

The Trustee Act 2000

Panesar, S.

Published version deposited in CURVE March 2012

Original citation & hyperlink:

Panesar, S. (2001) The Trustee Act 2000. International Company and Commercial Law Review, volume 12 (5): 151-157.

<http://www.sweetandmaxwell.co.uk/Catalogue/ProductDetails.aspx?recordid=423&productid=6944>

Publisher statement: Published by Sweet & Maxwell.

Copyright © and Moral Rights are retained by the author(s) and/ or other copyright owners. A copy can be downloaded for personal non-commercial research or study, without prior permission or charge. This item cannot be reproduced or quoted extensively from without first obtaining permission in writing from the copyright holder(s). The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the copyright holders.

CURVE is the Institutional Repository for Coventry University

<http://curve.coventry.ac.uk/open>

International Company and Commercial Law Review

2001

Legislative Comment

The Trustee Act 2000

Sukhninder Panesar

Subject: Trusts**Keywords:** Trustees powers and duties**Legislation:** Trustee Act 2000

***I.C.C.L.R. 151 Introduction**

The Trustee Act 2000, which received Royal Assent last year, came into force on February 1, 2001. The Act makes fundamental changes in the manner in which trustees can and are expected to administer property subject to a trust. The Trustee Bill 2000, which led to the enactment of the Trustee Act 2000, was introduced into the House of Lords in January 2000 and implemented the proposals and recommendations of the Law Commission set out in their 1999 Report entitled "Trustees Powers and Duties".¹ The Act is divided into six parts and consists of 43 sections and four schedules. The main thrust of the legislation focuses on five areas of trust law which were thought to be unsatisfactory for the purposes of administering modern trusts. These five areas are (1) the duty of care imposed upon trustees; (2) the power of investment conferred upon trustees; (3) the power to appoint nominees and agents; (4) the power to acquire land; and (5) the power to receive remuneration for work done as a trustee. This article explores the background to the Act, which no doubt must be the single most important statutory intervention in the administration of trusts since the Trustee Act 1925. It also examines why and how the new law has been implemented. The Trustee Act 2000 is an important piece of legislation for commercial lawyers as well as providers of financial services. The main provisions of this new legislation reflect the importance of the trust in commercial matters.

The background

The need for changes in the law relating to the administration of trusts was not something of a new phenomenon; indeed, the Trustee Act 2000 had a long history to it. As far back as 1982 the Law Commission had recommended reform, particularly so in the context of the rules relating to the delegation of trustee duties upon other persons.² Nothing resulted from the 1982 Report despite continuing pressures from trust lawyers. Some specific changes were brought into force by statutory instrument, most notably in relation to investment practice. For example, in 1996 an order was passed which allowed trustees, when exercising their powers of investment under the Trustee Investment Act 1961, to invest a greater proportion of the trust funds in equities.³ This order was made in recognition of the fact that modern trusts required a greater proportion of the funds to be invested in equities so as to achieve acceptable increases in the capital of the trust fund. Furthermore, investment in equities was no longer to be seen in the same cautious way as it was some 100 years ago because of the modern portfolio theory of investment, which meant that investment in equities was not necessarily a risky thing to do.⁴ In June 1997 the Law Commission published a consultation paper recommending, *inter alia*, changes in the law relating to trustee delegation. The 1999 Law Commission Report⁵ was arrived at in the context of an increasing awareness that the modern trust operates in quite different circumstances from those that existed some 150 years ago.⁶

There is no doubt that the trust operates in a context far different from that which existed at the end of the nineteenth and beginning of the twentieth century. The ability of the trust to adapt to social and economic changes stems from the very fact that the trust is an immensely flexible concept and one capable of operating in different areas of society to achieve different social and economic objectives.⁷ At the end of the nineteenth century the

trust operated primarily in the context of wills and family settlements. The **I.C.C.L.R. 152* primary function of trustees in such a context was to preserve the trust fund over a long period of time for the benefit of beneficiaries entitled in succession. Whilst investment of the trust funds was important, the paramount duty was to preserve the trust fund and this meant that trustees were generally not allowed to invest in risky investments. In such a context investment was not necessarily a complex matter for trustees. Today, whilst the trust does have a role to play in wills and in the context of family arrangements, the express private trust finds itself operating more and more in a commercial context requiring trustees to meet different social and economic objectives. In many modern trusts the paramount duty of the trust is not only to preserve the trust fund but also to make sure that the fund grows and meets inflationary pressures. In trusts where capital growth is of the essence, for example in trusts governing pension and investment funds, the trustees duty is to make sure that there is satisfactory growth in the capital value of the fund.

