

## 4 POWER OF INVESTMENT

[T] has a [statutory duty to invest the trust funds, which will yield a profit, [even if the trust fund does not explicitly request investments] (*Re Wragg*; s 5 TA). Thus, [T] can invest in anything not excluded by the terms of the trust instrument. Here [INSERT FACTS].

Investment?

For [INVESTMENT] to constitute an investment, a broader interpretation is given to statutory power to 'expend money or effort in something from which a return or profit is expected' (*Cheyne*).

- Superannuation: Money in a super fund is not an investment under s 5 TA, as [T] does not receive anything in return (*Cheyne*).
- Unsecured loan: Applying *Cheyne's* case, it is unlikely that an unsecured loan will amount to an investment,

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## DUTY OF PRUDENCE

### Professional Trustee

As [T] is a professional t/ee because he is [FACTS] which is in the business of investing money. He must exercise care, skill and diligence that a prudent person engaged in that profession would have (s 6(1)(a)). This is a higher threshold compared to a non-professional trustee (*ASC*) and a higher standard compared to day-to-day management required by *Speight*.

Company directors of t/ee companies have a duty to act in accordance with standard of prudent businessman in management of trusts (*ASC*)

### Non Professional Trustee

As [T] is a non-professional t/ee, he must exercise care, skill and diligence that a prudent person would have (s 6(1)(b)). This is a lower threshold compared to a professional trustee (*ASC*) and a higher standard compared to day-to-day management required by *Speight*.

Irrelevant that [T] used to work as an investment professional; the standard is based upon their current occupation.

[T] is not an insurer of trust property, and there may be errors in judgment (*Nestle*), as merely losing money does not render [T] in breach (*Bartlett*). Further, [INVESTMENT] can be distinguished from *Bartlett* where it was clear that there was no planning or approval given. However, here there was nothing upon the facts to suggest that [T] would have known about the [UNEXPECTED EVENT], which led to the decrease in value of the shares.

The failure here is very comparable to that in *Bartlett*, namely not taking the steps that could be taken as a majority shareholder to take control over the commercial activities of the firm. For example, instead of simply deferring the decisions to [X], [T] could have asked for more questions or sought independent advice.

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## DUTY TO REVIEW

[T] has a duty to review the investment portfolio at least once a year (s 6(3)). Upon the facts, [FACTS], thus [T] is likely/unlikely to be in breach of s 6(3)). By [T] failing to review the portfolio, this would also be in breach of a prudent trustee. Further, [T]'s failure to review resulted in the portfolio suffering a loss through [FACTS]. Had [T] reviewed the portfolio, this loss could have been avoided.

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## DUTY TO ACT IMPARTIALLY

[T] has a duty to act impartially between beneficiaries and must act fairly in making investment decisions, which may have different consequences for different classes of beneficiaries (*Nestle* per Hoffman J; s 7(2)(c)).

This can be analogised to *Re Mulligan* where the trustee favoured the life tenant by placing capital in fixed interest investments which increased income but eroded the capital.

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## DUTY TO SEEK ADVICE

Under the duty of prudence, [T] should seek independent advice (s 7(2)(d)) even though there is no clear positive duty to do so.

As [T] is a professional trustee, it is unlikely that a prudent person in his position would seek independent advice. Thus it is unlikely that [T] will be in breach of seeking advice (s 7(2)(d)).