.⁴⁰ And to the extent that there may be “gaps” in the legislation regulating complex trust structures such as mutual funds or collective investment schemes, normal trust law principles may be activated to fill these “gaps”.⁴¹ Moreover, the normal principles and rules of trust administration remain applicable. The joint-action rule, as the focus of this article, is one of these rules and in the next part it will be subjected to the comparative analysis referred to above.

3 A comparative analysis of the joint-action rule and possible deviations from it

3 1 South Africa

Once it is established that a valid trust has been formed, certain consequences follow. One relates to the administration of the trust. Regarding the internal administration of the trust, the trust deed usually provides when, where and how meetings of trustees should be held, and the procedures to be followed at these meetings.⁴² It has also been suggested that if there is more than one trustee, a chairperson should be appointed.⁴³ In the absence of provisions dealing with the issue, meetings should be held at the place and on intervals as the chairperson may direct, but a meeting should be held at least

⁴⁰ See Nel et al (2013) *Obiter* 121 who very specifically refer to these requirements in their discussion of the trust as a “special purpose institution” (that is, in the context of business trusts)

⁴¹ See in general B Austin & P Dimitriadis “Not All Trust Law Principles Apply to Pension Trusts: the Supreme Court of Canada Decision in *Buschau v Rogers Communications Inc*” (2006-2007) *Estates, Trusts & Pensions Journal* 217 228 who put this proposition in a reverse form with reference to Canadian pension fund law:

“It could be argued that where there is no ‘gap in the legislation’, there is no need to apply trust law principles to determining pension plan issues. In such cases, issues should be determined based on the legislation, which has arguably displaced the common law”

The judgment in *Yarram Trading CC t/a Tijuana Spur v ABSA Bank Ltd* 2007 2 SA 570 (SCA) provides a very good example of the application of normal trust law principles in the context of collective investment schemes in South Africa

⁴² Du Toit (2013) *Trust Law International* 21

⁴³ E Cameron, M de Waal, B Wunsh, P Solomon & E Kahn *Honoré’s South African Law of Trusts* 5 ed (2002) 312

once a year, or more if the standard of conduct expected of trustees⁴⁴ requires it.⁴⁵

Cameron et al argue that trustees must act jointly regarding internal administration.⁴⁶ What is trite, though, is that in dealings with outsiders all the trustees must act jointly in order to bind the trust (in the absence of contrary provisions in the trust deed).⁴⁷ Indeed, in *Land and Agricultural Bank of South Africa v Parker* Cameron JA (as he then was) described the duty to act jointly as “forming the basis of trust law in this country”.⁴⁸ He also reiterated that the duty derives from the nature of the trustees’ joint ownership of the trust property.⁴⁹ As indicated, a provision allowing a deviation from the joint-action rule can be inserted in a trust deed – for example by stipulating that decisions can be taken by a majority of the trustees.⁵⁰ However, there is a qualification that is often overlooked by trustees. In *Parker*, Cameron JA stressed that this majority remains part of the full trustee complement and that it must therefore “exercise its will in relation to that complement”.⁵¹ In practice all the trustees must therefore be consulted and be given an opportunity to take part in the decision-making process, even if one or more of them may ultimately be outvoted by the majority.⁵²

Outsiders dealing with a trust should therefore assume that all the trustees of a trust must act jointly when contracting on behalf of the trust, unless the trust deed contains provisions to the contrary.⁵³ But, as indicated, contrary provisions of this nature (such as a provision allowing decisions to be taken by a majority vote) have their own limitations. Moreover, the joint-action rule as just explained must be clearly distinguished from what was referred to as a “capacity-defining condition” in *Parker*. The typical example of such a condition (and one that was also relevant in *Parker*) is a stipulation in a trust deed that there must always be a certain minimum number of trustees in office. This is how Cameron JA explained the concept:

“It lays down a prerequisite that must be fulfilled before the trust estate can be bound. When fewer trustees than the number specified are in office, the trust suffers from an incapacity that precludes action on its behalf.”⁵⁴

In other words, if a trust deed specifies that there must always be (for example) a minimum of three trustees and one trustee dies, the remaining two trustees cannot bind the trust estate – even if they act jointly. This was

⁴⁴ In terms of the Trust Property Control Act 57 of 1988, s 9(1), trustees must act with the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another

⁴⁵ Cameron et al *Honoré* 322

⁴⁶ 324

⁴⁷ 342; F du Toit *South African Trust Law: Principles and Practice* 2 ed (2007) 97; Du Toit (2013) *Trust Law International* 18

