

INVESTMENT DUTIES

POWER OF INVESTMENT

Trust instrument overrides statute – so comply with TA **unless** excluded or modified by the instrument (**s2(3)**)
Trustee must exercise power of investment in accordance with any provision of the instrument that is binding on T (**s6(2)**)

SCRIPT:

- **DUTY TO INVEST:** [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] per **s5 TA**. Therefore, [T] can invest in anything not excluded by the terms of the trust investment. Here, [FACTS].
 - Further, at any time, [T] may vary an investment (**s5(b)**)
- **IS IT AN 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 **s5 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.

DUTY OF PRUDENCE

Did the trustee breach their duty of prudence? Consider two aspects – **actual investment** and **day-to-day management**

SCRIPT:

- **PROFESSIONAL TRUSTEE:**
 - [T] is a professional t/ee since 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 **s6(1)(a)**.
 - This is 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 **s6(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**
 - It is irrelevant if [T] **used** to work as an investment professional; the standard is based upon their **current occupation**.
- **WHAT IF MIX?**
 - Presumably higher standard applies, then liability for non-professional potentially excluded in **s67** if they acted honestly and reasonably
- **ERRORS IN JUDGEMENT:** [T] is not an insurer of trust property, and there may be errors in judgement (**Nestle**), as merely losing money does NOT render [T] in breach (**Bartlett**).
 - **BEYOND THEIR CONTROL:** Further, [INVESTMENT] can be distinguished from **Bartlett** where it was clear that there was no planning or approval given. However, here there was nothing on the facts to suggest that [T] would have known about the [UNEXPECTED EVENT], which led to the decrease in value of the [SHARES/ASSETS]
 - **STEPS COULD HAVE BEEN TAKEN:** 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 more questions or sought independent advice.

DUTY TO REVIEW

A very active duty, requiring Trustees to know what is going on with the trust

SCRIPT:

- Subject to trust instrument, but [T] has a duty to review the investment portfolio at least once a year (**s6(3)**)
- On the facts, [FACTS], therefore [T] likely/unlikely to be in breach of **s6(3)**.
- By [T] failing to review the portfolio, this is also breach of their duty of prudence as 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.
 - **NB:** In **HLB** – Given size of fund, annual review not enough! Nor was twice – volatility of market needed more reviews!
- For each exercised power of investment, T **must** have regard to results of a review of existing investments **s8(1)(o)**

DUTY TO ACT IMPARTIALLY

T/ee cannot favour one class over the other!

- **Capital Assets** = expenses relating to the property/upkeep of the property – this is an expense apportioned to capital beneficiaries
- **Income assets** = expenses relating to income – like payment to stock broker for managing share portfolio, rental income, etc – this is an expense apportioned to income beneficiaries

SCRIPT:

- [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); **s7(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 by eroded the capital
- **However**, it is OK if discretion favoured one group **slightly**, so long as proper considerations given in exercise of discretion and done so in good faith (**VEN**)
- This is also paired with the **duty to review**: If [T] reviewed more often, then they would have turned their mind to the fact that more investments were needed for [CAPITAL/INCOME BENEFICIARIES] (**Nestle; re Mulligan**)

DUTY TO SEEK ADVICE

SCRIPT:

- **Under the duty of prudence**, [T] should seek independent advice (**s7(2)(d)**), even though there is no clear positive duty to do so – **s8(2)(a)** suggests it is not mandatory, but may be a relevant factor to consider in **s12C(d)**
 - **IF PROFESSIONAL TRUSTEE:** 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 **s7(2)(d)**
- **NB:** The reasonable costs of obtaining this advice is payable out of T fund **s7(4)**

SPECULATIVE INVESTMENTS

Modern Portfolio Theory:

- A more *laissez-faire* approach to investment – risky investments are encouraged, **provided there are enough safe shares to shore up the risk ones**.
- Review the risk of **entire** portfolio (type of asset + risk profile), rather than just the risk attaching to each investment taken in isolation!
 - Endorsed by Hoffman J in **Nestle** and **s6(3)** allows trust investments to be reviewed “as a whole”

SCRIPT:

- [T]'s investment in [PROPERTY] may be speculative, which [T] has a duty NOT to invest in **s7(2)(b)**, where ‘speculation’ is not defined.
- Per Modern Portfolio Theory (MPT), **the whole portfolio** must be taken into consideration in determining whether [PROPERTY] is unduly speculative and risky, endorsed by Hoffman J in **Nestle**.
 - Note- look @ dates in paper – if it was a while ago, perhaps try and argue **Nestle** that cannot judge a trustee in hindsight – conservative investment practices back then
 - **Some** losses are OK – ordinary prudent person would make some losses
- **FACTORS:**
 - **NEW COMPANIES:** As [SHARE] is a new company, alone it would be seen to be speculative, however in conjunction with the overall portfolio, this will be seen as diversification in line with MPT)
 - **LARGE PORTFOLIO:** It is suggested that the larger the portfolio is, the more diversification is required (**Mulligan**)
 - **SMALL PORTFOLIO:** It is likely that there will be a limit to the acceptable risk profile of individual investments regarding the overall balance, especially in small trusts with few overall investments (**Nestle**)

- **BENEFICIARIES:** Are there children involved? Is it for a business – need to keep business liquid and running

SECTION 8 FACTORS (CANNOT K OUT)

S8(1) TLA FACTORS:

- a) **Purposes of trust & needs & circumstances of beneficiaries**
 - Always important – having as much income generation as possible. Are they making investments that are only capital growth investments (e.g. shares), not income investments?
- b) **Desirability of diversifying trust instruments**
 - High and low risk and different types of assets. So long as risky ones balanced with safe ones. E.g. renewable energy, new companies
- c) **Nature of and risk associated with existing trust investments and other trust property**
 - Exploring risks of different types of property/assets
- d) **Need to maintain real value of capital or income of the trust;**
 - Income only investments = bank account, bonds – suffer from rises in inflation – capital value of these assets would not increase over time
- e) **Risk of capital or income loss or depreciation (Nestle; HLB)**
- f) **Potential for capital appreciation**
 - Capital appreciation is important if there are young beneficiaries!
- g) **Likely income return and timing of income return**
- h) **Length of term of proposed investment**
- i) **Probable duration of trust**
- j) **Liquidity and marketability of proposed investment during and on determination of, the term of the proposed investment**
 - Liquid investments in bank accounts - non easily liquidated assets = shares
- k) **Aggregate value of trust estate**
 - Larger fund requires more diversification – likely to have to manage it more, regulate more, more investments to think about, be aware of beneficiaries needs. Is it a trust that needs to maintain significant value?
- l) **Effect of proposed investment in relation to tax liability of trust**
- m) **Likelihood of inflation affecting value of proposed investment or other trust property**
- n) **Costs of making proposed investment**
 - Including commissions, fees, charges and duties payable (of making proposed investment)
- o) **Results of review of existing trust investments**
 - If had been reviewing investments regularly, would have more information about the value of the investments. Looking at individual investments as part of portfolio

S8(2)(1): Duty to take advice and get aid re: investments (not mandatory)

SCRIPT:

- [T] is required to take into consideration section 8 matters. [T] failed to take into consideration [FACTS], s8(1)(___).
- Further, [T] has undertaken analysis of the shares upon the facts through [FACTS]. Therefore, whether the stock is risky or not is dependent on the quality of the analysis (s8(1)(c))
- In determining what to invest in, [T] should have also actively sought more information (Bartlett; s7(2))
- Although [T] lost money, merely losing money does not render the trustee in breach because it is expected for investments to fluctuate (Bartlett)
- **PRUDENT TRUSTEE:** This can be analogised to HLB, as it was held that even though the investment climate was volatile due to the GFC, and that it was prudent to ensure that capital risk was minimised, investing only in bank guarantees was a breach of the duty of prudence. A prudent trustee would have invested in other investments that were guaranteed by the government that would have earned a higher interest, such as bonds, and the trust cash management fund.

NOTE – SPECIFIC DEFENCES RELATING TO INVESTMENT DUTIES!!

Speight v Gaunt (1883) – STANDARD OF CARE OF THE REASONABLE BUSINESS PERSON	
FACTS:	<ul style="list-style-type: none"> • Trustee appointed broker to sell shares – broker misappropriated funds – trustee sued for breach of trust • ISSUE: Would an ordinary prudent person of business appointed a broker in the same circumstances?
HELD:	<p>Standard of reasonable business man = OK to appoint an agent</p> <ul style="list-style-type: none"> • TRUSTEE NOT HELD LIABLE – generally acceptable for businesses to appoint a broker – this was the SoC of reasonable business person • This relates to the standard for ongoing management of business of trust
Bartlett v Barclays Bank [1980] – STANDARD OF CARE REASONABLE BUSINESS PERSON	
FACTS:	<ul style="list-style-type: none"> • Bartlett family trust – Bartlett family settled shares on their company (BTL) for 99% of the shares. Bank as corporate trustees of the trust

