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Perpetuities and Accumulations Bill [HL]

Bill 145 2008-09

RESEARCH PAPER 09/78 14 October 2009

This briefing on the provisions of the *Perpetuities and Accumulations Bill [HL]* has been prepared for the Second Reading debate on the Bill in the House of Commons.

The Bill is the first to be considered under a new House of Lords procedure for Law Commission bills and would implement, with minor modifications, the recommendations of a 1998 Law Commission report on the rule against perpetuities and the rule against excessive accumulations.

The rule against perpetuities sets a time limit, known as the perpetuity period, within which dealings with property which are to take effect in the future (such as a gift to a child who is not yet born) must occur. The Law Commission report considered that the application of the rule is now too wide: it applies, for example, to many commercial dealings which have nothing to do with the family settlements that the rule was designed to control. Moreover, it found that the existence of multiple methods for calculating the perpetuity period is complex and confusing. The Bill defines the circumstances in which the rule would apply. In general terms, it would only apply to rights under trusts. Other property rights would no longer be subject to the rule. Where the rule does apply, the perpetuity period would be 125 years. This period would generally apply prospectively only.

The rule against excessive accumulations applies where a disposition carries a duty or a power to accumulate income. The rule places restrictions on the period of time during which income may be accumulated. The Law Commission found that there was no longer a sound policy basis for restricting settlors' ability to direct or allow for the accumulation of income, except in the case of charitable trusts. The Bill would therefore abolish the current rule for all non-charitable trusts. Charitable trusts would, however, be subject to a limit of either a 21 year period or the life of the settlor.

John Woodhouse

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ISSN 1368-8456

Contents

Summary **1**

1 Introduction and background **2**

1.1 Law Commission bills 2

1.2 Perpetuities and accumulations 3

2 The Bill **6**

2.1 Progress of the Bill 6

2.2 Comment on procedure 6

2.3 Content of the Bill 7

2.4 Debate in the House of Lords 7

Rule against perpetuities 9

Rule against excessive accumulations 13

Appendix 1: Extract from Ministry of Justice briefing **15**

Summary

The rule against perpetuities and the rule against excessive accumulations are two distinct but closely related legal rules, mostly used in relation to trusts and wills. Both rules concern the extent to which one generation is able to dictate the future use and ownership of property, and restrict the freedom of later generations to deal with property as they please. The rule against perpetuities sets a time limit, known as the perpetuity period, within which future dealings with property must occur. The rule against excessive accumulations applies where a disposition carries a duty or a power to accumulate income. The rule places restrictions on the period of time during which income may be accumulated.

In 1993, the Law Commission published a consultation paper, *The law of trusts: the rules against perpetuities and excessive accumulations*, which considered whether the two rules needed abolishing, reforming, to be left alone or, in the case of the rule against perpetuities, replacing with a new rule. The Commission's final report was published in March 1998 and included a draft bill and explanatory notes. The report considered that the application of the rule against perpetuities is now too wide: it applies, for example, to many commercial dealings which have nothing to do with the family settlements that the rule was designed to control. Moreover, it found that the existence of multiple methods for calculating the perpetuity period is complex and confusing. With regard to the rule against excessive accumulations, the Commission's report found that there was no longer a sound policy basis for restricting settlors' ability to direct or allow for the accumulation of income, except in the case of charitable trusts (a settlor is a person who creates a trust).

The *Perpetuities and Accumulations Bill [HL]* is the first to be considered under a new House of Lords procedure for Law Commission bills and will implement, with minor modifications, the recommendations of the 1998 Law Commission report. The Bill would define the circumstances in which the rule against perpetuities applies. In general terms, it would only apply to rights under trusts. Other property rights would no longer be subject to the rule. Where the rule does apply, the perpetuity period would be 125 years. This period would generally apply prospectively only. The Bill would abolish the current rule against excessive accumulations for all non-charitable trusts. Charitable trusts would, however, be subject to a limit of either a 21 year period or the life of the settlor.

The Bill, together with the new procedure for Law Commission bills, received cross-party support in the House of Lords. However, there was debate on a number of issues, including whether:

- a consolidation Act was necessary for the law relating to perpetuities
- the length of the new perpetuity period was appropriate and why 125 years chosen
- the Bill should generally apply prospectively only
- the rule against excessive accumulations should be abolished for non-charitable trusts
- there should be an alternative accumulation period for charitable trusts of the settlor's life.

In the Special Public Bill Committee, Government amendments were agreed relating to the highly technical area of trusts created under a power of appointment. Amendments were also agreed that would create an alternative period for charitable trusts of the life of the settlor.

1 Introduction and background

The *Perpetuities and Accumulations Bill* is a Law Commission bill and is one of two bills being used to pilot a new procedure in the House of Lords for Law Commission bills.

1.1 Law Commission bills

The Law Commission is an independent statutory body, established by the *Law Commissions Act 1965*, with responsibility for promoting reform of the law in England and Wales.[1] The Commission summarises its aims as follows:

- To ensure that the law is as fair, modern, simple and as cost-effective as possible
- To conduct research and consultations in order to make systematic recommendations for consideration by Parliament
- To codify the law, eliminate anomalies, repeal obsolete and unnecessary enactments and reduce the number of separate statutes[2]

The Law Commission is required to prepare and submit a programme of reform to the Lord Chancellor before commencing any new work: the tenth programme began on 1 April 2008, with the eleventh expected to commence on 1 April 2011.[3]

When the Commission looks at an area of law, the remit is established with the relevant Government department. After a consultation process, the Commission submits a report to the Lord Chancellor and Secretary of State for Justice giving final recommendations. The report often contains a draft bill giving effect to the recommendations, with the draft bill being referred to as a "Law Commission bill".[4]

