Investment – the new law

The Trustee Act 2000 was passed on 23 November, and is likely to come into force on 1 February 2001. It repeals the Trustee Investments Act in England & Wales, and creates new and less bureaucratic powers for trustees. It imposes some conditions and precautions, but should broadly make trusts much easier to manage. Nigel Siederer explains.

A duty of care

The Trustee Act creates a general duty for trustees to exercise reasonable care and skill in these main areas:

- investment;
- acquiring land;
- employing an agent, nominee or custodian;
- holding funds, paying debts, and giving security;
- setting the value at which trust property is sold;
- insuring trust property.

A person acting professionally as a trustee must use the level of skill that would normally be expected of such a person. This might apply not just to a solicitor or accountant who becomes a trustee professionally, but also to a business person who is appointed as a trustee of their company's trust or is seconded as a trustee to an outside voluntary organisation.

Investment powers and duties

Trustees may make any kind of investment that they could make if the trust funds were their own, except for land outside the UK, settled land, and university land. Trustees must:

- review investments from time to time, both on their merits and for their suitability to the trust concerned;
- normally obtain and consider proper advice when reviewing, ie from a person that they reasonably believe to be qualified to give it through ability and experience in relevant financial and other matters;
- consider whether there is a need to diversify investments, taking into account the trust's circumstances.

These powers and duties apply to all trusts, whenever created. They replace and extend powers given by the Trustee Investments Act 1961, and normally extend the powers given in a trust's own deed (though not overriding specific exclusions in deeds created since mid-1961). The powers and duties rest on each trustee rather than on the trustees collectively, though a trustee may judge that the other trustees are qualified to give advice, and of course cannot be blamed if overruled by majority decision.

Trustee Investments Act

The familiar parts of the Trustee Investments Act 1961 are swept away: the requirement to divide funds into broad and narrow range, the lists of permitted investments, and the restriction on investing in shares to companies with a 5-year dividend record. A warning however to trusts in Scotland and Northern Ireland: the new Act does not apply to you, and the TIA is still in force. A draft law has been prepared for Scotland and awaits attention from the Scottish Parliament.

Delegating trust functions
A trust can delegate many functions to an agent:

- carrying out trustees' decisions;
- all investment functions – but see below;
- managing, acquiring or disposing of investment land;
- fund-raising (except through a profit-making business that is an integral part of the trust's work).

Any delegated authority must include all restrictions on the trustees' own power, except that a manager who is qualified to advise the trustees does not need him/herself to seek advice. The trustees can delegate to one or more of their own number, but not to a beneficiary (even if the beneficiary is a trustee), nor to anyone else who might have a conflict of interest. The delegated authority may not normally be further passed on, nor may the trustees normally limit the liability of the person to whom they delegate. An agent, including an investment manager, may be paid reasonable remuneration and reimbursed for properly incurred expenses.

Delegating investment management
In order to delegate investment management functions (which include management of investment land, and acquisition or disposal of property or interests in property), the trustees must:

- have prepared a written policy statement that gives guidance as to how the investment management functions are to be exercised in the best interests of the trust;
- have a written agreement with the investment manager which requires compliance with the policy statement and any revision or replacement of it;
- keep the arrangements and their operation under review and intervene if necessary by revising the policy statement, or by giving instructions to or replacing the manager.

A trust that uses an investment manager *must* have a written policy statement and agreement. This applies even where the policy is very simple, for example to say that the trustees have decided after due consideration and advice that all their funds should be invested in common investment funds. The agreement that gives authority for the manager to invest in accordance with the policy must be signed by both parties. *If trustees have not already put such a statement and agreement in place, they will need to do so before the Act comes into force on 1 February 2001.*
Provided they fulfil all these conditions, the trustees can delegate without being liable for losses that may be incurred by the manager. However, the agreement with the manager will not be invalid even if the Trustee Act conditions have not been met.

Nominees and custodians
The new Act – with some refinement - restores the law to the state it was assumed to have been in all along, until the Charity Commission discovered (c. 1993) that there had been no general authority for trusts to employ nominees and custodians (though many individual deeds did contain these powers). The Act fills the gap. A trust may appoint nominees to hold its property (including their investment assets other than land), and may vest all property in a custodian. Bearer bonds etc *must* be placed with a custodian or custodian trustee. Any appointee must be a person or body that carries on a business of acting as nominee or

custodian. The same appointee can also be the investment manager. The appointment for each function must be in writing (except that a written agreement is not required with the Official Custodian for Charities). As with investment managers, the appointment cannot normally be further delegated, nor can the liability of the nominee or custodian to the trustees normally be limited; however, negligence would normally be covered by the nominee/custodian's insurance, and confirmation of this is a wise precaution in an agreement. The authority to act must be kept under review and changed where necessary, and the trustees must be sufficiently aware of the possible need to intervene directly

Paying fees to trustees

Very few trusts have a power in their deed to pay trustees, and the Charity Commission will only agree to create such a power in exceptional circumstances. A small minority of trusts have been created with such a power in their original deed. This section of the Act regulates the arrangements for payment of a trustee who is appointed in their professional capacity. Such a trustee can be paid, provided that the deed authorises it and a majority of the other trustees agree, even if their services could have been provided by a lay trustee. The terms are to be set out in regulations that have yet to be issued.

Reimbursing trustees' expenses

The Act creates a general power to reimburse trustees for expenses properly incurred on a trust's behalf, without the need for an authorising clause in the deed.

Insuring a trust

The Act creates another general power:- for trustees to insure a trust's property. Note that this is *not* a power for trustees to insure themselves against wrongful acts and omissions ('trustee liability' insurance), which *does* require specific authorisation in the deed. Nor does it cover insurance for liability to employees and other third parties, though *these* powers can normally be inferred from a general power to manage a trust's affairs.

The above summary covers the main provisions of the Trustee Act 2000. Though produced in good faith, it is not a complete statement of the law, and trustees may need to obtain advice about how the law applies in their particular circumstances. The Trustee Act 2000 is available from the Stationery Office, ……

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