

THE AMANAH RAKYAT NEGERI SABAH ENACTMENT 1990

This note* is a quest to determine first, the nature and status of the trust created by the Amanah Rakyat Negeri Sabah Enactment 1990, which may be called the "trust instrument" of the Sabah Legislative Assembly and second to emphasize the importance of construing the Amanah Rakyat Negeri Sabah Enactment 1990 as a charitable trust such that the passing of the above-mentioned Enactment by the Government of Sabah is *intra-vires* the Federal Constitution. The former is done by comparing and contra-distinguishing the Enactment with principally the Trustee Act 1949 and decided cases, whilst the latter is done by reference to the Federal Constitution and other legislation in force in Malaysia, namely:

The Trusts (State Legislatures Competency) Act 1949
Incorporation (State Legislatures Competency) Act 1962
National Trust Fund Act 1988
Trustee (Incorporation) Act 1952
Trustees (Incorporation) Sabah Cap. 148 and Amendment Ordinance 8/1955
Trust Companies Act 1949 in relation to section 3(1)(b) of the Civil Law Act 1956

The Trustee Act 1949 (hereinafter referred to as the Trustee Act) was revised in 1978. It applies to all trustees irrespective of the classification of the trust. It came into force in two stages, in West Malaysia on 31 December 1949 and to Sabah and Sarawak on 30 June 1965.

Section 2(2) of the Trustee Act provides that when the terms of a trust instrument conflict with the terms of the Act, the trust instrument overrides.¹

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¹In *Cowan & Ors v Scargill & Ors* [1984] 2 All ER 750 the Court held the trust of a pension fund were in general governed by the ordinary law relating to trusts, subject to any contrary provision in the rules or other provisions which governed the trust.

The section reads as follows:

The powers conferred by this Act on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers unless otherwise stated, apply if and so far only as a contrary intention is not expressed in the instrument, if any, creating the trust, and have effect subject to the terms of that instrument.

The Amanah Rakyat Negeri Sabah Enactment 1990 (hereinafter referred to as the "Enactment") was assented to by the Yang di Pertua Negeri of Sabah on 31 March 1990. It will come into force only on such date as specified by the Minister in the gazette.²

(i) Manifestation of a General Charitable Intention

The preamble to the Enactment reads:

An Enactment to establish the Amanah Rakyat Negeri Sabah. Enacted by the legislature of the state of Sabah ...

The preamble to the Enactment, it is submitted stands in the same position as a preamble to an Act.³ From it, it is clear that the settlor is the Sabah State Legislative Assembly and the Enactment is a clear, imperative and unequivocal expression of the legislature of Sabah to create the public charitable trust.

Other sections which deal with this aspect are sections 1 and 11. Section 1 of the Enactment has already been highlighted.

²Section 1.

³See *Maxwell on The Interpretation of Statutes*, (12th Edn.) (1976), Tripathi; *Preamble as legitimate aid in construing enacting parts*, *Sussex Peerage Claim* (1844) 11 Ch. & F. 85; *Turquand v Board of Trade* (1886) 11 App. Cas. 286 per Lord Selborne L.C.; *Powell v Kempton Park Racecourse Co Ltd* [1899] AC 143, "I... regret that the practice of inserting preambles in Acts of Parliament has been discontinued as they were often of great assistance to the Courts in construing the Acts," *L.C.C. v. Bermondsey Blascope Co Ltd* [1911] 1 KB per Lord Alverston C.J. at p. 451; *Constable* (1827) 3 Russ 436; *All Gen. v Foundling Hospital* [1914] 2 Ch. 154. Also see *Craies on Statute Law*, (6th Edn.), pp. 42-44; *All Gen. v HRH Prince Ernest Augustus of Hanover (HOL)* [1957] AC 436.

(ii) Public Element

Section 11 of the Enactment implies the public element of the charitable trust and makes provisions for the application of monies of the Fund. It provides as follows:

- 11(1) Moneys standing to the credit of the Fund may be applied -
- (a) to pay to such Malaysian citizens having permanent residence in Sabah such amount of cash distributions for the promotion of their general welfare, at such time and in such manner as the Board⁴ may from time to time determine;
 - (b) to donate, grant or contribute to any charitable organisation or body as the Board in its sole discretion deem fit;
 - (c) to provide monetary grants and scholarships for candidates selected by the Board to assist such candidates in their education whether within or without the State; and
 - (d) to provide such other grants as may be approved by the Yang di-Pertua Negeri.
- (2) Where moneys provided under paragraph (a) of section 3 are applied for any of the purposes mentioned in subsection (1) of this section, the Board shall be deemed to be an agent of the State Government.

This is a laudable provision because it does not discriminate either on grounds of race or sex.