In February 2008 the House of Lords Procedure Committee published a report on Law Commission bills.[5] The report noted that 54 Law Commission reports with bills had been published since 1991.[6] While most had been implemented, usually by incorporating them into relevant Government bills, eight reports that had been accepted by the Government were still awaiting implementation; another 12 reports had not yet had a Government response.[7] The Leader of the House therefore proposed a new procedure to clear the backlog and reduce possible future delays. The Procedure Committee recommended adoption of the new procedure, which would only be used for bills that were "generally agreed to be uncontroversial".[8] If it became apparent during proceedings (at second reading, for example) that the bill was controversial, the new procedure would be stopped and Government business managers would decide whether to continue with the bill under the normal procedure for public bills.[9]

The Procedure Committee recommended that if its proposals were accepted, there would be a trial period during which two uncontroversial bills would be considered under the new

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1 A Scottish Law Commission was also set up by the 1965 Act for promoting the reform of Scottish Law
2 Law Commission, About us (at 14 October 2009)
3 *Ibid*
4 This is a generic term for draft bills included in Law Commission reports. It should not be confused with the *Law Commission Bill* [HL] 2008-09, a Private Members' Bill currently before the House of Commons
5 House of Lords Procedure Committee, *Law Commission Bills*, 25 February 2008, HL 63 2007-08, (at 14 October 2009)
6 *Ibid*, p3
7 *Ibid*, p3
8 *Ibid*, p3
9 *Ibid*, p3

procedure. The Committee would then report back to the House on whether to make the procedure permanent.[10] A summary of the new procedure was provided by the Committee:

> 6. On introduction, the Bill would be identified as a Law Commission bill in House of Lords Business. This would be done by means of an italic note.
>
> 7. Following first reading, a motion would be tabled, with at least three sitting days' notice, to refer the Bill to a "Second Reading Committee". This would be an innovation for the Lords. It would function like a Grand Committee, with unlimited membership, and would take place in the Moses Room. Any Member could speak and there would be no time limit on the debate. However, as in Grand Committee, there would be no provision for divisions.
>
> 8. The Second Reading Committee would only debate the bill; it would not itself decide on the motion for second reading…the Second Reading Committee would simply report that it had considered the bill, and the motion for second reading would be taken formally in the House at a later date. It would of course be possible, in the event of serious opposition to the bill, for a vote to take place at this stage, as for any other public bill.
>
> 9. Assuming the bill had been given a second reading, the next stage would be a motion to commit the bill. The Companion to the Standing Orders describes Special Public Bill Committees as being particularly suited to Law Commission bills, and we recommend that this existing procedure should become the norm for the committee stage for Law Commission bills.
>
> 10. Special Public Bill Committees are empowered to take written and oral evidence within a 28-day period following their appointment. Having taken evidence, they then consider the bill clause by clause and consider amendments in the usual way.
>
> (…)
>
> 12. Once the Special Public Bill Committee has completed its work the bill is reprinted as amended. Written and oral evidence, and a verbatim report of proceedings, are also published.
>
> 13. The remaining stages, Report and Third Reading, would follow in the usual way, on the floor of the House and on separate days. Subsequent proceedings (for instance consideration of Commons amendments) would also be exactly as for any other public bill.[11]

The House of Lords agreed to the Committee's report on 3 April 2008.[12]

1.2 Perpetuities and accumulations

The rule against perpetuities and the rule against excessive accumulations are two distinct but closely related legal rules, mostly used in relation to trusts and wills. Both rules concern the extent to which one generation is able to dictate the future use and ownership of property, and restrict the freedom of later generations to deal with property as they please. The rules have been summarised by the Law Commission as follows:

- The rule against perpetuities has its origins in the common law. A statutory scheme for the rule was later added to the existing common law system

[10] *Ibid*, p3
[11] *Ibid*, p4
[12] HL Deb 3 April 2008 c1146-8

(currently the statutory provisions are found in the *Perpetuities and Accumulations Act 1964*). The rule sets a time limit (known as the perpetuity period) within which future dealings with property (such as gifts to a particular child, or a group of people who fulfil a particular condition) must occur. Breaching the rule against perpetuities will result in a settlor's wishes being ineffective to a greater or lesser extent.

- The rule against excessive accumulations applies where a disposition carries a duty or a power to accumulate income; that is, to add income to capital, instead of the income being distributed. The rule against excessive accumulations places restrictions on the period of time during which income may be accumulated. The rule has always been a statutory rule. At present, the rule against excessive accumulations is found in section 164 of the *Law of Property Act 1925* and section 13 of the *Perpetuities and Accumulations Act 1964.*[13]

In 1989, the Law Commission proposed examining the two rules as part of its fourth programme of law reform. In 1993, the Commission published a consultation paper, *The law of trusts: the rules against perpetuities and excessive accumulations*,[14] which considered whether the two rules needed abolishing, reforming, to be left alone or, in the case of the rule against perpetuities, replacing with a new rule. The Commission's final report was published in March 1998 and included a draft bill and explanatory notes.[15] A number of problems with the existing rules were identified in the report:

- The application of the rule against perpetuities has developed over time and is now too wide. It applies to many commercial dealings (such as future easements, options and rights of pre-emption) which have nothing to do with the family settlements that the rule was designed to control.

- The application of the rule to pension schemes is not consistent with the policy of the rule. Although there is an exception for most pension schemes from the rule against perpetuities, a small number of pension schemes fell outside of the exemption, and are subject to the rule. The Commission's view was that there was no sound policy basis for this group of pension schemes being subject to the rule against perpetuities.