It is not only the changes in the functions of the modern trust that have resulted in the new law, but also changes in investment practices. Trustees who have a duty to invest trust funds, particularly so in the context of commercial trusts such as pension fund trusts and unit trusts, will inevitably find themselves faced with complex investment practices which may require the need for experienced financial experts to not only implement investments decisions but also to make those decisions so as to satisfy the duty of the trustees to act in the best interest of their beneficiaries.⁸ Therefore, unlike the trustees of the nineteenth and early twentieth century, the modern trustee's duty to invest is an extremely important matter requiring knowledge of complex investment matters. The transition of trusteeship from the type that existed at the end of the nineteenth century to a more modern one is no better explained by one commentator as far back as 1951.⁹ Shattuck writes:

"[T]o be sure, a hundred years before the time of Victoria's death trusteeship had passed, somewhat nervously, from the concept of safe conduct of a specific *res* into the concept of maintenance of a stated set of values. During that transition the duty of the English trustee had transformed itself from the relatively restricted obligations related to care, custody and operation of family agricultural real estate and its appurtenances to the more intricate task of trading in commercial and financial markets and to the attempted maintenance, through the life of the trust, of a value which had been stated to exist at the time of the opening of the inventory."¹⁰

It is in this background that the Trustee Act 2000 finds itself on the statute books. The following sections of this Article explore the changes which the Act has introduced

The general duty of care

Part I of the Act introduces a new statutory duty of care applicable to trustees when carrying out their functions under the Act, for example investment and appointment of agents, nominees and custodians. The general duty extends to trustees carrying out similar functions under the trust instrument. The general duty is defined in section 1 and basically provides that a trustee must exercise such care and skill as is reasonable in the circumstances making allowance for his special knowledge, experience or professional status. Schedule 1 of the Act makes provision for this general duty to be excluded in the trust instrument. The general duty of care, whilst creating an objective standard of care, does have a subjective element to it. Whilst a trustee is expected to behave as a prudent businessman, section 1 specifically requires that the experience and skills of the individual trustee be considered when applying the duty of care. There are a couple of points to note about the general duty of care in section 1 of the Act.

First, the general duty of care is really an enactment of the rule which had been on many occasions explained in the common law. For example, in *Speight v. Gaunt* Lord Blackburn explained that: "as a general rule a trustee sufficiently discharges his duty if he takes in managing trust affairs all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own."¹¹ However, what is different is that section 1 requires a court to take into consideration the specific skills and experience of the individual trustee. The question arises as to whether this subjective element lowers the standard of care required of a lay trustee who may not have the knowledge which a

reasonable businessman may have. It is doubtful that it does lower the standard of care, all that it appears to be saying is that reasonableness must be measured in light of different trustees. Of course, it would be absurd to suggest that a professional trustee must be expected to exercise the same degree of care and skill as that required of a lay trustee. Equally on the other hand, a lay trustee cannot be expected to exercise the same care and skill which a **I.C.C.L.R. 153* professional trustee claims to have. However, this does not mean that a lay trustee is necessarily subject to a low duty of care; he must exercise such care and skill required of a person in a similar situation. In other words, reasonableness must now be measured in light of all the circumstances of the trust.

Secondly, and following on from the first point, the general duty of care makes it absolutely clear that a professional trustee owes a higher duty of care than a normal trustee. Prior to the Trustee Act 2000 there was no doubt in the minds of many that a professional trustee should exercise a higher duty of care than that of a reasonable businessman. However, in so far as the case law is concerned, the matter was far from clear and much confusion centred on the question as to whether the higher duty of care was required from a paid trustee or professional trustee. In one case Harman J. explained that a "paid trustee is expected to exercise a higher standard of diligence and knowledge than an unpaid trustee, and ... a bank which advertises itself largely in the public press as taking charge of administrations is under a special duty".¹² Whilst there is no doubt that a professional trustee should owe a higher duty of care based on his knowledge, skill and experience¹³, not all paid trustees are necessarily professional trustees. What Harman J. was envisaging was a professional trustee and not just a paid trustee. The general duty of care in section 1 allows for a higher duty of care to be expected from a professional trustee without necessarily a higher duty from a paid trustee who happens to be a lay trustee. Although a lay trustee may be paid for his services, the duty of care required of him is to be measured in the circumstances of the case making allowance for his special knowledge and experience.

