

Trustees Duties

1. *Fiduciary Duties*

Trustees owe a fiduciary duty to the beneficiaries of a trust. This is a duty of loyalty, honesty, integrity, good faith and transparency. They must not allow personal interests to conflict with those of the beneficiaries. A trustee:

- May not benefit from his position save where this is authorised (e.g. where the trust instrument/document expressly permits it);
- Is accountable for any profits made by him in his capacity as trustee;
- Should not normally purchase trust property;

If a trustee purchases trust property it is voidable at the option of the beneficiaries irrespective of whether the transaction is fair and reasonable.

2. *General Duties*

The duties imposed on trustees arise initially by virtue of the general obligation as a fiduciary.

Prior to acceptance of the position of trustee, a trustee should ensure that there is no conflict of interest between his own personal interest and that of the beneficiaries. A person who is in dispute with the trust should not be appointed as a trustee.

a) To Comply With The Terms Of The Trust

A trustee should fully inform himself of the terms of the trust and comply strictly with the duties and directions set out in the trust instrument (e.g. the Trust Deed or Will). Trustees are under onerous duties of investment, for example, and can be made liable to account for losses resulting from negligence or unreasonableness, so familiarisation with the trust, the trust property and the beneficiaries is a necessary task when accepting the trustee position.

b) To Take Control Of The Trust Property

A trustee should ascertain the extent of the trust property, ensure it is vested in him and any co-trustees and take steps to ensure its preservation (e.g. buildings insurance for property).

All trust documents must be kept secure and any debts owing to the trust must be pursued – even to the extent of taking court action or obtaining court approval for litigation.

c) To Act Impartially Between The Beneficiaries

Trustees are under a general duty to act in the best interests of the beneficiaries, but in exercising this duty they must not allow one beneficiary to suffer at the expense of a benefit to another beneficiary.

d) To Take Reasonable Care

The standard of care and skill expected of a trustee varies according to whether they are unpaid or professional.

Section 1 of the Trustee Act 2000 sets out the statutory duty of care:-

“to exercise such care and skill reasonable in all the circumstances having regard to:

- a) any special knowledge or expertise that the trustee holds himself out to have;*
- b) if the person acts as a trustee, in the course of his business, any special knowledge or expertise that is reasonable to expect of them”*

There is also a **“common law”** (derived from case law) duty of care. Following the cases of Re Whitely (1886) and Learoyd v Whitely (1887)

This is that a trustee should use the same diligence as a man of ordinary prudence would take in the management of his own affairs or the affairs of someone for whom he felt morally bound to provide.

An exclusion clause in the trust instrument may relieve a trustee from liability for certain acts of default but it generally cannot exclude liability for breach of the core fiduciary duties – to hold the assets for the benefit of the beneficiaries under the terms of the trust.

e) Duty To Keep Accounts

A trustee is under a duty to keep and provide clear and accurate accounts of the trust and to provide them to the beneficiaries on request, provided the beneficiaries are prepared to pay the cost. The beneficiaries must allow reasonable time for compliance and on receipt they may inspect them and request information and answers to any queries they may have.

There is no general duty to have accounts audited, but trustees at their discretion may choose to do so, provided it is not required more than once in every three years.

f) Duty To Provide Information

A trustee must produce, on request, information and documents relating to the trust when required by the beneficiaries. This right extends to beneficiaries of a discretionary trust. Trust documents will include the trust deed, accounts, letter of wishes and any legal advice and opinions. The beneficiaries cannot require documents outlining the trustee’s reasons for decision making.

g) Duty To Act Unanimously

Trustees must normally act unanimously in any decisions they make, though the actual discharge of the duty itself may be carried out by less than all of the trustees. There are a number of exceptions to this rule – e.g. trustees of a charitable trust may act by majority rule.

h) Duty To Consult

In general, trustees should consult the beneficiaries whenever possible and give effect to their wishes.

In particular, in relation to land the trustees should so far as is practicable consult with the beneficiaries of full age (over 18 years) and who are beneficially entitled to an interest in possession of the land and so far as is consistent with the general interest of the trust, give effect to their wishes or if there is a dispute to the wishes of the majority – according to the value of their combined interests (i.e. not majority by number of beneficiaries but by the size / value of their interest in the trust property).