- The existence of multiple methods for calculating the perpetuity period (which includes the use of lives in being at common law, as well as periods of up to 80 years under the 1964 Act) is unnecessarily complex and confusing. In addition, the use of lives in being gives rise to practical difficulties. For example, where a "royal lives clause" has been used, it may be impossible for the trustees to identify who the last remaining descendants of a monarch are, or indeed whether they are still alive.

- In relation to the rule against excessive accumulations, the Law Commission found that there was no longer a sound policy basis for restricting settlors' ability to direct or allow for the accumulation of income, except in the case of charitable trusts (for which there is a public interest in limiting the time for

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[13] Law Commission website (at 14 October 2009)

[14] Law Com No 133, 1993

[15] Law Commission, *The rules against perpetuities and excessive accumulations*, HC 579 1997-98; Law Commission No 251 (at 14 October 2009)

accumulations, so that income is spent for the public benefit, rather than accumulated indefinitely).[16]

With regard to the rule against perpetuities, the report's main recommendations were that:

- the best way of ending the uncertainty involved in determining the perpetuity period was to impose a single, mandatory perpetuity period, to act as a long-stop for settlors and testators. The perpetuity period would apply irrespective of whatever the instrument creating the estate or interest provided. This would eliminate the uncertainty of calculating perpetuity periods based on the duration of lives in being. It would also reduce the difficulties faced by trustees in administering trust property subject to different perpetuity periods.

- The application of the rule would be confined entirely to the Bill, removing the need to have recourse to the common law in determining whether the rule applies to a particular estate or interest.

- The rule should apply only to future estates and interests in property that are held on trust. The effect of this is that the rule will no longer apply to commercial interests such as future easements, options and rights of pre-emption.

- There should be a clear and comprehensive exemption for all pension schemes.[17]

On the rule against excessive accumulations, the report recommended that:

- the rule against excessive accumulations should be abolished for all non-charitable trusts

- for charitable trusts, a single accumulation period of 21 years should be imposed. The 21-year limit would apply irrespective of whether the settlor was a corporate settlor or an individual[18]

A written Parliamentary reply of 6 March 2001 stated that the Government accepted the recommendations of the report and would "legislate when Parliamentary time allows".[19]

In 2002 the Government consulted on whether the Law Commission's suggested reforms to the rule against excessive accumulations could be implemented by way of regulatory reform order.[20] The consultation also included a proposal to allow the court and Charity Commission to make orders overriding the 21 year maximum accumulation period for charities, and proposed a power for the Charity Commission to make general derogations from the limitation for classes of charities. Although respondents were generally in favour of the proposals, it was concluded that implementing them was "outside the scope of the regulatory reform order procedure."[21]

In 2005-06 the Government conducted a limited consultation on several changes to the Law Commission's draft Bill. This resulted in a number of amendments which, according to the

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16 Law Commission website (at 14 October 2009)
17 *Ibid*
18 *Ibid*
19 HC Deb 6 March 2001 c212W
20 Referred to at p1, Ministry of Justice memorandum to the House of Lords Special Public Bill Committee, *Perpetuities and Accumulations Bill [HL]: evidence and proceedings,* HL Paper 127 2008-09, (at 14 October 2009)
21 *Ibid,* referred to at pp1-2

Ministry of Justice, did not change the fundamental policy of the Bill. The changes are considered in a Ministry of Justice memorandum.[22]

2 The Bill

Following a targeted consultation with key stakeholders in 2008,[23] the *Perpetuities and Accumulations Bill [HL]* was introduced in the House of Lords on 1 April 2009 as Bill 35 of 2008-09. It is the first to be considered under the new procedure for Law Commission Bills and would implement, with "minor modifications",[24] the recommendations of the 1998 Law Commission report. Sir Terence Etherton, then Chairman of the Law Commission, commented:

> I am delighted that the Perpetuities and Accumulations Bill has been introduced in the House of Lords. Reform of this ancient area of law is long overdue, and I am pleased that the Ministry of Justice has taken forward the Law Commission's 1998 Report and draft Bill for legislative implementation. The Bill aims to modernise and simplify the centuries-old rules that prevent property being tied up indefinitely in trusts, and which limit the extent to which trusts can accumulate income. The effects of the Bill will be felt particularly in commercial transactions, which will be freed from the unnecessary complexity added by these rules.[25]

2.1 Progress of the Bill

Under the new procedure, the Bill was considered in Second Reading Committee in the Moses Room on 28 April 2009 and a formal motion for its second reading was agreed on 11 May 2009. The Bill was then considered in Special Public Bill Committee on 20 May and 2, 9 and 30 of June. It then was considered on report on 13 July before having its third reading on 20 July 2009. The Bill was passed to the Commons on 20 July 2009 and is likely to be considered in Second Reading Committee under Standing Order 59.[26] The Bill extends to England and Wales. Further information on the Bill's stages can be found on the Parliamentary website.

2.2 Comment on procedure

Lord Bach, Parliamentary Under-Secretary of State at the Ministry of Justice, introduced the Bill in Second Reading Committee. He commended the new procedure, noting that:

> [the] development of the new procedure was only possible because of the co-operation between all parts of your Lordships' House—the Government, the opposition parties and the Cross Benches—and I hope that we will carry this spirit through our debate, because a new procedure is founded on the principle of consensus.
>
> Few, if any, bodies outside Parliament can claim to have had such an influence on our laws as the Law Commission. It has established an international reputation for excellence of legal research and analysis. However, all too often and for all too long, potential Law Commission Bills have languished unimplemented because parliamentary time could not be found for them. The new procedure is intended to address part of this problem. It is not intended for every Law Commission Bill.