The power of investment

Part II of the Trustee Act 2000 creates a new statutory power of investment and in doing so repeals the Trustee Investment Act 1961 which had for a long time been regarded as out of date with modern investment practices. Although many modern trusts will invariably contain wide powers of investment, older trusts tend not to have such express powers, neither do trusts created in home drawn wills, and it is here that the statutory power becomes important. To understand the basis of the new statutory power of investment brief mention must be made to the position before the Trustee Act 2000 came into force. Historically, the law of trusts took a very cautious approach to investment of trust funds. The primary objective behind the investment of trust funds was to preserve the trust fund and generate income. Trustees were not permitted to invest in high-risk investments such as equities unless there was some express power in the trust instrument authorising them to do so. The most obvious types of investment authorised at the turn of the twentieth century were investments in mortgages and government stocks. Such investments hardly presented problems in the typical family trust where the duty of the trustees was to preserve and protect the trust fund whilst at the same time generating interim income for beneficiaries entitled in succession.

The cautious approach to trustee investment became clearly out of date around the middle of the twentieth century. Around this period the trust had become employed for purposes rather different from those that existed before. The trust became employed in family as well as commercial contexts and for purposes which were not necessarily to preserve the trust fund in its simple meaning, but to preserve the fund in line with inflationary pressures. The only way in which trust funds can hedge against inflation is if they can be invested in equities. The Trustee Investment Act 1961 allowed trustees to invest in equities without totally abandoning the policy of safe investments. The 1961 Act restricted trustees to authorised investments. The Act divided investments into "narrow range" and "wide range" investments. Narrow range investments consisted primarily of fixed-rate investments whilst wide range investments consisted of shares in public companies. Trustees could, if

they wanted, invest the whole of the trust fund in the narrow range; however, if they wanted to invest in the wide range they were required to divide the trust fund into two parts. Initially trustees were required to divide the fund equally and make sure that one-half was invested in the narrow range allowing the other half to be invested in equities. At the time of its repeal, that division had changed so that trustees were only required to invest 25 per cent of the trust fund the narrow range allowing up to 75 per cent to be invested in the wide range.

Whilst the Trustee Investment Act 1961 was seen as generous at the time of its enactment, it had clearly become out of date with modern investment practices. The manner in which financial markets operate and the functions of the modern trust have made it impossible in many cases for the ordinary trustee to invest trust funds in the best interests of the beneficiaries. In many cases it is far more appropriate for such trustees not to be restricted to authorised investments such as those which existed under the Trustee Investment Act 1961, but rather to delegate the entire process of selecting and implementing investment **I.C.C.L.R. 154* decisions to professional persons.¹⁴ The requirement to divide the fund between the narrow range and the wide range had been criticised as being unduly restrictive.¹⁵ There is no doubt that investing trust funds in modern financial markets is a complex matter for trustees, and whilst it is not intended to examine the complexity in this Article, a few points are worth mentioning.¹⁶ In the case of trusts which consist of very large funds, investment, which can produce substantial growth in the capital, requires the employment of nominees to deal with securities. The use of nominees is absolutely essential to the investment because it is only through this medium that the investment of the trust fund can produce the best results. Nominees are not only in the best position to determine the adequacy of a particular portfolio of investment but they can also manage the fund, provide paperwork for the Inland Revenue and facilitate the electronic transfer of and settlement in securities.