The beneficiaries in this charitable trust are the people of Sabah and students from all over Malaysia, namely (1) Malaysian citizens having permanent residence in Sabah, (2) any charitable organisation or body, (3) candidates selected by the Board for education assistance and finally any other beneficiary who receives a grant. The fourth category of beneficiaries are kept open in line with the objectives of the trust. The objective is to pay Malaysian citizens having permanent residence in Sabah such amount of cash distributions for the promotion of the general welfare as determined by the Board. The Board is deemed to be an agent of the State. The unique feature of this public charitable trust is that it is more in the nature of a non-exhaustive discretionary trust where the trust fund need not be exhausted but can be accumulated and the trustees can determine based on their

⁴Board' has been defined as Board of Trustees in section 4 of the Enactment. See *infra.*, pg. 196.

discretion whether any particular claimant falls within the scope of "beneficiary" and how much he is to get. The Enactment may be interpreted as giving rise to a charitable trust since section 11 which is the quintessence of the trust to a great extent, falls within Lord MacNaughten's classification of charity in *Commissioners for Special Purposes of the Income Tax v J.F. Pemsel*⁵ as shown below:

<i>Pemsel's case</i>	The Enactment
1. Trusts for the relief of poverty	1. Section 11(1)(a)
2. Trusts for the advancement of education	2. Section 11(1)(c)
3. Trusts for the advancement of religion	3. (i) Section 11(1) (ii) Section 11(1)(b)
4. Trusts for other purposes beneficial to the community not falling under any one of the preceding heads.	4. (i) Section 11(1)(b) (ii) Section 11(1)(d)

As a public charitable trust, it will be subject to the law on charities as applicable in East Malaysia, viz. the Trustees (Incorporation) Sabah Ordinance Cap. 148 and Amendment Ordinance 8/1955, the Trustee Act and the English law as permitted by section 3(1) of the Civil Law Act 1956. The Civil Law Act⁶ came into force in Sabah with effect from 1 April 1972. According to section 3(1) of the Civil Law Act, in Sabah the common law of England, the rules of equity and statutes of general application as administered or in force in England on 1 December 1951 apply. Where they

⁵[1891] AC 531.

⁶Enacted in 1956 as Federation of Malaya Ordinance No 5 of 1956 and came into force on 7 April 1956. Modified and extended to apply to the States of Sabah and Sarawak by P.U.(A) 424/1971. It was revised in 1972 and published as Act 67, and subsequently amended by P.U.(A) 16/75, Acts A308 and A602.

conflict with local legislation, local legislation would override. In other words, the above rules are to be applied so far only as the circumstances of the states of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.

Besides fitting in squarely with *Pemsel's* case, there are other charitable trust elements under the Enactment. For instance, under the Enactment, the preamble, sections 1 and 11 deal with the general charitable intention; section 11 focusses upon the public element concept; section 3⁷ deals with certainty of subject matter and section 4⁸ does not restrict the number of trustees to mere four. However, section 15(2) lays down a statutory requirement for accounts to be audited. For public charitable trusts generally, there is no legal requirement for accounts to be audited. There is also no specific mention that the Attorney-General acts as *parens patriae* on behalf of the Crown. He acts as representative plaintiff as in *Brooks v Richardson*.⁹ Sections 1 to 11 permit the application of the *Cy pres* doctrine.

(iii) Certainty of Subject Matter

Section 3 of the Enactment provides for the establishment of the Fund. It provides as follows:

There shall be established a Fund to be known as the "Amanah Rakyat Negeri Sabah" which shall comprise the following:

- (a) moneys from time to time appropriated from the Consolidated Fund to and for the purposes of the Fund;
- (b) all moneys including interest and dividends from any investments of the Fund;
- (c) all grants, donations, endowments, gifts, contributions and bequests that may be made to or in favour of the Fund;
- (d) any property real or personal which may be donated to the Fund; and
- (e) such contributions as may be made to the Fund by any person or authority.

⁷See *infra*.

⁸See *infra*, pg. 197

⁹[1986] 1 All ER 952.

The contributions to this Fund are from the Consolidated Fund of the Government. Any investments of the trust, cash collections from "public appeal" and any other personal or real property donations and contributions from the public, that is, from any person or authority are the other sources of income of the Fund. The words "may be" denote that the amount of money in the trust fund is in a fluid or uncertain state. However, in section 3(a) and (b) there is certainty of subject matter to some degree because a certain sum of money from the Consolidated Fund will be given periodically for the purposes of the Trust Fund and the same to a lesser extent can be said of the trust investments. Monies of the Trust Fund are treated as an amalgamation and the amalgamation is administered as a single fund, to be applied commonly for the objectives set out in section 11 of the Enactment.

The problem that arises in this context is that it is usually the settlor who provides the charitable trust "fund". Under the Enactment the Sabah Legislative Assembly or the Government is the settlor and only the "Consolidated Fund Money" is Government money. So out of the five sources of funding only one, that is, section 3(a) can be said to be settlor's funds, the rest having a having a somewhat "public appeal" flavour about them. What happens if the objectives set out in section 11 of the Enactment cannot be fulfilled? Read differently, the question is what happens if the charitable trust cannot be effected due to reasons of impossibility or impracticality of performance? It is submitted that the *Cy pres* doctrine would apply. Where the testator has expressed a general charitable intention and also a particular manner in which he desires it to be carried out but the intention cannot be carried out in the particular manner, the court will direct the intention be carried out as nearly as possible in the way desired.¹⁰

(iv) Board of trustees - General Control, Management and Administration of Charity

Section 4 provides for the establishment of a Board of Trustees:

¹⁰See *Re Wright* [1954] Ch 347; *Re King* [1927] 1 Ch 24 and *Re Wilson* [1913] 1 Ch 314.