⁴⁸ *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) para 15 See also *Coetzee v Peet Smith Trust* 2003 5 SA 674 (T) (for the relevance of unanimous decision-making); *Pascoal v Wurdeman* 2012 3 SA 422 (GSJ) para 19

⁴⁹ *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) para 15

⁵⁰ See also part 1 above

⁵¹ *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) para 17

⁵² See De Waal (2011) *Annual Survey of South African Law* 1067

⁵³ Cameron et al *Honoré* 324; Du Toit (2013) *Trust Law International* 22

⁵⁴ *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) para 11

the important point that was made in *Lynn NO v Coreejes*⁵⁵ where Majiedt JA declared that “even where trustees act jointly, they cannot in law bind the trust estate where they are not the requisite number stipulated in the trust deed ...”⁵⁶

Hence, and to enable the trust to function effectively, the trust deed often provides for the appointment of an executive or managing trustee who takes care of running the trust’s affairs.⁵⁷ This trustee can be authorised in terms of an explicit provision in the trust deed or in terms of express or implied authorisation granted to this trustee by the other trustees in accordance with the trust deed.⁵⁸ *Grainco (Pty) Ltd v Broodryk NO*⁵⁹ (“*Grainco*”) provides an excellent example of the implied authorisation of a co-trustee in a business trust context. In *Grainco* the trustees conducted a farming business through the trust. The trust had only two trustees, namely the first defendant and his 82 year-old mother (the second defendant). The joint-action rule was confirmed in the trust deed in that it required all trustee decisions to be taken unanimously.⁶⁰ According to Cillié J, it would have been “naïve” to think that the first defendant obtained the consent of the second defendant each time he conducted the trust’s business. The necessary inference (“*onafwendbare afleiding*”) was therefore that the first defendant had received a general authorisation from the second defendant to manage the affairs of the trust.⁶¹

But note that in practice there might be potential pitfalls regarding such an authorisation. Perhaps the most significant one is section 2(1) of the Alienation of Land Act 68 of 1981 that provides that no alienation of land “shall ... be of any force or effect unless it is contained in a deed of alienation signed by the parties thereto or by their agents acting on their written authority”. The Supreme Court of Appeal has held in *Thorpe v Trittenwein*⁶² that a contract of sale for the alienation of land is invalid if it is concluded by a trustee without the written authorisation of his or her co-trustees.⁶³ In other words, even if such a trustee has in fact been authorised by his or her co-trustees, the contract would under these circumstances be invalid unless the authorisation has been in writing.

Also, trustees may delegate some of their functions, such as the everyday administration of the trust, to others, for example, an outside company.⁶⁴ Trustees are also allowed to consult experts.⁶⁵ Trustees are not permitted to

⁵⁵ 2012 1 All SA 620 (SCA)

⁵⁶ Para 9

⁵⁷ Du Toit *South African Trust Law* 98; *Coetzee v Peet Smith Trust* 2003 5 SA 674 (T); Du Toit (2013) *Trust Law International* 23

⁵⁸ *Nieuwoudt v Vrystaat Mielies (Edms) Bpk* 2004 3 SA 486 (SCA) paras 6 and 23; Du Toit *South African Trust Law* 98; Du Toit (2013) *Trust Law International* 23

⁵⁹ 2012 4 SA 517 (FB) and see De Waal (2012) *Annual Survey of South African Law* 851

⁶⁰ *Grainco (Pty) Ltd v Broodryk NO* 2012 4 SA 517 (FB) para 6 1

⁶¹ Para 6 4

⁶² 2007 2 SA 172 (SCA)

⁶³ For subsequent cases in which *Thorpe v Trittenwein* 2007 2 SA 172 (SCA) was applied, see for example *Van der Merwe NO v Hydraberg Hydraulics CC* 2010 5 SA 555 (WCC); *Jansen NO v Ringwood Investments 87 CC* (59771/2009) 2013 ZAGPPHC 129 (20 May 2013) *SAFLII* <<http://www.saflii.org/za/cases/ZAGPPHC/2013/129.html>> (accessed 28-05-2013)

⁶⁴ Cameron et al *Honoré* 326; Du Toit (2013) *Trust Law International* 22

⁶⁵ Cameron et al *Honoré* 328; Du Toit *South African Trust Law* 96

abdicate their responsibilities, though, and such abdication may lead to the invalidity of the act.⁶⁶ Trustees therefore are the only ones who can make the decisions regarding the achievement of the trust object and remain responsible for such achievement, even if they have handed over certain (lesser) functions to others. Fundamental decisions regarding the trust should therefore be taken by the trustees, but implementation may be delegated to others.⁶⁷ In South Africa it is certainly possible that, if a trust deed allows it, one of a number of co-trustees may be authorised by the remaining trustees to conclude a contract (or contracts of a specified nature) on behalf of the trust. This could indeed be one of the more effective ways of avoiding the practical difficulties with the application of the joint-action rule.