[22] *Ibid*

[23] For details of the consultation see the Ministry of Justice memorandum to the House of Lords Special Public Bill Committee, *Perpetuities and Accumulations Bill [HL]: evidence and proceedings,* HL Paper 127 2008-09

[24] Bill 35-EN, p4 (at 14 October 2009)

[25] "Law Commission welcomes reform of outdated trusts law", *Law Commission press release*, 1 April 2009, (at 14 October 2009)

[26] This states that, subject to certain conditions, any public bill whose main purpose is to give effect to the proposals contained in a Law Commission report, shall be referred to a second reading committee.

> However, it will be suitable for what might be described as unspectacular but worthy law reform; work that will not command headlines on the front page, but without which our laws will become out of date and dislocated from the real world. It is work that this House, if I may say so, seems to me to be especially suited to scrutinise and carry forward.[27]

The new procedure was widely supported by those contributing to the Lords debate. The late Lord Kingsland, the Conservative spokesperson for legal affairs, spoke of the “historic nature” of the second reading.[28] The Conservative peer Lord Hodgson of Astley Abbotts praised the new procedure and “speeding up the modernisation of legislation”.[29] Baroness Deech (Crossbencher) welcomed “the consensus that appears to lie behind the Bill” and noted that it was “a happy occasion to see a new procedure for Law Commission Bills”.[30] Lord Goodhart (Liberal Democrat) said that it would be “very desirable” for such bills to be enacted more swiftly.[31]

2.3 Content of the Bill

The Bill covers a highly technical area of law, as was commented on at various points during the Second Reading Committee. Baroness Deech who, earlier in her career had lectured on perpetuities at Oxford, doubted whether the subject was “widely taught or known”.[32] Lord Bach spoke of his “trepidation”[33] at introducing the content of the Bill, before doing so as follows:

> The overall aim, which is based on the result of extensive consultation, is to modernise, simplify and streamline the rule against perpetuities and the rule against excessive accumulations. Clauses 1 to 12 deal with the reforms to the operation of the rule against perpetuities, and Clauses 13 and 14 deal with the reform of the rule against excessive accumulations. The remaining clauses are ancillary to these substantive reforms.[34]

The Government’s Explanatory Notes published with the Bill provide a detailed explanation of the clauses, as well as practical examples of how the two revised rules would operate. It also includes a glossary of the terms used.[35] A Ministry of Justice memorandum, an extract from which is set out in Appendix 1 to this paper, covers the history of the rules and the intended effects of the Bill.

2.4 Debate in the House of Lords

Lord Bach introduced the Bill as follows, beginning with the rule against perpetuities:

> Clauses 1 and 2 define precisely when the rule is to apply and when it is not to apply. It will apply only in three sets of circumstances: successive interests in trusts or executory bequests, non-successive interests subject to conditions precedent, and rights exercisable on breach of conditions subsequent. If it transpires that the rule still applies where it ought not to do so, Clause 3 provides an order-making power for the Lord Chancellor to specify exceptions. This is subject to the affirmative resolution procedure. Where the rule applies, Clause 2 preserves the present exception for gifts

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27 HL Deb 28 April 2009 c1GC
28 HL Deb 28 April 2009 c14GC
29 HL Deb 28 April 2009 c4GC
30 HL Deb 28 April 2009 c8GC
31 HL Deb 28 April 2009 c13GC
32 HL Deb 28 April 2009 c9GC
33 HL Deb 28 April 2009 c2GC
34 HL Deb 28 April 2009 c2GC
35 Bill 35-EN (at 14 October 2009)

> over from one charity to another and extends the current exception for pension schemes to all personal occupational and public service schemes. By necessary implication from Clause 1, the rule will no longer apply in other cases. Options, rights of pre-emption and future easements currently subject to this rule will cease to be so. This major reform responds to the concerns of the consultees that the rule was unnecessarily complicating commercial transactions.
>
> …Subject to one exception, Clause 5 provides that where the Bill applies, the perpetuity period will be 125 years. This is broadly the maximum likely to be achieved under the present law and present life expectancies…
>
> Clause 6 defines when the period will start…
>
> The Bill is in general only prospective and will not, subject to one beneficial exception, affect the terms of existing trusts or wills. The exception is that where the trustees of a pre-commencement trust believe that it is difficult or not reasonably practicable to calculate whether a perpetuity period defined by reference to "lives in being" has ended, they can opt in to a fixed period under the Bill of 100 years.
>
> The remaining clauses applying to perpetuities broadly replicate instruments to which the Bill applies the effect of the "wait and see" and class-closing reforms effected by the Perpetuities and Accumulations Act 1964, an Act that, if I may mention in passing, was built upon the work of the Law Reform Committee in 1956.[36]

Lord Bach then set out the provisions relating to the rule against excessive accumulations:

> Broadly speaking, accumulation is the rolling up of trust income into capital. This rule, originating in a statute enacted at the turn of the 19th century in respect of the Thellusson case of 1799, limits how long income can be added to capital, rather than being distributed to beneficiaries. Currently, six alternative statutory periods can apply. The rule applies to trusts created by natural persons, but not trusts set up by corporations.
>
> The Law Commission found that for most cases the rationale for the rule had disappeared and recommended that the current rule be abolished for all but charitable trusts. Charitable trustees are under a duty to distribute funds to provide for the charitable purposes for which the trust was established. The Bill therefore repeals the present rules but retains a statutory accumulation period of 21 years for property held on trust for charitable purposes. This period will however not apply where the court or the Charity Commission under their existing powers have made specific provision for a charity.
>
> As in the case of the reforms to the rule against perpetuities, these reforms will apply only to instruments taking effect after the Bill comes into force unless the instrument is a will made before that date and taking effect after it. In that case, the present law will apply.[37]