The new statutory power of investment is now to be found in section 3(1) of the Trustee Act 2000. Section 3(1) confers upon trustees an extremely wide power of investment; basically it gives the trustees the same power of investment as that held by an absolute owner of property. The section provides that: "... a trustee may make any kind of investment that he could make if he were absolutely entitled to the assets of the trust". The trustee must of course comply with the general duty of care in section 1 of the Act, which provides a safeguard for the beneficiaries. This new power of investment must be examined in light of the new powers of delegation. Unlike before, trustees will be able to delegate their discretion as well as their duty to invest. Like the Trustee Investment Act 1961, this new power is a "default provision" and will only apply in so far as there is no contrary provision in the trust instrument. Furthermore, the new statutory power contained in Part II does not apply to occupational pensions schemes, authorised unit trusts and schemes under the Charities Act 1993.¹⁷ The new power is retrospective in nature; section 7(1) provides that Part II of the Act applies to trusts created before the commencement of the Act. Whilst the statutory power is contained in section 3(1), section 4(1) of the Act requires trustees to have regard to "standard investment criteria" when investing. Section 4(3) defines "standard investment criteria" to mean suitability to the trust of the investment and the need for diversification in so far as it is appropriate in the circumstances. This investment criteria is not entirely new, similar provisions were found in section 6(1) of the Trustee Investment Act 1961. The standard investment criteria are important because the functions of trust investment vary from one type of trust to another. Section 4(2) requires the trustee to periodically review the trust investments with regard to the standard investment criteria. This duty to review is an enactment of the position exemplified in the common law.¹⁸

Trustees are required by section 5 to obtain advice before investing unless the circumstances conclude that it is unnecessary or inappropriate to do so. Obviously putting the trust funds in an ordinary current account pending further investment decisions may not require advice, but a decision to invest in securities will invariably require advice. Section 5(4) defines proper advice to mean: "advice of a person who is reasonably believed by the trustee to be qualified to give it by his ability in and practical experience of financial

and other matters relating to the proposed investment". The full impact of this new statutory power of investment must be seen in conjunction with the new power of delegation, which is examined later on. Collectively these powers allow trust investments to be managed by professional persons for the best interests of the beneficiaries whilst at the same time protecting trustees from liability for improper management of trusts assets in the interests of their beneficiaries.

Acquisition of land

Until the Trustee Act 2000 came into force, trustees had no general power to purchase land as an investment. There were only two exceptions to this. First, where the trust instrument authorised the trustees to purchase land as an investment, they could do so for the purpose of generating income.¹⁹ Secondly, where the trustees were trustees of land ***I.C.C.L.R. 155** and so governed by the Trusts of Land and Appointment of Trustees Act 1996. Section 6 of the 1996 Act confers upon trustees of land a power to purchase land as an investment, for occupation by the beneficiary or for any other reason. The net effect of the absence of a general power to purchase land was that trustees of pure personalty had no power to acquire land for the rent-free occupation of their beneficiaries. However, trustees who held personalty as well as land on trust for their beneficiaries could give rent-free occupation to their beneficiaries by virtue of the 1996 Act. This produced an unsatisfactory result since, if by chance the subject-matter of a trust consisted of personalty as well as realty, trustees could invest in land and give rent-free occupation. On the other hand, personal property subject to a trust could not be converted into real property for the rent-free occupation of the beneficiaries.

Under the new legislation trustees can now purchase land in the United Kingdom. Part III of the Trustee Act 2000 gives the trustees a power to purchase the land as an investment, for occupation by the beneficiaries or for any other reason.²⁰ This new power is based upon that which is contained in the Trusts of Land and Appointment of Trustees Act 1996. Once trustees have acquired land they will be vested with the same powers as an absolute owner of land. Trustees will be able to sell, lease and mortgage the land. The new power to purchase land is a default provision, which means that it can be excluded subject to a contrary provision in the trust instrument.²¹ Moreover, the new power is retrospective so applies to trusts created before the commencement of the Act.²²

The power of delegation and liability for the acts of agents

Part IV of the Trustee Act 2000 deals with the appointment of agents, nominees and custodians and the liability of the trustees for such persons. This area of the law of trusts had become the subject-matter of immense criticism. It is not intended here to examine the nature of that criticism in detail simply because such an exercise has been carried out on many occasions in the various literature on the law of trusts. Indeed most students and practitioners of the law of trust will be familiar with the criticisms of the law of delegation under the Trustee Act 1925. However, a few obvious points about the delegation rules before the commencement of the new legislation can be made in order to put the new rules into context.