Trustees, however, retain the duty to supervise the work of any person to whom a task was delegated.⁶⁸ In *Hoosen NO v Deedat*,⁶⁹ one of the trustees suffered a stroke which left him sound of mind, but incapable of attending meetings of the trustees and performing related duties as trustee. He therefore granted a special power of attorney to his daughter-in-law to represent him at meetings of the trustees, thereby transferring all his rights, duties and powers (including the power to vote at meetings as she pleased) to his daughter-in-law. The court had to decide whether the trustee was entitled in law to delegate his functions *qua* trustee in terms of the power of attorney to his daughter-in-law. The court held that the trust deed did not provide, either expressly or impliedly, that such a delegation could take place. According to the court this accorded with the principle that fundamental decisions relating to the trust had to be taken by the trustees. Hence the delegation to the daughter-in-law was legally impermissible.

3.2 England

The general powers of administration of a trust are placed in the hands of the trustees.⁷⁰ In terms of the common law, trustees must act jointly, unless the trust deed provides otherwise.⁷¹

Each of the trustees must act personally, save to the extent that a trustee may delegate to other trustees or agents in terms of the Trustee Act 2000.⁷² In terms of this Act trustees may authorise any person to exercise any or all of their delegable functions as their agent. The trustees' delegable functions consist of any function other than

- (i) any function relating to whether or in what way any assets of the trust should be distributed;

⁶⁶ *Hoosen and Other NNO v Deedat* 1999 4 SA 425 (SCA)

⁶⁷ Cameron et al *Honoré* 327; Du Toit *South African Trust Law* 97

⁶⁸ Cameron et al *Honoré* 328

⁶⁹ 1999 4 SA 425 (SCA)

⁷⁰ G Moffat, G Bean & R Probert *Trusts Law* 5 ed (2009) 434; Trustee Act (1925) Pt II

⁷¹ D Waters *Waters' Law of Trusts in Canada* 4 ed (2012) ch 18 1 11; G Thomas & A Hudson *The Law of Trusts* (2004) 342-343; A Hudson *Equity and Trusts* 7 ed (2013) 348

⁷² D Hayton *The Law of Trusts* 4 ed (2003) 142; J Riddall *The Law of Trusts* 6 ed (2002) 317; Hudson *Equity and Trusts* 353

- (ii) any power to decide whether any fees or other payment due to be made out of the trust funds should be made out of income or capital;
- (iii) any power to appoint a person to be a trustee of the trust; or
- (iv) any power conferred by any other enactment or the trust deed which permits the trustees to delegate any of their functions or to appoint a person to act as a nominee or custodian.⁷³

The trustees may not permit an agent to appoint a substitute, to act in circumstances capable of giving rise to a conflict of interest, or restrict the agent's liability to the trustees or any beneficiary.⁷⁴ Special rules apply when an agent is authorised to act as asset manager for the trustees, such as that the agreement must be in writing and that trustees must prepare a written policy statement which gives guidance to the agent as to how his or her functions must be performed.⁷⁵ While the agent acts for the trust, the trustees must keep under review the arrangements under which the agent acts and how those arrangements are being put into effect. They must also consider whether there is a need to exercise any power of intervention that they have and exercise such a power if necessary. "Power of intervention" includes a power to give directions and to revoke the authorisation or appointment.⁷⁶ The provisions of the Trustee Act set out above may be restricted or excluded by the trust deed.⁷⁷

The Trustee Act 1925⁷⁸ provides that an individual trustee may delegate the execution or exercise of all or any of the trusts, powers and discretions vested in him or her as trustee.⁷⁹ The delegation must be given in terms of a written power of attorney and may continue for a maximum of twelve months.⁸⁰ The trustee, however, remains liable for the acts of the person to whom he or she has delegated. A trustee may also delegate his or her discretion in terms of the trust deed.⁸¹