4(1) For the purpose of managing, administering and controlling the Fund there shall be established a Board of Trustees called "the Board of Trustees of Amanah Rakyat Negeri Sabah" which shall consist of

- (a) the Chief Minister who shall be the Chairman; and
- (b) not more than four and not less than two other persons appointed by the Yang di-Pertua Negeri for a term not exceeding three years.

(2) A trustee shall cease to hold office -

- (a) on his death;
- (b) on his resignation by writing to the Chairman; or
- (c) on the revocation of his appointment by the Yang di-Pertua Negeri.

(3) The Board shall be a body corporate under the name of the Board of Trustees of Amanah Rakyat Negeri Sabah and by that name shall have perpetual succession and a common seal and the Board is hereby empowered for the purposes of the Trust to sue and be sued and to make contracts and to acquire, purchase, take, hold and enjoy movable and immovable property of every description and to sell, convey, assign, surrender, mortgage, lease or otherwise dispose of any movable or immovable property vested in the Board upon such terms as the Board may deem fit and to collect and receive further subscriptions and donations for the benefit of the Fund.

(4) The Board may continue to act notwithstanding any vacancy in the number of the Trustees.

(5) The quorum of the Board shall be two.

(6) The Chairman shall preside at all meetings of the Board.

(7) The Chairman shall have a casting vote.

(8) No salary, fee or honorarium shall be paid to any Trustee.

(9) Subject to the Enactment, the Board shall have the powers to make rules and to regulate its proceedings.

Generally, the trustees of a charity and the trustees of a private trust have exactly the same powers, duties and liabilities. Following the ratio *decidendi* in decided English cases¹¹ however, charitable trustees are not bound by the unanimity rule. On the contrary, charitable trustees can act as a majority and, therefore, bind a dissenting minority.

The Board serves not only as quasi custodian trustees but also as active trustees for the management of the trust and for auditing of trust accounts.¹² According to Underhill and

¹¹See Philip H Pettit, *Equity and the Law of Trusts*, (6th ed.)(1984), pg. 241.

¹²Section 15(1)(2) and (3).

Hayton the advantages of custodian trusteeship are that it safeguards the capital against loss by breach of trust whether fraudulent or not and it saves the periodic expense caused by the necessity of transferring the trust property on every appointment of new trustees.¹³

The advantages of custodian trusteeship at the moment are latent. The functions of the Board superficially resemble those of a Public Trustee Corporation. Further, the Board stands in exactly the same position as a private trustee with regard to the beneficiaries. It is submitted that it is also implied that the state of Sabah guarantees that it will make good the loss which an ordinary trustee would be liable to make good.¹⁴ This implication arises, because according to Underhill and Hayton, monies are taken from the Consolidated Fund. The Trustee Board has a legal personality since it shall have perpetual succession and a common seal, and the Board is empowered for the purposes of the trust to sue and be sued and to make contracts, and to acquire, purchase, take, hold and enjoy movable and immovable property of every description and to sell, convey, assign, surrender, mortgage, lease or otherwise dispose of any movable or immovable property vested in the Board upon such terms as the Board may deem fit and to collect and receive further subscriptions and donations for the benefit of the Fund.¹⁵ For the purposes of the Board meeting, the quorum of the Board is fixed at two. The Chairman has the casting vote.¹⁶

The Enactment makes no mention about subsequent trustees. In the case of an express private trustee, the Trustee Act provides for power of appointing new or additional trustees in section 40(a) and (b). Section 40(a) refers to persons nominated for the purpose by the trust instrument, section 40(b) says that if there are no such persons under section 40(a) then, the surviving or continuing trustee or trustees for the time being or the personal representatives of the last surviving or continuing trustee may appoint new or additional

¹³*Law of Trusts and Trustees* (14th ed.) (1987), pg. 686.

¹⁴*Op. cit.*, pg. 680.

¹⁵Section 4(3).

¹⁶Section 4(5) and (7).

trustees. Where all of them in section 40(a) and (b) refuse then the beneficiaries can appoint, if all are *sui juris*, have full knowledge and are fully entitled to the full trust property. If the beneficiaries for some reason cannot appoint, then the court will appoint as in *Bhikku Daeng v Maung Shwe Tyn & Anor*.¹⁷ A landmark decision which has been followed in Malaysia on the selection of new trustees by the court is *Re Tempest*.¹⁸ In a proper case, the court may notwithstanding the power of the trust instrument or the power in section 40 of the Trustee Act, appoint a trustee *vide* its inherent jurisdiction as in *Buchanan v Hamilton*.¹⁹

Under the Enactment, a vacancy in a trust office can arise in any one of the three ways, on death, resignation or on revocation of appointment of the trustee (section 4(4)). The Chief Minister shall be the Chairman of the Board.²⁰

This is a mandatory provision under the Enactment. In comparison section 40 of the Trustee Act lays down grounds for vacancies, for instance, on death, where the trustee remains out of Malaysia for more than twelve months, where a trustee desires to be discharged or where he refuses to act or is unfit to act or is incapable of acting or is a minor. It is submitted that unfitness relates to defects of character or conduct and not medical incapacity. On the matter of removal of trustees, the Court is guided by the principles laid down in *Letterstedt v Broers*²¹ and *Tan Chong Kee v Tan Chong Lay*.²² In *Letterstedt v Broers*, the Court said the main guide on removal of trustees must be the welfare of the beneficiaries. No one is compelled to become a trustee. A trustee can step down either by retirement or removal from office.