First, although it had become clear in the nineteenth century, and perhaps even before then, that trustees could in certain circumstances delegate their functions to another, trustee could not, however, delegate their administrative or dispositive powers to another person. The Law Commission recognised that this presented a serious problem in the administration of modern trusts.²³ In particular, the fact that the office of trusteeship had become so specialised that it might be impossible for trustees to exercise certain administrative discretions properly for the beneficiaries. The most obvious example here is the exercise of power of investment in a complex financial market.

Secondly, there was the problem with the statutory power of delegation contained in the Trustee Act 1925 and the rules relating to the liability of the trustees for the acts of the agent employed under that power. Section 23 of the Trustee Act 1925 allowed for the appointment of an agent by a trustee providing such appointment was made in good faith. Section 23 read that a trustee who appointed an agent in good faith was not liable for the

default of the agent employed. Section 30 of the same Act; however, read that a trustee could be liable for the acts of the agent employed if the trustee was guilty of "wilful default". Not only was there inconsistency with the two sections but also the net effect of the sections was to put a very low standard of care on trustees in respect to the appointment of agents and their subsequent supervision. The sections excluded a negligence based liability and restricted it to conscious wrongdoing or recklessness in the sense of not caring whether the trustee's acts amounted to a breach of duty or not. In the much criticised decision in *Re Vickery*²⁴ Maugham J.'s judgment left no room for doubt that a trustee may escape liability for the appointment of an agent if he acted in good faith, which meant satisfying a subjective test of honesty rather than reasonableness. Moreover, a trustee who was not guilty of conscious wrongdoing or recklessness, albeit negligent, could however escape liability for the defaults of the agent. This state of affairs was clearly unsatisfactory and out of kilter with the onerous and objective duties of reasonableness imposed on trustees.

Finally, there was the problem of appointing nominees and custodians. Until the new legislation it was trite law that a trustee was under a duty to safeguard the trust property.²⁵ Furthermore, where trust property was vested in the two or more trustees it could only be transferred with the consent of all of them. These rules meant that it was almost impossible to appoint nominees and **I.C.C.L.R. 156* custodians without committing a breach of trust. The appointment of nominees and custodians is however an increasingly important mechanism employed in investment practices. As noted above in relation to the discussion on investment, the use of nominees provides a very important method in which securities are traded in on the financial markets. Nominees in an increasing number of cases provide the means by which investors can trade in securities through paperless transactions. To get the best investment returns it is in the interests of the trust to appoint nominees to facilitate effective trade in securities.

Sections 11 to 20 of the Trustee Act 2000 deal with the appointment of agents, nominees and custodians. Sections 21 to 23 deal with the review of the agents, nominees and custodians acts and the question of liability for the acts of such persons employed. These sections can be briefly examined. First, in so far as collective delegation, section 11(1) provides that trustees of a trust "may authorise any person to exercise any or all of their delegable functions as their agent". Section 11(2) defines delegable functions to consist of any function other than four exceptions. These exception are (a) dispositive function, in other words, function relating to the distribution of trust assets; (b) a power to allocate fees or other payments to capital or income; (c) power to appoint a trustee; and (d) a power conferred by law of the trust instrument which allows a trustee to delegate their functions or appoint a nominee or custodian. It is apparent from section 11(1) that a trustee may delegate his or her administrative functions to another person.

Where an administrative function is delegated to another, section 15 requires special conditions to be satisfied. For example, where a trustee delegates his or her function of selecting investments or the sale of trust property, section 15(1) requires that the terms of the agreement must be made in writing or at least evidenced in writing. This agreement, known as the "policy statement" must give guidance as to how the functions should be exercised and should seek an undertaking from the agent that such agent will secure compliance with the policy statement. In a typical example, where there is a trust for beneficiaries entitled in succession, the policy statement may refer to the standard investment criteria contained in Part II of the Act as well as requiring the investment to provide a balance between income and capital growth for the life tenant and the remainderman.