The debate in the House of Lords focused on a number of issues, including those outlined below. More detailed discussion can be found in the report of the Special Public Bill Committee.[38]

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[36] HL Deb 28 April 2009 c2-3GC

[37] HL Deb 28 April 2009 c3-4GC

[38] House of Lords Special Public Bill Committee, *Perpetuities and Accumulations Bill [HL]: evidence and proceedings,* HL Paper 127 2008-09 (at 14 October 2009)

Rule against perpetuities

The complexity of having different regimes and whether a consolidation Act is necessary

In Second Reading Committee Baroness Deech commented that:

> Clause 1(1) is misleading…this clause suggests that the Bill contains the entire law of perpetuities. Only when they get to Clause 15 does the reader realise that the provisions apply prospectively, although including wills already made where the death occurs after commencement. The net effect of this prospective element is that the Law of Property Act 1925 and the Perpetuities and Accumulations Act 1964 will still be needed for about 100 years to come. This law, complicated as it is, is having yet another layer added to it, possibly needlessly, and it should be made plain at the outset that this is what is happening[39]

She considered that "some consolidation might be a good idea".[40] Lord Bach replied to Baroness Deech in a letter dated 4 May 2009.[41] He acknowledged that "having three possible legal regimes in force appears complicated, but it will be relatively simple to decide whether the new regime applies and practitioners appear to have coped with the present alternatives".[42] However, Baroness Deech repeated her concerns in the Special Public Bill Committee on 2 June 2009, claiming that after the Bill was passed, the rule "will neither be simplified nor modernised nor streamlined".[43]

Later, at Report stage, Lord Hodgson of Astley Abbotts placed on record his "disappointment" that "we will now have three different sets of legislation applying to perpetuities and accumulations…It is a great shame that the Government have not taken the chance to consolidate all this legislation into one statute".[44] As a result of Lord Hodgson's comments, Lord Bach said he would be asking the Law Commission to consider the desirability of consolidation in the "very near future".[45]

Should the rule be abolished?

Baroness Deech admitted in Second Reading Committee that her first "preference" would have been abolition of the rule against perpetuities.[46] She discussed the "rationale" for keeping the rule, observing that:

> We simply do not know what the economic effect of the law was or will be…The rule does not exist in Scotland to any extent, or indeed in several jurisdictions, with no ill-effects reported…The only justification for the rule is the so-called "dead hand rationale", in other words: stop the dead hand of the long-since dead testator reaching out into the future. That rationale is several hundred years old with, as I have said, no research behind it.[47]

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[39] HL Deb 28 April 2009 c8-9GC

[40] HL Deb 28 April 2009 c9GC

[41] HC Library Deposited Paper DEP2009-1283 (at 14 October 2009)

[42] *Ibid*

[43] p16-7, House of Lords Special Public Bill Committee, *Perpetuities and Accumulations Bill [HL]: evidence and proceedings,* HL Paper 127 2008-009 (at 14 October 2009)

[44] HL Deb 13 July 2009 c939-40

[45] Letter dated 16 July 2009 from Lord Bach to Lord Etherton, then Chair of the Law Commission, HC Library Deposited Paper DEP2009-2074 (at 14 October 2009)

[46] HL Deb 28 April 2009 c12GC

[47] HL Deb 28 April 2009 c11GC

She continued:

> The dead hand rationale has been undermined by tax law and by a testator's perception of the need to shed conditions and rearrange gifts every now and then when new tax laws are passed...The Bill, in effect, keeps a troublesome law while at the same time effectively removing its constraints because 125 years is such a long time.[48]

Lord Goodhart, however, disagreed with Baroness Deech:

> I think it is desirable that there should be a limit on the time during which any owner of property can direct what happens to that property through creating a trust. If somebody wishes to set up a trust for a young, seriously disabled child who will never be able to manage his or her own affairs, and who might have a long life, that might suggest a maximum period of something like 100 years, given that a large number of people now live into their 90s.[49]

In a letter dated 18 June 2009 to Lord Lloyd of Berwick (Crossbencher), the chairman of the Special Public Bill Committee, Lord Bach reiterated that the Government believed that reform of the rule, rather than abolition, was preferable:

> The Government remains of the view that abolition of the rule [against perpetuities] would be a radical reform that does not command a consensus of support. The Bill is a moderate, but beneficial, reform that preserves the rule's function as a "long-stop" for trusts, while reducing the complexities of its future application.[50]

Length of the new period: why was 125 years chosen?

Clause 5 of the Bill would provide for a fixed perpetuity period of 125 years. The choice of this time period was explained by Lord Etherton, then Chairman of the Law Commission, in a memorandum to the Special Public Bill Committee:

> The length of this period has been the subject of some discussion, both recently and during the 1993 consultation. In particular, it has been suggested that the period is too long, especially when compared with the 80-year period provided for in the Perpetuities and Accumulations Act 1964 ("the 1964 Act"). The Law Commission gave considerable thought to this issue. It took into account the support from consultees for a 100-year perpetuity period, and also analysed what the maximum length of a life in being plus 21 years could be (that being the common law formulation which remained optional under the 1964 Act).
>
> 1.7 The Commission concluded that 125 years was the most appropriate period, having regard to the variety of human circumstances and increasing longevity. It also noted that the mandatory 125-year perpetuity period would simply be an upper limit for vesting; it would be entirely possible for settlors to create a trust instrument which would terminate at an earlier stage. The recommendation of a 125-year perpetuity period was also intended to acknowledge the views of consultees who favoured outright abolition of the rule. Clause 5 therefore achieves a balance between that view, and the preference of the majority of consultees for reform of the rule.[51]