There are no provisions on retirement under the Enactment. Under the Trustees Act, the retirement of trustees can be effected by one of the three ways, where the trust instrument so provides, under the powers of section 40 (discussed earlier) and finally by the courts on an application to it. The court

¹⁷[1980] 2 MLJ 184.

¹⁸(1866) LR 1 Ch App 485.

¹⁹(1801) 5 Ves 722. See Pettit, *op. cit.*, pg. 291.

²⁰Section 4(1).

²¹(1884) 9 App Cas 371.

²²[1926] SSLR 128.

will usually allow a trustee to retire if there is at least one other trustee or if a replacement can be found.

Under the Enactment no salary, fee or honorarium is to be paid to any trustee. The words are totally prohibitive in section 4(8). The Trustee Act does not entitle a trustee to any payment unless it falls under section 46 or under any one of the exceptions recognized by case law.²³

The general principle on trustees not being entitled to any remuneration is found, *inter alia* in *Barrett v Hartley*²⁴ and *Re Gates*.²⁵ Trustees are not entitled to any remuneration except where,

- (1) the trust deed allows such remuneration;
- (2) the beneficiaries of the whole trust are *sui juris* and agree to remunerate;
- (3) the Court allows remuneration in instances where the trustee has shown to the Court that he has brought exceptional benefit to the trust, as in the case of *Boardman v Phipps*;²⁶
- (4) the trustee is a public trustee falling under the Public Trustee Act;
- (5) it is a trust corporation and the Court allows;
- (6) a trustee comes within the scope of *Craddock v Piper*²⁷ which states that where a solicitor trustee acts as a solicitor for himself and the co-trustee in a dispute relating to the trust and the cost of acting for both of them would not exceed the cost that would arise if he acted for the trustees only.

Where a trustee has obtained a financial benefit from the trust other than under any of the six grounds mentioned above, the Court has held that the trustee must repay the

²³Or cases under s:28(1) Trustee Act which deal with the power to employ agents. For more recent cases on this point are *O'Sullivan v Management Agency and Music Ltd* [1985] AC 428, and *Re Berkeley Applegate (Investment Consultants) Ltd* [1988] 3 All ER 71.

²⁴(1886) 2 Eq. 789.

²⁵[1933] Ch 913.

²⁶[1967] 2 AC 46.

²⁷(1850) 1 Mac & G 664.

trust the financial benefit so attained. This was so held in *Williams v Barton*,²⁸ *Webb v Earl of Shaftesbury*²⁹ and *Molyneux v Fletcher*.³⁰

(v) Similar powers, duties and liabilities as a private trustee

Though section 9(1) of the Enactment provides for management and section 10 provides for delegation, section 10 is a follow up on section 9. Though worded as management and delegation, the management discussed in section 9 incorporates delegation and section 10 only makes it directive and not mandatory that delegation is to be made by instrument in writing under the common seal of the Board. Section 10 also covers the possibility that duties may have to be carried out outside Malaysia subject to such condition or restriction as the Board may impose.

In other words, the Enactment permits trustees to delegate their function or duties vide the Board.³¹ It can appoint any person or corporate body for the day-to-day administration and management of the affairs of the trust, whether inside or outside Malaysia.³² Under the Enactment there is no mandatory requirement that delegation has to be by instrument and in writing. Under the Trustee Act, a trustee can delegate his functions by virtue of sections 28 and 35.³³

Section 19 of the Enactment provides for liability of trustees as follows:

No Trustee shall be liable for any loss arising from or contingent upon any investment made unless such loss has been occasioned by his negligence, fraud or dishonesty; and no agent or person acting under authority to the Board shall be personally liable to any action or proceeding for or in respect of any action made or thing done or omitted to be done in good faith and in the proper exercise of any of the powers of the Board or of the members thereof.

²⁸[1927] 2 Ch 9.

²⁹(1802) 7 Ves 480.

³⁰[1898] 1 QB 648.

³¹Section 10.

³²Section 9.

³³See case of *Walia v Michael Naughton (Ltd)* [1985] 3 All ER 673.

Under the Enactment, the trustee is liable for loss - which may not be quite the same as breach of trust when the trustee has been negligent, fraudulent or dishonest. The defence of good faith is not expressly available to the trustee under section 19 of the Enactment. On the other hand, "good faith" and "proper exercise" are express defences available to agent or person acting under authority of Board. Under the Trustee Act, the vicarious liability of the trustee for acts of his agent is a grey area by virtue of the difficulty in reconciliation between sections 28 and 35 of the Act which raise quite separate issues but have not been kept separate in the case of *Re Vickery*³⁴ and the rationale of other underlying case law principles for instance *Re Brier*³⁵ and *Re Lucking's Will Trusts*.³⁶

The effect of the statutory powers upon the overall responsibilities of a trustee is a matter of dispute. The local position reflects the English law on the subject.³⁷

(vi) Financial Year

Section 14 of the Enactment provides that the financial year shall commence on 1st January and end on 31st December of each year. This section has no parallel under the Trustee Act.

