Trustee Act 2001

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The Trustee Act 2001 (an Act of Tynwald) (the "Act") was enacted in an attempt to satisfy criticism of certain aspects of trust law as it then stood, which were considered too restrictive and to hinder the effective management of trusts. The aim of the Act is to facilitate better administration of trusts and enable trustees to take advantage of wider investment opportunities. The Act seeks to achieve this by conferring on trustees the new statutory powers set out in the Act. In general, the Act applies to trusts whenever created, so can apply to trusts created before as well as after the Act came into effect.

The new powers under the Act only apply to the extent not excluded or restricted by the trust instrument. The role of the Act is to supplement trust provisions where otherwise there would be a gap in the trustee's powers, but not to override any express exclusion or restriction. An important justification for the enactment of the Act was to amend the pre-existing default powers which applied, for example, to trusts and will trusts created a long time ago and which therefore did not contain the extensive express powers common today.

Discussion of the Act in this briefing paper relates exclusively to express private trusts (and is not applicable to occupational pension schemes or authorised unit trusts).

The Act, in summary, is divided into six parts:-

Part 1 - The Duty of Care

[(i)] Part 1 (Sections 1 and 2) introduces a new safeguard for beneficiaries in the form of a statutory duty of care, which applies to trustees in the circumstances listed in Schedule 1 to the Act. This duty of care applies to trusts whenever created.

Part 2 – Investment

(ii) Part 2 (Sections 3 - 7) sets out the new general trustee power of investment, which gives a trustee the same power of investment as an absolute owner (with an exception in relation to land). This power applies to trusts whenever created. This power may be excluded or restricted by the trust instrument.

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Part 3 - Acquisition of Land

(iii) Part 3 (Sections 8 - 10) introduces a power enabling trustees to acquire freehold and leasehold land for any reason. This power applies to trusts whenever created. This power may be excluded or restricted by the trust instrument.

Part 4 - Agents Nominees and Custodians

(iv) Part 4 (Sections 11 - 27) contains a wide range of powers relating to collective delegation by trustees. These powers apply to trusts whenever created. These powers may be excluded or restricted by the trust instrument.

(a) Sections 11 - 15 provide trustees with the power to delegate certain of their functions to agents.

(b) Sections 16 - 20 allow trustees to appoint nominees and custodians.

(c) Sections 21 - 22 impose a duty on trustees to keep any delegation of their functions under review and to take intervention action if appropriate.

(d) Section 23 defines the extent of the liability of a trustee for acts and omissions of an agent, nominee, or custodian, or his or her permitted substitutes.

(e) Sections 24 - 27 cover supplementary provisions.

Part 5 - Remuneration

(v) Part 5 (Sections 28 - 33) aim to create a better statutory regime for the payment of trust corporations and professional trustees and the reimbursement of trustees' expenses and those of their agents, nominees and custodians. This regime applies to trusts whenever created (with some minor exceptions), but not to remuneration for services provided before the Act came into effect.

Part 6 - Miscellaneous and Supplementary

(vi) Part 6 (Sections 34 - 42) deals with several matters including power to insure trust property, the application (with modifications) of the Act to personal representatives and the limited application of the Act to occupational pension scheme trusts and authorised unit trusts.

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The Duty of Care

Pursuant to Section 1 of the Act, a trustee has a statutory *duty of care* in relation to: -

- the exercise of any power of investment;
- when from time to time reviewing and considering whether to vary the trust's investments;
- when exercising its duty to obtain and consider proper advice about exercising any power of investment;
- when acquiring or managing land;
- when taking out insurance over property;
- when authorising agents, appointing nominees and custodians to act and when reviewing their activities;
- when exercising a power to compound liabilities.

Essentially the duty of care requires the trustee to exercise such care and skill as is reasonable in the circumstances having regard in particular to his or her special knowledge, experience or professional status. The statutory duty of care is in addition to, but may not differ very much from, the common law duty of care which also applies. The statutory duty of care applies to trusts whenever created.

The statutory duty of care does not apply if or in so far as it appears from the trust instrument that the duty is not meant to apply, and therefore may be excluded or restricted by the trust instrument. Trust instruments made after the Act came into force often expressly exclude the statutory duty of care. Trust instruments made before then will not have done so, but may have excluded specific duties (for example, to interfere in the management of a company in which the trust is a substantial shareholder) which excluded duties should not be reintroduced by the application of the statutory duty of care.

Investment

Prior to the Act, trustees (unless granted wide powers of investment pursuant to the terms of a trust deed) were restricted in the investments which could be made on behalf of a trust. Section 3 of the Act gives the trustee a *general power of investment* to make any kind of investment that he could make if he were absolutely entitled to the assets of the trust. This is a default power of investment for trustees who do not otherwise have sufficiently wide powers of investment. It applies in relation to trusts whenever created, but can be excluded or restricted by the trust instrument. For example, the general power of investment could not be used to invest in unlisted shares in a company, if the trust instrument (whether made before or after the Act) provided that the trust fund may only be invested in listed shares.