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[48] HL Deb 28 April 2009 c11GC
[49] HL Deb 28 April 2009 c13GC
[50] p13-4, House of Lords Special Public Bill Committee, *Perpetuities and Accumulations Bill [HL]: evidence and proceedings,* HL Paper 127 2008-09 (at 14 October 2009)
[51] *Ibid*, p3

In a letter to Baroness Deech, Lord Bach supported the Law Commission's choice of 125 years:

> Life expectancy is increasing and I would not wish a trust to expire during the life of a particularly long-lived beneficiary. The Law Commission chose 125 years as it represented the outer limits of what was currently available with a little ingenuity and good fortune under the present 'lives in being' system. On this basis, the new period seems to me a reasonable solution.[52]

However some peers questioned the choice of 125 years. Lord Archer of Sandwell (Labour), for example, asked "what is the magic of 125 years?"[53] Lord Goodhart felt that the period was "too long", arguing that if "such a rule had been in force in the past, it would mean that a trust set up in 1885 could still be in effect for a few more months. That seems to me pretty absurd."[54] However Lord Goodhart later conceded that he had "been persuaded by the arguments for having it [the perpetuity period] as 125 years rather than 100 years".[55] Lord Millett (Crossbencher) was another who believed that 125 years was "too long" and questioned the Law Commission's methodology in arriving at the figure.[56]

Should the Bill operate only prospectively?

When introducing the Bill, Lord Bach noted that it would in general only apply prospectively and would not affect the terms of existing trusts or wills. In this context, the Explanatory Notes explain that the "general rule for wills is that the Bill will apply to wills only if they are both executed and take effect after the Bill comes into force.[57] The one exception would be where "the trustees of a pre-commencement trust believe that it is difficult or not reasonably practicable to calculate whether a perpetuity period defined by reference to "lives in being" has ended".[58] In such circumstances, the trustee will be able to "opt in to a fixed period under the Bill of 100 years."[59]

In a memorandum to the Special Public Bill Committee, Lord Etherton explained that the Law Commission had considered whether any changes should be retrospective, noting that:

> No consultee favoured a completely retrospective approach. The Law Commission concluded that it would not be feasible to extend the application of the Bill to arrangements that had been put in place on the basis of the law in force at the time.[60]

Lord Kingsland later asked Lord Etherton about why the measures were mainly prospective.[61] Lord Etherton admitted that there were "some voices"[62] for retrospectivity but argued that:

> when one is disturbing existing property interests which have been created on the basis of the existing law and advice given, then for the sake of the legislation as a

[52] p2, HC Library Deposited Paper DEP2009-1283 (at 14 October 2009)
[53] p19, House of Lords Special Public Bill Committee, *Perpetuities and Accumulations Bill [HL]: evidence and proceedings,* HL Paper 127 2008-09 (at 14 October 2009)
[54] HL Deb 28 April 2009 c13GC
[55] p26, House of Lords Special Public Bill Committee, *Perpetuities and Accumulations Bill [HL]: evidence and proceedings,* HL Paper 127 2008-09 (at 14 October 2009)
[56] *Ibid*, p42-3
[57] Bill 35-EN, pp5-6 (at 14 October 2009)
[58] HL Debate 28 April 2009 c3GC
[59] *Ibid*
[60] p3, House of Lords Special Public Bill Committee, *Perpetuities and Accumulations Bill [HL]: evidence and proceedings,* HL Paper 127 2008-09 (at 14 October 2009)
[61] *Ibid*, p8
[62] *Ibid*, p9

> whole my view would be the correct decision was reached in this case. Indeed, if I may say so, if one was going to make it retrospective, it would be highly dangerous to do so without very detailed and further consultation on that point, because there are all manner of interests one might be affecting of which one is unaware.[63]

Charles Harpum, a former Law Commissioner, submitted a memorandum to the Special Public Bill Committee.[64] This touched on the prospective nature of the Bill's proposals and warned about the effect of any retrospective legislation:

> [It] could lead to the divesting of contingent and possibly even vested proprietary interests, which would in all probability fall foul of Article 1 of the First Protocol of the European Convention on Human Rights as that has been interpreted by the Court of Human Rights. Somebody would be bound to challenge the changes in the law.[65]

He concluded:

> The fact that the Bill will be largely prospective should in most cases cause little difficulty in practice. The practitioner will need to know that the legislation applies to an instrument taking effect on after the commencement date. However, from that date, the law will be infinitely easier for him or her to understand and apply.[66]

Trusts created under a power of appointment

There was some highly technical discussion of the implications of clause 5(2) of the Bill.

Edward Nugee QC argued that "it is wrong that you should alter the powers under an existing settlement in a way which could…deprive people of income to which they are currently entitled".[67]

In the Special Public Bill Committee of 30 June 2009, Lord Bach moved amendments relating to the application of the Bill. He noted that the Committee had "received evidence of the highest quality from several leading lawyers on this topic"[68] and explained the amendments:

> The provisions of the Bill as originally drafted would have applied to an instrument created by the exercise of a special power of appointment even if the power was created pre-commencement. These amendments will exclude such instruments from the application of the Bill. This will mean that the law that applies to the master trust will continue to apply the exercise of the special power.[69]

Lord Goodhart noted that there were counter-arguments to the proposed amendments, but that he would not pursue them as he wanted the Bill as a whole to proceed.[70] Lord Kingsland thanked the Government for amending the Bill to incorporate the "Nugee principle".[71]

The amendments were agreed without division.

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63 *Ibid*, p9
64 *Ibid*, pp31-5
65 *Ibid*, p35
66 *Ibid*, p35
67 *Ibid*, p29
68 *Ibid*, p75
69 *Ibid*, p74
70 *Ibid*, p75
71 *Ibid*, p75. The "Nugee principle" being the principle of keeping existing powers of appointment subject to the present law even when exercised after the Bill comes into force

Rule against excessive accumulations

Should the rule be abolished completely for non-charitable trusts?