(vii) Accounts, Audit and Annual Report

Section 15 of the Enactment provides for Accounts and Audit as follows:

- (1) The Board shall keep or cause to be kept proper accounts and other records in respect of the operation of the Fund and shall prepare statements of accounts in respect of each financial year.
- (2) The Board shall, not later than three months after the end of its financial year cause the accounts of the Fund to be audited

³⁴[1931] 1 Ch. 572.

³⁵(1884) 26 Ch. D. 238.

³⁶[1968] 1 W.L.R. 866.

³⁷See Hanbury and Maudsley, *Modern Equity*, (13th ed.) (1990), pp. 532-537.

- by a duly qualified auditor or firm of auditors who shall be appointed by the Board and who may in like manner be removed.
- (3) At the end of each financial year and as soon as the accounts of the Fund have been audited, the Board shall cause a copy of the statement of accounts to be submitted to the Minister, together with a copy of the observations made by the auditor on any statement of accounts or on the accounts generally.

Section 16 of the Enactment provides for Annual Reports:

The Board shall, not later than the thirtieth day of April in each year, cause to be made and submitted to the Minister a report dealing with the investments of the Fund during the preceding financial year and containing such information relating to the proceedings and policy of the Board as the Minister may from time to time direct.

These mandatory sections have no parallel under the Trustee Act.³⁸

(viii) Common Seal, Sealing Documents

Section 6 provides for the sealing of documents with the common seal of the Board in the presence of the chairman and one other trustee both of whom should sign the document. The common seal of the Board shall be in the custody of the chairman.^{38a} There are no parallel provisions of this nature under the Trustee Act.

(ix) Raising Money

Section 7 provides for the raising of money for the Fund as follows:

- (1) The Board shall have power from time to time to raise public subscriptions for the Fund.
- (2) The Board shall have power to realise and turn into money any real or personal property which may be donated to the Fund under paragraph (d) of section 3.

^{38a}Section 5.

³⁸See Section 27(4) Trustee Act for discretionary powers.

The Trustee Board also takes charge of raising money by way of public subscriptions for the trust fund. It also has the power to convert real or personal property that has been donated for the same purpose. It is submitted that sections 20 and 21 of the Trustee Act have a different scope altogether. Section 20 provides for the power of trustees of renewable leaseholds to renew and raise money for the purpose. Section 21(1) provides for power to raise money by sale, charge etc ... any part of the trust property. Section 21(2) states that this section does not apply to trustees of property held for charitable purposes.

(x) Investment

The Enactment states that any part of the trust fund may be invested by the Board in any security authorized by law on the point. It also states that all investments should be held by the Board or an agent on behalf of the Board.³⁹

The provisions and guidelines under the Trustee Act are built on the underlying principle that a trustee has a duty to invest, largely based on case law.

Section 4 of the Trustee Act lays down the authorized investments as - securities of Federal Government, securities guaranteed by the Parliament or Federal Government, immovable properties within limits of city, Municipality or Town Board and which provides rental of 7% of purchase price annually, fixed interest securities, loans to approved companies subject to sections 3(1)(a)(b) and (c) and 4(2) and loans the principal and interest of which are guaranteed by the Federal Government. The trustee can invest in unit trusts which has been approved by the Yang di-Pertuan Agong through government gazette. To do so, the trustee must obtain professional advice.⁴⁰ To invest in shares, the shares must be listed on the Stock Exchange and the capital of the company must not be less than five million dollars and in the preceding five years dividends must have been paid by the company. If all

³⁹Section 8. The Malaysian Trustee Investment Act 1965 (No 36) was superseded by the Trustee Act 1949.

⁴⁰Section 6(2) Trustee Act 1949.

these out-lined regulations are followed, the company is considered a legitimate company for trust investment.⁴¹ When obtaining advice on the investment, the trustee must fulfill the need for diversification of investment and suitability of the investment.

Where the investment is to be in securities, the trustee must obtain the advice of the stockbroker. When investing in land, the trustee must be careful to determine if the land is suitable for investment. Where trust money is advanced as loan on the security of land, the trustee must be careful and observe three requirements namely, he must have acted on the valuation report of an authorized valuer under the Trustee Act, the amount of the loan should not exceed 2/3 parts of value of the property and finally the loan must be made on the advice of the valuer expressed in the report.⁴² If the valuer is related to the trustee, for instance, the valuer is the wife, husband or child, then the valuer is not considered independent. Independence of valuer is a requirement under the Trustee Act. The valuer, it is said, must be able, practical and independent. To relieve a trustee from personal liability for breach of trust it must appear to the court that he has acted honestly and reasonably and ought fairly to be excused. If any of the three conditions are not fulfilled, the trustee will be liable for breach of trust.

(xi) Administration of Fees

Section 12 of the Enactment provides that any costs, expenses or other payments directly attributable to the administration of the Fund shall be charged to the Fund.

