

The Trustee Act 2000

Introduction

The Trustee Act 2000 (the Act) came into force on 1 February 2001 and as a general rule applies to all trusts irrespective of when they were created. The Act imposes positive obligations on trustees to reflect modern practice, and provides a set of default powers that apply to trusts unless the trust document specifies differently by exclusion, modification or extension.

Provisions of the Act

The Act is arranged into 6 parts which cover the following ground:

- 1 the statutory duty of care;
- 2 trustees' powers of investment;
- 3 power to acquire land;
- 4 use and appointment of agents, custodians and nominees;
- 5 remuneration of trustees and agents;
- 6 miscellaneous and supplementary matters.

Statutory Duty of Care

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

The Act specifies the circumstances in which the duty will apply to trustees which include:

- 1 when exercising a power of investment or reviewing an investment policy;
- 2 when acquiring or managing land;
- 3 when appointing or reviewing the appointment of an agent, nominee, or custodian; and
- 4 when insuring trust property.

The duty of care can be expressly excluded in a trust instrument.

Powers of Investment

The Act creates a general power of investment which enables the trustees to make any kind of investment that they could make if they were absolutely entitled to the assets of the trust.

This general power of investment is a default power, in addition to any other powers conferred on trustees, but subject to any restrictions or exclusions expressly imposed by the trust instrument. It permits all trustees to invest in assets which may be expected to produce either an income or capital return in accordance with the investment strategy of the trust. The only investments which are denied to trustees are those whose terms of issue confine them to private individuals, for example Individual Savings Accounts.

A number of safeguards exist in the Act to ensure that this general power of investment is exercised responsibly. Firstly, trustees remain subject to their fundamental duties to act in the best interests of present

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and future beneficiaries and to avoid any conflict between their duties as trustees and their personal interests. Secondly, the trustees are exposed to the statutory duty of care (unless expressly excluded). Thirdly, trustees are required to have regard to the standard investment criteria.

The standard investment criteria are defined in terms of the suitability of the investment for the trust in question, and the need for diversification of investment which is appropriate to the circumstances of the trust. In addition, trustees must keep investments under regular review. The need to review investments may create difficulties in the case of long-established trusts which have not in the past been subject to proper review. Accumulated Capital Gains Tax liabilities may inhibit the trustees from exercising their wider investment powers to conduct a wholesale re-organisation of a neglected trust portfolio.

The Act requires trustees to obtain and consider proper advice when considering an exercise of the power of investment or carrying out a review of the investments of the trust. The advice should take account of the standard investment criteria. This potentially covers all investments, including National Savings. An exception is permitted however, if the trustees reasonably consider it unnecessary to seek advice e.g. where they themselves possess the relevant investment skills. As a matter of good practice, trustees should ensure that any advice is confirmed in writing.

Acquisition of Land

The Act confers a general power for trustees to acquire freehold or leasehold land as an investment, for occupation by beneficiaries or for any other reason. The

power is limited to land in the UK and confers on trustees all the powers of an absolute owner to manage the land.

The Act does seem to be limited to the acquisition of a legal estate in land and consequently, in the absence of an express power allowing them to do so, trustees will not be able to invest in a beneficial share of freehold or leasehold property.

The trustees must still consider whether it is appropriate to buy land, and this power can be excluded in the trust document. Interestingly, trustees are not given an express duty to take proper advice when buying land, unless they are acquiring it as an investment.

Agents, nominees and custodians

The Act provides a framework for collective delegation by trustees of their powers, in default of an express power to do so in the trust instrument. Delegation by individual trustees is governed by the Trustee Delegation Act 1999.

Trustees (other than trustees of charitable trusts) can delegate their functions to an agent. The Act encourages trustees to review their allocation of administrative and management responsibilities and consider which of these might be delegated to outside agents. Where trustees delegate their asset management functions, there must be an agreement between the trustees and the agent in writing or evidenced in writing. In addition, the agent must comply with a written statement produced by the trustees setting out the objectives of the trust to give guidance to the agent as to how his functions are to be exercised. Trustees are under a duty to review any

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appointment. The only functions which cannot be delegated are listed in the Act as:

- 1 a function relating to the distribution of trust assets;
- 2 a power to allocate fees or other payments to capital or income;
- 3 a power to appoint a trustee; and
- 4 a power conferred by the instrument or by law permitting the trustees to delegate any of their functions or to appoint a nominee or custodian.

Trustees may not appoint an agent on terms that allow the agent to restrict his liability, or if there is a conflict of interest. An agent will be subject to any restrictions contained in the trust but is not subject to the statutory duty of care. The agent will owe a duty of care to the trustees under general law. The trustees will not be liable for the acts of agents provided the trustees have exercised their statutory duty of care in appointing the agents and when reviewing the appointment.

Trustees may not delegate to a beneficiary. This restriction, however, will not apply if it is reasonably necessary to delegate.

The Act also allows trustees to appoint professional nominees and custodians to hold trust assets, allowing trusts to take full advantage of modern investment practices. Such appointments must be in writing. The persons who can be appointed include a solicitor's nominee company and a body corporate controlled by the trustees.

Remuneration of Trustees

Subject to the express terms of the trust document, the Act provides that a trustee who acts in a professional capacity can receive reasonable remuneration out of the trust funds for any services that he provides to the trust. Before this can take effect:

- 1 there must be at least two trustees;
- 2 the other trustees must agree in writing;
- 3 the trustee to be remunerated must act in the course of a business or profession which includes the provision of services in connection with the management or administration of trusts, and the services provided by the trustee must fall within these parameters; and
- 4 the remuneration must be reasonable.

This applies where the trust document fails to make suitable provision.

Miscellaneous

The Act allows trustees to insure against all risks and the power covers all assets including chattels. The statutory duty of care will apply to trustees when selecting the terms of insurance. The insurance premiums can be taken out of the trust fund (either income or capital).

Conclusion

The Act does not override any express provisions in a trust document. However, the terms of older trusts should be reviewed to ensure that the trustees are taking full advantage of powers conferred by the Act.

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Disclaimer

This information sheet has been prepared to highlight some key issues relating to the Trustee Act 2000. It is intended for general guidance only and is not a substitute for specific advice. It is based upon our understanding of the legal position as at January 2010 and may be affected by subsequent changes in the law.

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