There was some debate about whether the rule against excessive accumulations should be completely abolished for non-charitable trusts. Lord Goodhart, for example, argued that the accumulation of income throughout a trust period should be allowed "but only as a power for the trustees to implement, not as an obligation imposed on them by the settlor or the testator. From time to time it may be in the interests of the beneficiaries that the income be accumulated rather than distributed, but that should never be unavoidable".[72]

Lord Bach acknowledged, in a letter of 4 May, that the abolition of the rule would permit an eccentric settlement similar to that created by Peter Thelluson[73] in the eighteenth century.[74] However he argued that "social and economic conditions, including taxation, have changed considerably in the intervening years and militate against the attractiveness of such a settlement".[75] Lord Bach continued:

> prohibiting duties to accumulate would run counter to the wishes of settlors and would extend the subject matter of the Bill to new areas on which we have not properly consulted. The Law Commission carefully examined the reasons for retaining a rule against against excessive accumulations and found them wanting except for charities.[76]

There was further discussion of this issue in the Special Public Bill Committee.[77]

Should there be an alternative accumulation period for charitable trusts of the settlor's life?[78]

In Second Reading Committee, Lord Hodgson of Astley Abbotts expressed his concern "about the default provision of 21 years for charitable trusts"[79] and its "bureaucratic" and inflexible nature.[80] Lord Kingsland also had "hesitations" about this part of the Bill and wondered whether it would "have been wiser to permit, as an alternative to 21 years, the life of the settlor."[81] He continued:

> Given the important role that charitable grants play in our society, I should have thought that we ought to give as much encouragement to settlors as possible.[82]

In a memorandum to the Special Public Bill Committee, Lord Etherton, then Chairman of the Law Commission, explained the thinking behind the Bill's proposal:

> The Commission acknowledged the importance of charities being able to accumulate income for a period of time; for example, to save up for worthwhile projects, or to build up a small initial endowment.[83]

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72 HL Deb 28 April 2009 c13-4GC

73 The rule against excessive accumulations came about in response to the case of *Thellusson v Woodford* (1799) 4 Ves 227 in which a wealthy banker directed his substantial assets to be accumulated in a trust for a period that was potentially very long

74 HC Library Deposited Paper DEP2009-1285 (at 14 October 2009)

75 *Ibid*

76 *Ibid*

77 See, for example, pp12-3, p39, House of Lords Special Public Bill Committee, *Perpetuities and Accumulations Bill [HL]: evidence and proceedings,* HL Paper 127 2008-09 (at 14 October 2009)

78 A settlor is a person who creates a trust

79 HL Deb 28 April 2009 c6GC

80 *Ibid*, c7GC

81 *Ibid*, c18GC

82 *Ibid*, c18GC

He continued:

> However, the Commission also noted that special privileges are afforded to charities, particularly in regard to taxation law, because of the fundamental importance of charitable work to society at large. The Commission's view was that in light of the nature of charitable work—that is, work undertaken for the public benefit—it was appropriate to set as a base line a 21-year accumulation period.
>
> In this way, a balance is achieved between the needs of charities to build up funds from time to time, and the importance of charitable funds being put to use for the public benefit. It is also important to remember that the administrative retention of income (for example, building up a long-term fund to meet future building maintenance and repair needs) is not considered to be accumulation. The Bill also provides that the restriction on accumulation will not apply if the Charity Commission or the court has previously made provision for accumulation by the charity (clause 14(2)).[84]

Lord Bach, in evidence to the Special Public Bill Committee, commented on Lord Kingsland's proposal that the "life of the settlor" should be allowed as an alternative maximum accumulation period for charities:

> We look forward to discussing that suggestion. It does not immediately attract us. Two alternative periods would, of course, still be an improvement on the present six, but the length of a settlor's life is inherently uncertain and including it, we feel, would go against the general thrust of the Bill which is to remove measurements by lives. Specifying a standard period will give charitable trustees certainty. This will assist them in managing the affairs of the charity efficiently and we do not think will discourage charitable giving.[85]

However, Lord Bach later conceded that the "life of the settlor" proposal could be "readily accommodated" in the Bill. In a letter of 18 June 2009 to the Committee's chairman, Lord Lloyd of Berwick, he wrote:

> Lord Kingsland and Lord Hodgson have suggested that the "life of the settlor" should be provided as an alternative period for the accumulation of income by charitable trusts…We have consulted the Charity Commission and do not consider that the circumstances in which a lifetime power of accumulation would be appropriate are so widespread that they could not be readily accommodated within the approach taken by the Bill.[86]

The Government later moved amendments which would allow an alternative accumulation period. Lord Bach explained that the amendments would "provide that a settlor can choose an accumulation period that ends upon the death of the settlor, or one of the settlors. This settlor can be a named settlor, or a settlor chosen by the order of their death".[87]

The amendments were agreed without division.

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83 p4, House of Lords Special Public Bill Committee, *Perpetuities and Accumulations Bill [HL]: evidence and proceedings,* HL Paper 127 2008-009 (at 14 October 2009)

84 *Ibid*, p4

85 *Ibid*, p5

86 *Ibid*, p14

87 *Ibid*, p76

Appendix 1: Extract from Ministry of Justice briefing

The rule against perpetuities

The rule against perpetuities is a common law principle, which was originally developed at the end of the 17th century to prevent property being tied up indefinitely in trusts. The perpetuity period is, in effect, an overall time limit within which any direction by a settlor of a trust or will must take effect. If there were no legal limits, a settlor could control property for many years, long after they had died. This is termed 'dead-hand control', and is ultimately against the interests of the beneficiaries of the trust, who would otherwise be able to use the property without restriction. To prevent this kind of control, the rule against perpetuities sets a limit within which trust property must pass to the beneficiaries. The limit is a 'life in being' (someone alive at the time the trust is created, who is identified as the relevant life by the terms of the trust) plus 21 years, or a fixed period of up to 80 years, depending on the circumstances.