Though the word "indemnity" has not been spelt out, section 12 is in the nature of an indemnifying section. Under the Trustee Act, vide section 35(2) a trustee can reimburse himself or pay or discharge out of the trust fund all expenses incurred in or about the execution of the trusts or powers. Under section 62 of the Trustee Act, the court has power to charge costs on trust estate.

⁴¹*Op. cit.*, section 4.

⁴²*Op. cit.*, section 12.

(xii) Ministerial Power in relation to Board

Section 13 of the Enactment provides for the power of the Minister in relation to the Board as follows:

- (1) The Minister may give the Board such directions of a general nature as are not inconsistent with the provisions of this Enactment as relate to the exercise and performance of its functions and the Board shall give effect to all such directions.
- (2) The Board shall furnish the Minister with such returns, accounts and other information with respect to the assets and activities of the Fund as he may from time to time require.

The provisions in the Trustee Act are slightly different. Under the Trustee Act, the Trustees are generally not accountable but there are exceptions for instance, when trustees carry out their duties imperfectly or under situations defined by case law.⁴³

(xiii) Bank Account and Signing of Cheques

Section 17 of the Enactment provides for bank accounts as follows:

All moneys of the Fund shall be deposited in such bank or other financial institution licensed under the Banking and Financial Institutions Act, 1989, as may be determined by the Board.

Section 18(1) of the Enactment provides for signing of cheques:

All cheques or other instruments drawn upon the bank account of the Board shall be signed by the Chairman and counter-signed by one other Trustee or in such manner as the Board may otherwise decide.

- (2) The bank or other financial institution may pay or arrange for payment in respect of all cheques or orders so drawn which are so signed and countersigned.

⁴³Section 66 of the Trustee Act provides for indemnity, *inter alia*, of trustees. See *Saunders v Vautier* (1841) 4 Beav 115.

There are no parallel provisions under the Trustee Act.^{43a}

(xiv) Public Servants

Section 20 of the Enactment provides that all members, officers and agents of the Board shall be deemed to be public servants within the meaning of the Penal Code.⁴⁴

This is a deeming section and there is no parallel provision under the Trustee Act. This feature of the Enactment is akin to the Public Trustee⁴⁵ which states that the Public Trustee and every officer of the Public Trustee is declared to be a public servant within the meaning of the Penal Code.

(xv) Power to make regulations

Under section 21 of the Enactment the Minister may make regulations for the better carrying out of the provisions of this Enactment. This final section also has no parallel under the Trustee Act.

(xvi) Nature and Status of the Enactment

What is the nature and status of the 1990 Enactment? It is not an express private trust as it lacks the three counts of certainties, namely certainty of intention of settlor as a settlor is generally understood, certainty of subject matter and certainty of beneficiaries. Express private trusts are subject to the Rule Against Perpetuities which means that a private trust cannot run for an indefinite period.⁴⁶ It is, therefore, submitted that since the objective of the Enactment is spelt out in section 11 and to a great extent, if not all, the objective falls within Lord MacNaughten's classification of

^{43a}Such powers may be inferred from sections 2(2) and 59 of the Trustee Act.

⁴⁴Cap. 45. Reprint 1973.

⁴⁵Section 18(3) Public Trustee Act 1950 (Revised in 1981).

⁴⁶Rule against perpetuities - A doctrine establishing that the vesting of a particular property in a person may not be delayed beyond the period of his life and 21 years after, it. This is expressed in the formula (x + 21) where 'x' is a variable representing the life of the person in whom the property is vested.

“charity”, as set out in *Pemsel’s* case, the 1990 Enactment at best is to be interpreted as a charitable trust. It is also submitted that to be *intra vires* the Constitution, the 1990 Enactment must be construed as a charity.

(xvii) Under the Federal Constitution

It is stated in Article 74(1) of the Federal Constitution that Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List.⁴⁷ Article 74(2) states that the Legislature of a State may make laws with respect to any of the matters enumerated in the State List⁴⁸ or the Concurrent List.

Under the Ninth Schedule of Federal List,⁴⁹ equity and trusts are federal matters.⁵⁰ However List IIIA of the Ninth Schedule which serves as supplement to the Concurrent List for States of Sabah and Sarawak provide as State matters the following:

15. Charities and Charitable trusts and institutions in the state (i.e. to say operating wholly within or created and operating in the State) and their trustees, including the incorporation thereof and the regulation and winding up of incorporated charities and charitable institutions in the State.

(xviii) Incorporation (State Legislatures Competency) Act 1962

Further to the above, federal legislation empowering the Sabah Legislative Assembly to enact laws on Charities and Charitable institutions is found in [the] Incorporation (State Legislatures Competency) Act 1962.⁵¹ It empowers all State Legislatures to make laws with respect to the incorporation of certain persons and bodies within a state and is deemed

⁴⁷That is, the First or Third List set out in the Ninth Schedule.

⁴⁸That is, the Second List set out in the Ninth Schedule.

⁴⁹No. 4(e).

⁵⁰State legislatures only have the mandate to pass laws on Islamic non-charitable trusts, wakaf, charitable and religious trusts. See List II - State List and List IIIA - Supplement to State List for States of Sabah and Sarawak.