Sections 21 to 23 of the new legislation provide for the review by trustees of the appointments of agents, nominees and custodians and also the liability of the trustees for the acts of such persons employed. Collectively these sections repeal sections 23 and 30 of the Trustee Act 1925 and in doing so impose objective standards of care on trustees rather than subjective standards imposed under the old law. Section 21 of the Act merely identifies when sections 22 and 23 of the Act apply. Basically these sections will apply when the trustees appoints agents, nominees and custodians under the Act or under similar

provisions in the trust instrument. Section 22 of the Act imposes upon trustees who delegate their functions to agents, nominees and custodians a duty consisting of three aspects. First, trustees are required to keep under review the terms of the appointment and make sure that the person appointed is suitable for the purposes for which he is employed. Therefore, unlike the old law, which allowed a trustee to escape liability of the agent who was employed in good faith, the new Act imposes upon trustees an ongoing duty to make sure that the appointment is satisfactory at all times. Secondly, trustees are required to consider whether to intervene in the appointment if the circumstances make it appropriate. Finally, trustees are expected to intervene if the circumstances make it appropriate for intervention. In so far as the delegation of administrative functions are concerned section 22(2) requires the trustees to consider whether there is any need to revise the policy statement, and if so, to do so, and also to make sure that the policy statement is being complied with.

In so far as the liability for the acts of agents, nominees and custodians, section 23 simplifies the law and imposes a high duty of care on trustees. The idea of wilful default and conscious wrongdoing or recklessness disappears and trustees will now be liable for negligent conduct both in respect of the initial appointment of the agent, nominee or custodian and subsequent supervision. Section 23 provides that a trustee will not be liable for the acts of agents, nominees and custodians providing he complies with the general duty of care in section 1 of the Act both in respect of the initial appointment of the agent, nominee or custodian and when carrying out his duties under section 22 of the Act. This is a welcome change in the law and puts an end to a long history of criticism directed to the statutory power of delegation in the Trustee Act 1925. The imposition of an objective standard of care puts this area of law in kilter with other areas relating to the duties of trustees when administering trust assets.

Remuneration

The final important area covered by the new legislation relates to remuneration and in particular the construction of professional charging clauses. It is trite law that the office of trusteeship **I.C.C.L.R. 157* is gratuitous.²⁶ If a trustee is to receive remuneration he must point to some specific entitlement to it either by law or the trust instrument. In most modern trusts professional trustees will insert charging clauses in the instrument purporting to create the trust. In certain cases statute authorises remuneration for special types of trustees, for example, judicial trustees are authorised by section 1(5) of the Judicial Trustee Act 1895 to receive remuneration. The court also has an inherent jurisdiction to authorise remuneration in circumstances where there is no remuneration clause in the trust instrument or where there is a remuneration clause but the trustees seek to increase the scale of fees.²⁷ The new legislation deals only with professional charging clauses.

Although commonly inserted into trust instruments, the courts strictly construe professional charging clauses. For example, a professional trustee relying upon a charging clause could only claim remuneration for his professional services which could not have been performed by a lay trustee. A solicitor, therefore, could not claim for work done which could have been done by a lay person. One way around this was to draft a charging clause in a very wide way so that a professional could charge for other services capable of being carried out by a lay trustee. Section 28(2) of the Trustee Act 2000, removes the strict construction of charging clauses so that a professional trustee can charge for services which could have been provided by a lay trustee. A fundamental change in the law is provided by section 29, which implies a professional charging clause in all non-charitable trusts that do not make provision for remuneration of professional trustees. Where such a professional charging clause is implied a professional trustee, such as a trust corporation, solicitor, banker or accountant, will be able to receive reasonable remuneration. In the case of professional trustees, such as solicitors, bankers and accountants, they must, however, obtain permission in writing from the other trustees before they are entitled to remuneration.

Conclusions

The history of the trust has demonstrated that it is a concept of immense flexibility and one that has no real problem in adapting to changes in social and economic conditions in society. It finds a home in almost all walks of life and it is this characteristic which continues to put the lawmakers under constant pressure to change the principles and doctrines of the law of trusts to reflect the different contexts in which it now operates. The provisions of the Trustee Act 2000 are a reflection of the fact that the trust is now operating in conditions far different from those that existed at the beginning of the twentieth century. Although the trust continues to play an important role in the family context, that importance is gradually being displaced by a commercial context where the needs of trustees are rather different from those of trustees administering family trusts. Furthermore, it is not just the functions of the trust that have changed, but practices relating to the management of assets in complex financial markets. The new legislation, the case for which has been argued over the last 20 years or so, is a welcomed development in the modern law of trusts.