Standard Investment Criteria

Section 4 of the Act provides that in exercising any power of investment a trustee must have regard to the *standard investment criteria*. In brief, this requires a trustee to have regard to the suitability of the investment (both generally and specifically) to the trust and the need for diversification. In addition a trustee must from time to time review the investments of the trust, and consider whether, having regard to the standard investment criteria, the investments

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should be varied. These duties apply in relation to trusts whenever created. They cannot be excluded or restricted by the trust instrument, but how they are to be performed depends on the circumstances of each case.

These requirements to have regard to the standard investment criteria also apply to any agent to whom the trustees collectively delegate their investment management powers (e.g. an asset manager).

Advice

Pursuant to Section 5 of the Act, before exercising any power of investment, a trustee must (unless the following exception applies), obtain and consider proper advice about the way in which, having regard to the standard investment criteria, the power of investment should be exercised unless the trustee reasonably concludes that in all the circumstances it is unnecessary or inappropriate to do so. An example of where advice may be unnecessary or inappropriate would be a situation where the trustee himself is qualified to give proper advice. This duty applies in relation to trusts whenever created and cannot be excluded or restricted by the trust instrument.

Section 5(4) of the Act provides that the advice is to be given by someone the trustees reasonably believe to be "qualified to give the advice by his ability in and practical experience of financial and other matters relating to the proposed investment".

Agents Nominees and Custodians

Prior to the Act coming into force, trustees were unable to delegate their collective investment powers without express authority in the trust deed because such powers involved the exercise of a fiduciary discretion (the idea being a trustee should not delegate to others the confidence reposed in himself). The Act provides that trustees can now collectively delegate certain ministerial functions to any person, aside from a beneficiary of the trust. In the case of a non charitable trust, trustees can so delegate any function apart from any decision to distribute assets, any decision whether any payment due to be made out of the trust fund should be made from capital or income, any power to appoint new trustees and any power conferred which already permits delegation.

The statutory power to delegate applies to all trusts whenever made, but is subject to any exclusion or restriction in the trust instrument or statute. For example, if a trust instrument (whenever made) provided that the trustees may not appoint an investment manager without the consent of a specified person, that restriction would apply to the statutory power.

Essentially, therefore, all trustees can now delegate their investment powers unless the trust instrument provides otherwise. Pursuant to Section 15 of the Act a trustee appointing an asset manager is required by the Act to do so in writing, to provide the asset manager with a *"policy statement"* that gives guidance as to the investment objectives and to obtain written agreement from the asset manager to comply with the policy statement.

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Also for all delegations under the Act, trustees must periodically review the arrangements and consider whether there is a need to intervene. A trustee is expressed not to be liable for an act or failure to act of a delegate unless the trustee is in breach of its statutory duty of care.

Remuneration

Prior to the Act, unless the trust deed provided for remuneration it was generally not possible to remunerate trustees. It was therefore considered that, if authorisation to remunerate trustees was absent from a will or trust deed, administration of the trust would necessarily fall to lay trustees rather than professionals, which may not be in the best interests of the beneficiaries, and that a statutory power to remunerate trustees was desirable. Under the Act trust corporations and professional trustees of non-charitable trusts are entitled to *"reasonable remuneration"*.

A trustee is not entitled to remuneration under the Act if any provision about his entitlement to remuneration has been made by the trust instrument or by any other statutory provision.

In addition:-

- the remuneration of a professional trustee (not being a trust corporation) must be authorised in writing by all the other trustees. The Act does not provide for the remuneration of a sole trustee who is not a trust corporation;
- reasonable remuneration means remuneration which is "reasonable in the circumstances".

Reimbursement

Section 31 of the Act entitles the trustee to be reimbursed from trust funds or to pay out of the trust fund expenses properly incurred by him when acting on behalf of the trust. This reflects the common law position.

Summary

The majority of trust instruments are professionally drafted and contain wide express powers; the Act may be of limited practical significance to trustees of such trusts. However even such trustees need to be aware of the statutory duties in the Act in relation to investment which cannot be excluded or restricted, although the impact of such duties on specific cases depends very much on the circumstances. The Act should be of more practical significance to trustees of older, or less sophisticated, trust instruments; if a trustee of such a trust lacks an express power for a particular transaction, a power may be found in the Act which will allow the transaction to proceed.

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Contact Us:

Simcocks Advocates can advise on all aspects of The Trustee Act 2001. For further information please contact us on +44 1624 690300 or by email at enquiries@simcocks.com

Ridgeway House
Ridgeway Street
Douglas
Isle of Man
IM99 1PY
Tel: +44(0)1624 690300
Fax: +44(0)1624 690333

Web: www.simcocks.com

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