The function of the perpetuity period is to strike a balance between the interests of the present generation to dispose of property as they see fit, and the interests of future generations to make best use of property in contemporary circumstances.

The effect of the rule was that a future interest in any type of property would be void if, at the date of the instrument creating it, there were any possibility that the interest might vest, or take effect, outside the perpetuity period.

The application of this common law rule, which still applies to dispositions made before 16 July 1964, can be demonstrated by an example. In 1963 a living settlor made a gift of property to his unmarried son by creating a trust. The terms of the trust are that the property is to be held on trust for X for his lifetime, then to X's eldest child at the age of 21. X is unmarried with no existing children. The trust instrument states the settlor's life is the specified 'life in being'. X's life interest is vested because he is immediately entitled to the property. This is not subject to the rule. X's [eldest child's] interest however is not vested because he or she does not currently exist. It is therefore subject to the rule, but it is not known whether this gift can take effect within the perpetuity period. Under the common law rule the trust will be void if there is a possibility that the child's interest will not vest within 21 years of the death of the settlor who is the relevant life in being.

Applying this test, the interest of X's eldest child is void. The reason for this is that it is possible that X may not have any children that qualify for the gift within 21 years of the settlor's death. It does not matter if X actually does have a child that turn 21 before the end of the perpetuity period expires, only that he may not. The result would be that the trust property would belong to X absolutely, because the subsequent interest fails.

The Perpetuities and Accumulations Act 1964 ("the 1964 Act"), which came into force on 16 July 1964, modified the operation of the common law rule. The 1964 Act made several fundamental reforms. First, it allowed settlors to specify a fixed perpetuity period of up to 80 years instead of having to rely on the common law period. This simplifies the calculation of the period. Second, it introduced a number of measures to save gifts from being rendered void by the harsh effects of the common law rule. These measures included a 'wait and see' rule, a 'class closing' rule, and provisions to save subsequent interests.

The 'wait and see' provisions allow the decision as to whether a disposition is void to be delayed until it is established that the property will indeed vest outside of the perpetuity period. The class closing provision allows members of a class who are to receive a gift to be excluded if their inclusion would invalidate the gift. If, for example,

a testator makes a gift 'to all of my grandchildren' any grandchildren not yet born within the perpetuity period will be excluded from benefiting from the disposition, but the gift to those born within it are saved. The saving provisions also allow an interest following after an interest that will be void for remoteness to not fail merely because of the failure of the preceding interest. To illustrate, in a disposition 'to A, then to B, then to C' if B's interest is found to be too remote C's interest does not automatically also fail.

Problems with the existing law

The law applicable to the rule is needlessly complicated. In a number of situations it is uncertain whether or how it applies. The rule itself was originally devised to deal with interests arising under wills and family settlements, but now applies to many other types of property transactions, such as options to purchase land and agreements to grant future easements, where justification for its use is absent. Its application creates difficulties in commercial property transactions. Overall, the rules are considered to have become increasingly cumbersome, restrictive and outdated.

Effect of the Bill

The Bill makes two major reforms to the operation of the rule, as well as maintaining some of the reforms brought in by the 1964 Act. First, the Bill restricts the scope of application of the rule. The proposals in the Bill would limit the effect of the rule to circumstances where it is justifiable. This will allow more effective use of land and introduce greater flexibility in dealing with property and drafting trusts, and make the law in this area simpler and therefore a lot easier to understand. Secondly, there will generally be one fixed perpetuity period of 125 years rather than the numerous alternatives that exist at the present time.

The Bill will apply to estates and interests created by instruments taking effect after the Bill comes into force. It will not disturb existing trusts.

The rule against excessive accumulations

A settlor may direct trustees to accumulate income generated by trust property. This is when, instead of immediately paying the income to an income beneficiary, the income is converted to capital. The effect is to build up a larger fund for the ultimate benefit of those beneficiaries that the settlor directs should be entitled to the capital in the future.

The rule against excessive accumulations is a statutory rule that restricts the period during which income may be accumulated. It came about in response to the case of *Thellusson v Woodford* in 1799—in which a wealthy banker directed his substantial assets to be accumulated in a trust for a period that was potentially very long.

The current rule against excessive accumulations, which does not apply to corporate settlors, is set out in section 164 of the Law of Property Act 1925 and section 13 of the Perpetuities and Accumulations Act 1964. These sections permit a settlor to select one of six specified periods after which an accumulation of income must cease. The most common period is 21 years, though one period is 'the life of the settlor' which can be somewhat longer.

Problems with the existing law

The rule is excessively complex and no longer serves a useful purpose when it applies in relation to non-charitable trusts.

Effect of the Bill

This rule is no longer necessary in the modern global economic context, and only operates to fetter the ability of people to manage their financial affairs effectively. The Bill therefore abolishes the rule against excessive accumulations, except in the case of charitable trusts, which are under a duty to dispense their funds for the public benefit.

For charitable trusts a settlor will be able to choose a period of the remainder his or her life. Otherwise a 21 year statutory limitation will be applied. This is subject to orders made by the Charity Commission and the courts allowing a longer period.

The accumulation provisions of the Bill only apply to instruments taking effect after the Bill comes into force. Existing trusts are not affected.

Ministry of Justice

September 2009[88]

[88] Ministry of Justice briefing for the House of Commons, September 2009