3 3 Scotland

The general principles regarding trust administration are that trustees must perform their functions personally and, where there is more than one trustee, must act as a body, on the basis that each individual takes responsibility for every step of the administration of the trust. Due to practical considerations and business efficacy, these principles have been relaxed in certain respects. More specifically, the relaxation of these principles relates to the extent to which trustee decisions may be taken without every trustee partaking or agreeing (that is, the first issue discussed herein) and the circumstances

⁷³ S 11(2) of the Trustee Act

⁷⁴ S 14(2) and (3)

⁷⁵ S 15

⁷⁶ S 22

⁷⁷ S 26 For a general discussion on the delegation of trustees' duties, see Hudson *Equity and Trusts* 480-485

⁷⁸ The Trustee Act was amended by the Trustee Delegation Act 1999

⁷⁹ S 25

⁸⁰ The power of attorney must be attested to by a witness (Hayton *The Law of Trusts* 156)

⁸¹ Moffat et al *Trusts Law* 528

under which the trustees may delegate their duties (that is, the second issue discussed herein).⁸²

Regarding the first issue, trust deeds under Scots law may lay down certain rules for the conduct of the trust's administration, but in the absence of rules in the trust deed certain default rules will apply. Thus, these default rules determine that a quorum of trustees must be present in order for a valid meeting to be held and that the majority of trustees are a quorum.⁸³ Furthermore, decisions are made by majority vote,⁸⁴ but the majority must be the majority of all the trustees and not just those present at the meeting.⁸⁵ In *Wolfe v Richardson*,⁸⁶ the testator appointed eight persons as trustees of a testamentary trust. One of the assets of the trust was shares in a company and all eight of the trustees unanimously appointed one of the trustees to attend, vote and act for the trustees at meetings of the company. Subsequently, two trustees resigned, but a dispute arose amongst the remaining six trustees. At a trustee meeting, three of the trustees moved to revoke the mandate earlier awarded to the one trustee, but that trustee and the two remaining trustees resisted. Consequently, the resolution could not be passed or defeated and a deadlock arose. The three trustees who had proposed the resolution then informed the relevant trustee (and the two others) that he no longer had authority to act under the mandate. Before the court the three trustees who had proposed the resolution argued that a quorum was the majority of trustees and that no quorum of trustees had acquiesced to the continuance of the relevant trustee's mandate. The court agreed with this argument, stating that the relevant trustee no longer had the authority to represent the trustees.

However, all trustees must be "consulted" and a failure to consult may lead to an invalid decision.⁸⁷ All that is required for "consultation" to take place, is for the trustees to be notified of a meeting that is to take place and that fair notice be given,⁸⁸ but even this is unnecessary if it would be pointless or impossible to do so.⁸⁹ Wilson and Duncan insist, however, that in impractical or impossible cases, consultation by written or telephonic communication must take place.⁹⁰

⁸² W Wilson & A Duncan *Trusts, Trustees and Executors* 2 ed (1995) 362 The authors do not list the practical considerations, but one can think of the practical difficulties involved in having the day-to-day affairs of a trust dealt with by all the trustees, especially where there are many trustees involved, as an example of these practical considerations

⁸³ 365; *Trusts (Scotland) Act (1921) s 3(c)*

⁸⁴ A Garden & S Mackintosh *Trusts and Estates in Scotland 2009/2010* (2009) 5; Wilson & Duncan *Trusts, Trustees and Executors* 362

⁸⁵ G Gretton, A Steven & A Struthers *Property, Trusts and Succession* (2009) 343 In cases where trustees are appointed on a basis of joint tenure or if they are designated *sine qua non*, all of these trustees must participate, or at least concur, in all acts of the administration of the trust (Wilson & Duncan *Trusts, Trustees and Executors* 362) These arrangements are rare in practice, but see part 3 1 above for the analogy with the position in South African law regarding the restrictions on a "majority-vote" provision in a trust deed

⁸⁶ 1927 S L T 490

⁸⁷ Wilson & Duncan *Trusts, Trustees and Executors* 359 See also *Wyse v Abbott* (1881) 8 R 983

⁸⁸ Wilson & Duncan *Trusts, Trustees and Executors* 363

⁸⁹ Gretton et al *Property, Trusts and Succession* 344

⁹⁰ Wilson & Duncan *Trusts, Trustees and Executors* 363

If trustees dispose of trust property, a dissenting trustee has a duty to sign the documents required for the disposition to take place, but it is uncertain whether, as a matter of conveyancing law, the signatures of the majority would be adequate.⁹¹

Regarding the rights of third parties, the Trusts (Scotland) Act 1921 provides as follows:

“Any deed bearing to be granted by the trustees under any trust, and in fact executed by a quorum of such trustees in favour of any person other than a beneficiary or a co-trustee under the trust where such person has dealt onerously and in good faith shall not be void or challengeable on the ground that any trustee or trustees under the trust was or were not consulted in the matter, or was or were not present at any meeting of trustees where the same was considered, or did not consent to or concur in the granting of the deed, or on the ground of any other omission or irregularity of procedure on the part of the trustees or any of them in relation to the granting of the deed.”⁹²

Regarding the second issue, namely the delegation of authority, legislation provides that trustees may appoint factors⁹³ and law agents and pay them suitable remuneration, unless such power is at variance with the terms of the trust deed or purpose of the trust.⁹⁴ In addition and at common law, trustees have the power to appoint agents.⁹⁵ If this power is exercised properly, it is not regarded as a delegation of functions which trustees are obliged to perform personally. The power may be exercised if a person of reasonable prudence dealing with his or her own affairs would consider the employment of an agent appropriate. Indeed, it seems that it is a trustee’s duty to use suitable agents such as solicitors in relation to matters for which a trustee does not possess the necessary skills.⁹⁶ The matters in relation to which agents may be appointed may be as limited or as extensive as the circumstances require.⁹⁷ In *Scott v Occidental Petroleum (Caledonia) Ltd*,⁹⁸ the court stated that it was a fundamental rule that a trustee may not delegate his trust. However, it was also clear that a trustee is not obliged to perform each and every duty personally and that a trustee could appoint an agent. According to the court, these two principles do not conflict. Rather, the “dividing line” was “that the trustee must never surrender his own judgment in matters committed to his discretion, since the confidence of the truster was placed in his discretion and his alone”.⁹⁹

⁹¹ Gretton et al *Property, Trusts and Succession* 344

⁹² S 7 of the Trusts (Scotland) Act 1921

⁹³ According to Wilson and Duncan, the term “factor” implies “a range of activities extending beyond the exclusive province of solicitors” (Wilson & Duncan *Trusts, Trustees and Executors* 368)

⁹⁴ S 4(f) of the Trusts (Scotland) Act 1921

⁹⁵ *Hay v Binny* (1861) 23 D 594

⁹⁶ Wilson & Duncan *Trusts, Trustees and Executors* 367

⁹⁷ 370 This statement by Wilson and Duncan was approved in *Scott v Occidental Petroleum (Caledonia) Ltd* 1990 S L T 882 886

⁹⁸ 1990 S L T 882

⁹⁹ 886 The South African equivalent of the term “truster” is “founder” and in the United Kingdom and Canada the term “settlor” is usually used

3 4 The rest of Canada

All the trustees must act jointly, unless the trust deed provides otherwise.¹⁰⁰ In other words, their decisions must be unanimous and if one trustee does not agree with the others, a deadlock arises. One way of breaking the deadlock is to approach the court for direction, although this remedy may be of limited use as the courts are hesitant to interfere with the trustees' exercising of their duties.¹⁰¹ A trustee may delegate his or her functions to other trustees under the same circumstances as those required for delegation to others.¹⁰²

The general rule is, therefore, that trustees must act personally and may not delegate their functions to others.¹⁰³ However, under certain circumstances, the trustees are entitled to delegate their functions, although they will remain responsible for making all decisions. These circumstances are:

- (i) if the trust deed or statute expressly permits it;
- (ii) if the duties are not required to be performed personally;
- (iii) where there is no other possible way for the trustee to perform, that is, it is necessary; and
- (iv) it is common business practice to do so.¹⁰⁴

Waters also acknowledges that trustees may delegate their functions, but formulates the circumstances under which they may do so as follows:

“[W]henver the power, discretion, or duty assigned to the trustee requires that a policy decision be made, the trustee must make it himself. A policy decision is one which, if dispositive, determines how much and at what time a beneficiary takes; if administrative, it directly affects the likelihood of the trust's object or purpose being achieved.”¹⁰⁵

Trustees may never delegate all of their functions as it would amount to an abdication of responsibility.¹⁰⁶ However, legislation in certain provinces enables a trustee, who is going to be absent from the province, to delegate all of his or her functions.¹⁰⁷ Some provinces also enacted legislation to enable trustees to employ certain agents, for example solicitors or bank managers.¹⁰⁸

3 5 Québec

The trustee has full administration of the trust property.¹⁰⁹ He or she therefore has the control and the exclusive administration of the trust patrimony, and the titles relating to the property of which it is composed are