I.C.C.L.R. 2001, 12(5), 151-157

[1.](#)

Law Com. (No. 260).

[2.](#)

23rd Report on the Powers and Duties of Trustees, (Cmnd. 8733) (1982).

[3.](#)

Trustee Investments (Division of Trust Fund) Order (S.I. 1996 No. 845).

[4.](#)

In May 1996 H.M. Treasury published a Consultation Document: *Investment Powers of Trustees* which sought to repeal the Trustee Investment Act 1961 by means of an Order under the Deregulation and Contracting Out Act 1994, s. 1. This Order was not approved because of the General Election of May 1997 and the cessation of Parliament.

[5.](#)

Law Com. (No. 260).

[6.](#)

See also D. Hayton, "Developing the Law of Trusts for the Twenty-First Century" (1990) 106 L.Q.R. 87 where Professor Hayton commented on the need for wider powers to be conferred upon trustees when investing. In particular he pointed out the need for investment managers to be appointed by trustees without attracting vicarious liability.

[7.](#)

One is often reminded of the words of Otto Kahn Freund who, when commenting on the importance of the trust in England, wrote, "it is an institute of great elasticity and generality, as elastic, as general as contract": *Equity* (2nd ed.,) (1936), p. 23.

[8.](#)

See D. Hayton, *op.cit.*

[9.](#)

Shattuck, "The Development of the Prudent Man Rule for Fiduciary Investments in the Twentieth Century" (1951) 12 Ohio State L.J. 491 at 491-492.

[10.](#)

ibid.

[11.](#)

(1883) 9 App. Cas. 1 at 19. Similarly, in the context of investment, Lindley L.J. explained in *Re Whiteley* (1886) 33 Ch. D. 347 that the duty of a trustee in investing trust funds is to "take such care as an ordinary prudent man would take if he were under a duty to make the investments for other persons for whom he felt morally bound to provide": at 355.

[12.](#)

Re Waterman's Will Trust [1952] 2 All E.R. 1054 at 1055.

[13.](#)

Bartlett v. Barclays Bank Trust Co. Ltd [1980] 1 All E.R. 139.

[14.](#)

For an excellent account of the need to appoint professional persons in the modern investment climate see J.H. Langbein, "Reversing the Non-delegation Rule of Trust-Investment Law" [1994] 59 Mo. L.R. 105.

[15.](#)

See, P. Milner and J. Holmes, "Trust Law Reforms: Are We Nearly There Yet" [2000] Priv. Client Bus. Vol. 2 pp. 144-129.

[16.](#)

A detailed account of modern investment practices operating in financial markets can be found in the Law Commission's Consultation Paper, "Trustees Powers and Duties" Law Commission Consultation Paper 146 (1998).

[17.](#)

These are governed by their own statutory rules, respectively, the Pension Schemes Act 1993, Financial Services Act 1986 and Charities Act 1993.

[18.](#)

Nestle v. National Westminster Bank plc (No. 2) [1993] 1 W.L.R. 1260.

[19.](#)

This application of this rule was shown in *Re Power* [1947] Ch. 572, where the court refused the purchase of land for the rent-free occupation of the beneficiaries. The rule has its origins in the judicial definition of investment for trust law purposes, which requires the production of income rather than simple capital growth. In *Re Wragg* [1919] Ch. 58, Lawrence J. commented that the word "invest" includes as one of its meanings "to apply money in the purchase of some property from which interest or profit is expected and which property is purchased in order to be held for the sake of income which it will yield": at 64.

[20.](#)

Trustee Act 2000, s. 8(1).

[21.](#)

Trustee Act 2000, s. 9.

[22.](#)

Trustee Act 2000, s. 10.

[23.](#)

Law Commission Consultation Paper, "Trustees Powers and Duties", Law Commission Consultation Paper 146 (1997), see P III.

[24.](#)

[1931] 1 Ch. 572.

[25.](#)

See, e.g. *Re Brogden* (1888) 38 Ch. D. 546.

[26.](#)

Robinson v. Pett (1734) 3 P Wms 249.

[27.](#)

The manner in which the court will exercise its jurisdiction was examined in *Re Duke of Norfolk's Settlement Trusts* [1982] Ch. 61.