⁵¹Revised 1989, Act 380.

to have come into operation upon Merdeka Day. Vide section 3 State Legislatures have the mandate to make laws relating to the incorporation of certain persons and bodies. Charities and charitable institutions are itemised as third in the First Schedule.⁵²

It is submitted once again that to be *intra vires* the Constitution, the 1990 Enactment must be construed as a charity. The converse would be that the 1990 Enactment is not a charity and therefore *ultra vires* the Federal Constitution since equity and trust are federal matters. It is also submitted that the 1990 Enactment is to be construed as an "executory" charitable trust under the Incorporation (State Legislatures Competency Act) 1962 since the Enactment has not come into force yet as explained at the outset. The meaning of executory is explained here below.

(xix) The Trusts (State Legislatures Competency) Act 1949

The Incorporation (State Legislatures Competency) Act 1962 is not the same as the Trusts (State Legislatures Competency) Act 1949. The Trusts (State Legislatures Competency) Act 1949⁵³ states in its preamble that it is an Act to confer upon state legislatures the authority to pass laws providing for the establishment of trusts. Section 1(2), however states that the Act is to be applied only in West Malaysia. Since this Act does not apply to East Malaysia, the status of the Enactment under the Trusts (State Legislatures Competency) Act 1949 at best is that of an incompletely constituted trust. Hanbury and Maudsley⁵⁴ explain that in an incompletely constituted trust, there cannot be a trust unless the trust is completely constituted. It is a mere rule for distinguishing what is a trust from something that is void. In an executory trust, the property is immediately subject to a valid trust but it remains executory until the further instrument is duly executed. The

⁵²Amd. PU(A) 120/90 w.e.f. 4.5.90 introduces new s. 13A to the Second Schedule. It stresses that assets are not to be disposed of without consent.

⁵³P.U.(A) 404/90, made under S. 3(2) of this Act adds the following item - "State Heritage Trust" to the Schedule. In force from 23 November 1990.

⁵⁴*Modern Equity*, (13th ed.)(1990), pp. 67-69.

authors further explain that in an executory trust, the execution of some further instrument is required in order to define the beneficial interests with precision.

(xx) National Trust Fund Act 1988

The National Trust Fund Act 1988 established the National Trust Fund. Bank Negara is responsible for the day to day administration and management of the Fund. A unique feature of this Act is that it is incorporated into the Second Schedule to the Financial Procedure Act 1957. It is not stated anywhere in the National Trust Fund Act 1988 that this Act applies to East Malaysia and in particular to Sabah. However section 5(1)(e) provides that the monies *inter alia* required to be paid into the fund from time to time are from such contributions as may be made by any State in Malaysia which derives any form of royalty from the exploitation of petroleum or other depleting resource making Sabah, at best, a contributor to the Fund set up under the National Trust Fund Act 1988.

It can be argued that the Amanah Rakyat Negeri Sabah Enactment is a prototype of the National Trust Fund Act 1988 as many of the provisions are in *pari materia*. For instance, under both the Act and the Enactment there is provision for the establishment of the National Trust Fund Panel and the Board of Trustees, respectively (section 4). There is also provision in both statutes on delegation (sections 4(3) and 10 respectively). Both statutes provide that the officers are public servants under the Penal Code (sections 4(6) and 20 respectively). The Act provides that moneys are to be paid into the Fund whilst the Enactment provides for the establishment of the Fund and raising money for the Fund (sections 5, 3 and 7 respectively). Both statutes deal with the administration of fees (sections 8 and 23 respectively), the powers of the Minister (sections 9, 14, 13(1) and 21 respectively), the financial year (sections 10 and 14 respectively) and accounts and audit (sections 11 and 15 respectively). There is also provision for Annual Reports (sections 12 and 16 respectively). However there is one provision which is slightly different and it deals with the tabling of the accounts and audit before the Parliament (sections 13 and 16(3) res-

pectively). There are three other significantly different provisions of which the first one deals with the application of monies of the fund (sections 6 and 11 respectively). The second one, relates to investments (section 7(1)(c) and 8 respectively). The third one relates to application of the provisions of the Financial Procedure Act (section 15), there is no corresponding provision under the Enactment.

The effect of this omission only sharpens the different purposes for which the trust funds were set up. Whilst the National Trust Fund Act is meant for investment overseas and in other domestic and international market indices, in OECD countries etc the Amanah Rakyat Negeri Sabah Enactment is basically for the public benefit of the people of Sabah.

Consideration of the Enactment in relation to the National Trust Fund Act 1988 above may be, argued ably, as an unnecessary exercise because the latter like the former is yet another Trust Fund. However, it is submitted that the consideration is meaningful, because it points out that there is a federal legislation in more or less similar vein to the State Enactment.

(xxi) Trustee (Incorporation) Act 1952

The Trustee (Incorporation) Act 1952 is an act to provide for the incorporation of the trustees of certain bodies or association of persons. This Act too applies only to West Malaysia.