¹⁰⁰ Waters *Waters' Law of Trusts* ch 18 I 4

¹⁰¹ A Oosterhoff, R Chambers, M McInnes & L Smith *Oosterhoff on Trusts: Text, Commentary and Materials* 6 ed (2004) 935

¹⁰² Waters *Waters' Law of Trusts* ch 18 I 4

¹⁰³ Ch 18 I 1

¹⁰⁴ Oosterhoff et al *Oosterhoff on Trusts* 950

¹⁰⁵ Waters *Waters' Law of Trusts* ch 18 I 2

¹⁰⁶ Oosterhoff et al *Oosterhoff on Trusts* 950

¹⁰⁷ British Columbia, but only for absence on war service (Trustee Act RSBC 1996 ch 464 s 14); Manitoba (Trustee Act CCSM ch T-160 s 36); New Brunswick (Trustees Act RSNB 1973 ch T-15 s 6)

¹⁰⁸ Ontario Trustee Act RSO 1990 ch T-23 s 20

¹⁰⁹ M Cantin Cumyn “Reflections regarding the Diversity of Ways in which the Trust has been Received or Adapted in Civil Law Countries” in L Smith (ed) *Re-imagining the Trust* (2012) 6 22

drawn up in his or her name. The trustee can exercise all the rights pertaining to the patrimony and may take any proper measure to secure its appropriation.¹¹⁰

If there is more than one trustee, a majority of them may act, unless they are required by law to act jointly or in a determined proportion.¹¹¹ It may be that the trustees cannot act by majority, because of an impediment or the systematic opposition of some of them. In such a case the others may perform conservatory acts, or a trustee may even act alone (with authorisation from the court) when immediate action is required. If the situation persists and impairs the administration, the court may intervene to resolve the situation.¹¹²

Trustees are solidarily liable for their administration, unless their duties have been divided by law, the trust deed or the court and the division has been respected, in which case each trustee is liable for his or her own administration only.¹¹³

A trustee may delegate his or her duties or be represented by a third person for specific acts, but may not generally delegate the conduct of the administration or the exercise of a discretionary power, except to his or her co-trustees. A trustee is accountable for the person selected by him or her if, among others, he or she was not authorised to make the selection. If the trustee was so authorised, he or she is accountable only for the care with which the person was selected and the instructions issued.¹¹⁴

3 6 Summary of comparative analysis

By way of summary it can be stated that, regarding the first issue, the principle in South Africa is clear: trustees must act jointly. However, the trust deed may allow decisions to be made otherwise, for example by majority decision. In England, trustees must act jointly, unless otherwise authorised by the trust deed. In Scotland, the trust deed may lay down rules for the conduct of the trust's affairs, but in the absence of such rules, the trustees need not act jointly and may make decisions by majority vote. This rule is subject to the qualification that all trustees must be consulted. However, a failure to consult any trustee will not result in a contract entered into by the trustees with a third party, who dealt onerously and in good faith, being void. Third parties are thus protected. In the rest of Canada, trustees must act jointly, unless the trust deed provides otherwise. In Québec, decisions may be taken by majority vote, unless trustees are required by law to act jointly. Under certain circumstances fewer than the majority may also act.

Therefore, in South Africa, England and the rest of Canada, trustees must in principle act jointly, unless the trust deed provides otherwise. In Scotland and Québec, a majority is sufficient to take a decision.

Regarding the second issue, namely delegation, South African trustees may delegate their administrative functions to others, but remain responsible to supervise the actions of the person to whom they have delegated. Fundamental