This duty can be excluded (and often is) and only applies to trusts made after 1st January 1997.

i) Duty To Act Personally

The position of trustee is a personal one and should not normally be delegated. The settlor (the person who created the trust or the testator where the trust is contained in a Will) usually selects the trustees often because of personal qualities. Delegation of trustee functions could result in a person of different values and beliefs making the decisions.

Delegation, however, is permitted:

- If it is authorised by the trust instrument
- If the beneficiaries authorise it (they must all be of full age and between them absolutely entitled to the trust property)
- Where it is provided for by statute

Under the Trustee Delegation Act 1999, trustees can delegate most administrative functions. They may not normally delegate their dispositive powers (powers relating to the distribution of the trust assets to the beneficiaries).

3. Investment

The duty of the trustee in investing the trust funds is to provide an income for the beneficiaries and to preserve the value of the capital. The trustees must always treat the beneficiaries impartially, ensuring that investments are made that do not favour one particular beneficiary.

The courts have considered the balance the trustee has to achieve, namely to provide a reasonable income for the life tenant (a beneficiary interested in the income of the trust fund) yet at the same time preserving the capital for the remainderman (a beneficiary entitled to the residue of the trust – when the life interest comes to an end).

In Nestle v National Westminster Bank (1993) the court emphasised:

- Trustees should make regular reviews of the trust investments (normally at least once a year);
- In making any decision on investments the court can take into account the taxation position of the beneficiaries and their relative wealth;

- Trustees should not change investments too frequently;
- The onus of proof is on a beneficiary who alleges that an investment is imprudent;
- Trustees can be judged by the current portfolio theory – this allows reliance on the risk level of the whole of the portfolio invested rather than being judged on the merits of a single investment taken in isolation

Where trustees are uncertain of their powers or duty they should take legal advice before acting.

a) Express Powers Of Investment

Most trust instruments contain an express power of investment. They often give the trustees power to invest the trust property as if the property belonged to them in an absolute capacity. Subject to the terms of the trust and the statutory guidelines, the trustees may make any investments that they believe will be in the best interests of the trust.

b) Statutory Powers Of Investment

i) *The general investment power*

Section 3 Trustee Act 2000 gives trustees the right to invest in anything as if they were “absolutely entitled” – subject to standard investment criteria. They are bound by their duty of care and to act fairly between all beneficiaries entitled to income and capital.

Standard investment criteria

In exercising the general investment power (above) a trustee must follow the standard investment criteria (i.e. take into account). This is defined as:-

- the suitability of the *type* of investment (gilts, equities, art etc.) for the type of *trust* (e.g. life interest, age of beneficiaries) and whether the *particular* investment selected is the most suitable of the type
- to diversify the investments of the trust in so far as is appropriate to do so in the circumstances of the trust (good spread to reduce risk etc.)

iii) *Requirement to take advice*

A trustee must seek advice before exercising his powers of investment on setting up the trust fund or on review. The advice must be from a person whom the trustee reasonably believes to be qualified.

There is an exception to having to take advice – where the trustee thinks it is not necessary in the circumstances. This is generally taken to mean where there are only small sums to invest in small trusts. If land is held as an investment the standard investment criteria will apply.

iv) *The power to invest in land*

Trustees may invest in land as:

- An investment
- For occupation by a beneficiary (with a current interest in the trust property); or
- For any other reason

After acquisition, trustees have powers of an absolute owner – which includes the power to mortgage. The powers are in addition to the powers granted in the trust instrument (or subject to restrictions or exclusions in the trust instrument) whenever the trust was made.

If land is held as an investment the standard investment criteria will apply.

4. *Duty To Distribute*

The trustees are responsible for ensuring that the trust assets are distributed to the correct beneficiary and in the correct amounts. **Failure to discharge this duty correctly can result in personal liability for the trustees.**

In the event of doubt as to who are the correct beneficiaries, the trustees should apply to the court for directions, having taken legal advice and having made all the proper enquiries.

If you require advice regarding your particular circumstances, please telephone us to speak to one of our specialists in this field.

Or REQUEST A CALL BACK at a time convenient to you.

NOTE: This guide assumes that English and Welsh law is applicable. Different laws apply in Northern Ireland and Scotland and in respect of property owned in other jurisdictions.

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Enfield:
020 8363 4444
enfield@curwens.co.uk

Cheshunt:
01992 631 461
cheshunt@curwens.co.uk

Hoddesdon:
01992 463 727
hoddesdon@curwens.co.uk

Royston:
01763 241 261
royston@curwens.co.uk