(xxii) Trustees (Incorporation) Sabah Ordinance No: 5 of 1951 (Cap. 148) and Amendment Ordinance (8/1955)

The preamble to the Trustees (Incorporation) Sabah Ordinance No 5 of 1951 (Cap. 148) and Amendment Ordinance (8/1955) states that it is an Ordinance to facilitate the incorporation of trustees for religious, educational, literary, scientific, social and charitable purposes. Upon the application by trustees to the Governor for a certificate of registration as a corporate body, the Governor may grant such certificate according to section 2 of the Ordinance. The 1990 Enactment under discussion does not make any reference either Trustees of the

Board being incorporated or to the Trustees (Incorporation) Ordinance Cap. 148, but it provides for a corporate identity in section 4(3) of the Enactment. Therefore it is submitted that the trustees under the Ordinance and the Board of Trustees under the Enactment have corporate identities.

(xxiii) Trust Companies Act 1949 in relation to section 3(1)(b) of the Civil Law Act 1956

The Trust Companies Act 1949 came into force in East Malaysia on 1 January 1973. It provides for first, the registration of a public company as a trust company under the Companies Act 1965 and second, the regulation of trust companies in Malaysia. The Fund under the Enactment to some extent resembles a trust company on two points namely investment mentioned in section 8 and Ministerial powers mentioned in sections 13(1)(2) and 21. However the Fund under the Enactment fails, *inter alia*, to fulfil two salient features of a trust company, that is, to provide for registration of a trust company under section 3⁵⁵ and to enumerate the

⁵⁵Section 3 reads:

"Any public company incorporated in Malaysia may apply to the Registrar to be registered as a trust company.

Provided that -

- (a) the objects of the company are restricted to some or all of the objects set out in section 8;
- (b) the authorized capital of the company is not less than five hundred thousand dollars divided into shares of not less than ten dollars each;
- (c) at least one-half of the amount of every share issued by the company remains unpaid and is not liable to be called up, except in the event and for the purpose of the winding-up, or dissolution of the company;
- (d) the board of directors has been duly appointed in accordance with the articles of association of the company;
- (e) at least one hundred and fifty thousand dollars of the authorized capital has been *bona fide* paid up;
- (f) the company has deposited with the Accountant General securities to be approved by the Minister of Finance to the value of one hundred thousand dollars and
- (g) the company is able to meet its obligations, apart from its liability to its shareholders, without taking into account the securities so deposited with the Accountant General.

sixteen activities in section 8(1)(a)-(p) which form the objects of a trust company under the Trust Companies Act 1949. Given the missing elements, perhaps a better view it is submitted would be to conclude that the 1990 Enactment does not create a trust company, but is a public charitable trust founded by the Sabah Legislative Assembly.

At the risk of repetition, it is concluded that as a public charitable trust, the 1990 Enactment will be subject to the law on charities as applicable in East Malaysia, viz. the Trustees (Incorporation) Sabah Ordinance Cap. 148 and Amendment Ordinance 8/1955, the Trustee Act 1949 and the English law as permitted by section 3(1) of the Civil Law Act 1956.⁵⁶

Conclusion

As mentioned earlier, this note is an attempt at classifying the nature and status of the trust created under the Amanah Rakyat Negeri Sabah Enactment 1990. Is it an express private trust, or a trust company or a general charitable trust? Or would the best nomenclature be just "Fund"? It is submitted that the better view would be to construe it as a public charitable trust.

Such a construction has certain advantages too. Charitable trusts need not satisfy the Rule Against Perpetuities. They need not satisfy the trust requirement of certainty of objects. There is income tax exemption of the income of a charitable trust established for charitable purposes only.⁵⁷ It will also be exempted from entertainment duty,⁵⁸ if it could fall within such a purview. Charitable gifts are entitled to other tax privileges, namely estate duty exemption⁵⁹ in some cases.

⁵⁶See footnote 6, *supra*.

⁵⁷See section 127(1)(a) and Schedule 6 Part I paragraph 13 of the Income Tax Act 1967; and also section 127(1)(b) and Schedule 6 Part II of the Income Tax Act.

⁵⁸See section 10(1)(a), Entertainment Duty Act 1953 (Revised 1973).

⁵⁹See section 5(iii) Proviso Estate Duty Enactment 1941. This will still be so with the purported abolition of estate duty for all types of estates - Datuk Seri Anwar Ibrahim, Finance Minister, 1992/93 Budget Speech.

The gift must be made *bona fide* 12 months before the death of the donor or whenever made must have been vested in the possession and enjoyment of the donee to the exclusion of the donor.

Overall, the Enactment though disjointed in nature has a noble objective. A re-arrangement of certain sections would enable a smoother reading of the law. For instance, section 11 which deals with application of the monies of the Fund or more correctly stated as objectives of the trust and beneficiaries of the trust could be read after section 3 which deals with the establishment of the Fund (subject matter). Again sections 9, 10, 12 and 17 of the Enactment which deal with management of the Fund, power of delegation, administration fees (indemnity) and liability of trustee and agent could come one after the other respectively. The powers of the Minister could be coupled instead of being split up between sections 13(1) and 21. Be that as it may, this is a mere cosmetic change. The Enactment is a laudable piece of legislation, albeit its quasi-ambiguous status.

Mary George*

*Lecturer,
Faculty of Law,
University of Malaya.