¹¹⁰ Civil Code of Québec SQ 1991 ch 64 art 1278

¹¹¹ Art 1332

¹¹² Art 1333

¹¹³ Art 1334

¹¹⁴ Art 1337

decisions must be taken by the trustees, though. Although a grey area may arise regarding the distinction between administrative functions and fundamental decisions, the principle is clear enough. However, in South Africa it is certainly possible that, if a trust deed allows it, one of a number of co-trustees may be authorised by the remaining trustees to conclude a contract (or contracts of a specified nature) on behalf of the trust. This could be one of the more effective ways of avoiding the practical difficulties with the application of the joint-action rule. In England, every trustee must act personally, although the trustees may (collectively) delegate some of their functions, as specified in the relevant legislation, to an agent. The trustees' ability to delegate their functions may be curtailed in the trust deed. Trustees also have duties of supervision in relation to an agent. In terms of legislation (or if allowed in terms of the trust deed), an individual trustee may also delegate the execution or exercise of his or her powers or discretions. In Scotland, trustees may, in terms of legislation, appoint law agents and factors unless prohibited by the trust deed. However, the common law in Scotland also allows a trustee to appoint an agent, provided that the trustee does not surrender his or her own judgment in matters committed to his or her discretion. Thus, a trustee may appoint an agent if a person of reasonable prudence dealing with his or her own affairs would consider such employment appropriate. In terms of Canadian law, trustees may delegate their functions under certain circumstances. The test laid down by Waters regarding the circumstances under which delegation may take place (namely that policy decisions must be made by trustees themselves) corresponds closely to the position in South Africa (where fundamental decisions must be taken by the trustees). Arguably, the position in Scotland (where trustees may not surrender their own judgment) is comparable. Furthermore, in all three of these jurisdictions trustees may never delegate all of their functions, as it would amount to an abdication of responsibility. Legislation in some Canadian provinces allows the trustees to employ certain agents. In Québec, a trustee may delegate his or her functions or be represented by a third person for specific acts, but may not delegate generally the conduct of the administration or the exercise of a discretionary power, except to his or her co-trustees.

Therefore, in South Africa, England and the rest of Canada the trustees may delegate some of their lesser functions, but not the more important ones (although the distinction between these two categories of functions is not always clear). In Québec, delegation of general administration or exercise of a discretionary power may take place, but only to co-trustees. In Scotland, an agent may be appointed, either in terms of statute or common law, but trustees may not surrender their own judgment.

4 Concluding remarks: lessons for South Africa?

The point of departure in this article was that the application of the joint-action rule can cause significant practical difficulties in the administration of trusts in South Africa, especially in the context of business trusts. This is because the nature of trusts in a business or commercial environment

normally dictates an active role for the trustees in the day-to-day running of the particular business. We have also attempted to show that the concept “business trust” covers a wide spectrum of business activities, but that a number of fundamental trust features can explain the popularity of the trust institution irrespective of where on this spectrum the particular business may find itself. Regarding the difficulties posed by the unqualified application of the joint-action rule in this context, we have highlighted the two mechanisms that have emerged in an attempt to ameliorate these difficulties. These mechanisms are, first, the possibility that a trust deed can contain a provision abrogating the joint-action rule (for example, by making provision for a majority decision); and, second, the possibility that certain trustee functions can be delegated to a co-trustee or an outsider. The fact that these mechanisms are available, illustrates the “flexibility of design in matters of governance”¹¹⁵ that is so typical of the trust.

It is clear, however, that difficulties remain and that South African courts are still facing challenges in developing this area of trust law. For the most part these difficulties can be explained by the natural limits that basic trust law principles dictate in the employment of the mechanisms mentioned above. We have therefore suggested that a comparative analysis of the treatment of these issues in a number of other jurisdictions might provide guidance in this regard (and might also be of assistance to trustees and other trust practitioners). This comparative analysis clearly illustrates that South Africa is not the only trust jurisdiction where the joint-action rule applies and where mechanisms have been developed to address the difficulties experienced with this rule.

The analysis shows that there is a remarkable degree of similarity between South Africa, on the one hand, and the other jurisdictions, on the other, as far as the basic application of the joint-action rule is concerned. But there are some interesting and at times subtle differences as well. For example, it is instructive to note that the default position in both Scotland and Quebec is that a majority vote is allowed, unless the trust deed contains provisions to the contrary. If one compares the South African approach (where trustees must act jointly, unless the trust deed provides otherwise) to the Scots approach (where majority vote is allowed, unless the trust deed provides otherwise), it is clear that both ensure flexibility, in that the settlor can change the default rule if he or she regards it as necessary.

At first blush it might seem as if adoption of the Scots approach might solve the dilemma that often arises in practice, namely that of trustees who rely on deficiencies in form or lack of authority¹¹⁶ in order to escape unwanted obligations. However, the South African case of *Van der Merwe NO v Hydraberg Hydraulics CC* (“*Van der Merwe*”) illustrates that this will not always be the case. In *Van der Merwe*, the trust deed did allow the trustees to take a decision by majority vote (which would be the default position in terms of Scots law). Yet the two trustees, who managed the trust as if there was no third trustee (which, in fact, there was), could not bind the trust. The court held

¹¹⁵ See part 2 above

¹¹⁶ *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) para 29

that a majority decision is only valid if it was taken at a meeting of trustees of which all the trustees had received notice. It was evident that the third trustee was never notified about any meetings and the remaining two trustees could therefore not validly resolve to enter into a contract.¹¹⁷ This is a clear illustration of the qualification formulated by Cameron JA in *Parker*, namely that the majority of trustees remains part of the full trustee complement and that they must exercise their will in relation to that complement.¹¹⁸ In terms of Scots law, all the trustees would have to be consulted even though a majority decision is in principle allowed. It therefore seems that the Scots approach would not, after all, offer more protection to third parties than would be the position in terms of the South African approach.

However, Scots law has a useful statutory provision regarding the protection of third parties in case of non-compliance with the joint-action rule. This provision, section 7 of the Trusts (Scotland) Act 1921,¹¹⁹ would clearly cover many of the practical scenarios that have caused difficulties in the South African context. It may be argued that the Scots provision has the same effect as the *Turquand* rule would have if it is to apply to trusts in South Africa,¹²⁰ namely that third parties would be protected against the non-compliance by the trustee in what is essentially internal matters.¹²¹ Scotland therefore provides an example of a jurisdiction that has opted to include a statutory provision to protect third parties against non-compliance with the joint-action rule. In the light of the uncertainty regarding the applicability of the *Turquand* rule to trusts, the Scots provision could provide a broad scheme for a South African statutory provision aimed at the protection of third parties.¹²² But whether such legislation will be introduced in South Africa remains to be seen.

There are also numerous analogies between South African law and the other jurisdictions regarding the issue of delegation of functions. But it is nevertheless clear that in some of these other jurisdictions legislation generally plays a much bigger role than is the case in South Africa. Especially the English legislation regarding delegation of functions to other trustees or agents is quite detailed and it provides a rich source of ideas for the development of this area of South African trust law. Of special significance in this regard are the special rules that apply if an agent is authorised to act as asset manager for the trustees.

¹¹⁷ *Van der Merwe NO v Hydraberg Hydraulics CC* 2010 5 SA 555 (WCC) para 16. The same outcome will be reached on the facts of *Steyn v Blockpave (Pty) Ltd* 2011 3 SA 528 (FB). For a more comprehensive analysis of *Van der Merwe NO v Hydraberg Hydraulics CC* 2010 5 SA 555 (WCC) in the wider trust law context, see A van der Linde "Debasement of the Core Idea of a Trust and the Need to Protect Third Parties" (2012) 75 *THRHR* 371-373-380.

¹¹⁸ See part 3.1 above.

¹¹⁹ See part 3.3 above.

¹²⁰ Whether the *Turquand* rule applies to trusts in South Africa appears to be unresolved; see *Man Truck & Bus (SA) Ltd v Victor* 2001 2 SA 562 (NC) 526; *Nieuwoudt v Vrystaat Mielies (Edms) Bpk* 2004 3 SA 486 (SCA); *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA); *Van der Merwe NO v Hydraberg Hydraulics CC* 2010 5 SA 555 (WCC).

¹²¹ An examination of the differences and similarities between these two rules falls outside the scope of this article.

¹²² It is to be noted that s 20(7) of the Companies Act 71 of 2008 contains a statutory version of the *Turquand* rule which applies to companies, in addition to the common-law *Turquand* rule.

SUMMARY

The “joint-action rule” in South African trust law entails that all trustees must act jointly in order to bind the trust. Non-compliance with the rule will most often lead to the invalidity of a contract between the trustees and an outsider. Hence, in the context of business trusts, the application of the rule may be particularly problematic. We submit that the main reason why the business trust remains a useful institution is that the trust brings with it, through the importation of certain standard features, important advantages that need not be specifically bargained for. However, normal rules of trust law, such as the joint-action rule, must also be complied with. Hence, mechanisms to ameliorate some of the problematical effects of this rule can be put in place, such as provisions stipulating that decisions can be taken by a majority of the trustees, or that the trustees can delegate certain defined duties or powers. It is clear, however, that difficulties remain and that South African courts are still facing challenges in developing this area of trust law. But South Africa is not the only trust jurisdiction where the joint-action rule applies and where mechanisms have been developed to address the difficulties experienced with this rule. Comparing the position in South Africa to that in England, Scotland and Canada (including Québec), a remarkable degree of similarity between South Africa, on the one hand, and the other jurisdictions, on the other, as far as the basic application of the joint-action rule is concerned, can be noted. However, there are a number of differences as well. In many of the other jurisdictions legislation generally plays a much bigger role than in South Africa and it may provide a rich source of ideas for the development of this area of South African trust law.