<ul style="list-style-type: none"> • BTL Board changed focus of investments to speculative property development, did not consult Bank before changing policy • Bank didn't make inquiries – BTL Board failed to get planning permission, incurred huge loss. Shares plummeted, became useless • Sued Bank as trustees
HELD: <i>A prudent business person will seek to protect investment and minimise risk</i> <ul style="list-style-type: none"> • Bank was in BREACH- they are held to a higher standard of care as professional trustees – they had been inactive and absent, no minutes of meetings, no information sought, no speculative policy, no attendance at AGM. Therefore they failed their duty of prudence • Bank saying they were relying on Director's prudence was NOT ENOUGH!! As Barclays held themselves out in having special skills, they are held to a higher standard • Must look at what would benefit beneficiaries in the long term – current AND future
ASC v AS Nominees (1995) - COMPANY DIRECTOR AS TRUSTEE
FACTS: <ul style="list-style-type: none"> • Constantly mixing trust assets w business assets – new trustee replaced existing trustees – new trustees did not alter former arrangement, so trust investments suffered losses that were quite significant – specifically, trust had invested/owned 90% of the shares in the company • New trustees attempted to argue they were not liable as they simply maintained the status quo
HELD: <i>Trustees advertising their services and holding out to have a higher skill must be held to a higher standard</i> <ul style="list-style-type: none"> • Given that trust owned 90% of the shares in the company, a prudent man of business would have exercised a greater degree of oversight • It was the trust company in breach of trust, not the directors. • When the trustee is a COMPANY DIRECTOR – tempting to treat them as a director who takes risks – but a trustee director must exercise more restraint, more conservatism.
Nestle v National Westminster Bank [1993] MODERN PORTFOLIO THEORY & DUTY TO ACT IMPARTIALLY
FACTS: <ul style="list-style-type: none"> • Life tenant & remainder person as beneficiaries, bank was professional trustee of estate. Life tenant died • At outset of trust, trust worth \$55,000. Sixty years later, trust estate only worth a quarter – eroded by inflation • Remainder argued, had it been property invested, would have been worth way more. She said the trustees maintained too much of the investment in fixed interest securities. They had not property diversified
HELD: <i>Cannot judge a trustee in hindsight. Now, MPT allows for more risky investments provided there are enough safe shares to shore up the risk</i> RE: MODERN PORTFOLIO THEORY: <ul style="list-style-type: none"> • REMAINDER FAILED – she had to expect that the standard of investment practices would change – at the time trust was set up, trustees followed a very conservative investment practice – had to be authorised in the trust deed if they wanted more • Therefore this did not amount to behaviour that no prudent trustee would have pursued at the time – you cannot expect to match or exceed market index • NOW = MPT – a more laissez-faire approach to investments – risky investments are encouraged provided there are enough safe shares to shore up the risky ones! • The MPT emphasises the risk level of the entire portfolio, rather than the risk attaching to each investment taken in isolation. RE: DUTY TO ACT IMPARTIALLY <ul style="list-style-type: none"> • They acted prudently according to standard of investment at the time, but did not act impartially • Its easy if only have life beneficiaries – pitch investments to those who own income. If only have income beneficiaries, look only for capital assets. But when you have both – have to look at benefits for both per s8(o) and s12C – duty to REVIEW – IF CONSTANTLY REVIEWING, COULD BRING MIND TO THIS!
HLB v Trust Company Ltd [2010] FAILED PRUDENCE TEST FOR BEING TOO PASSIVE
FACTS: <ul style="list-style-type: none"> • Huge trust – disabled beneficiary – to provide income and accom to her • Professional trustee placed funds in cash acc to fund short term accommodation. Money held on account earning only 2% income. • No losses made – but if invested different could have received 3-4% interest per month. They played it too safe • Trustee argued acted prudently by preserving capital in volatile market (GFC)
HELD: <i>Trustees can also be too passive and inactive which leads to breach of duty of prudence</i> <ul style="list-style-type: none"> • Trustees TOO PASSIVE – Court said there were various other safe investments they could have put it into – which would have been given more than 3% per month • Had they reviewed, would have been noted that 2% not enough! Given size of fund & volatility of market, annual review was not enough
VBN v APRA [2006] – DUTY TO ACT IMPARTIALLY
HELD: <ul style="list-style-type: none"> • It is OK if the discretion SLIGHTLY favours one group over the other – as long as proper consideration has been given in the exercise of discretion and done so in good faith.
Re Mulligan [1998] – DUTY TO ACT IMPARTIALLY
FACTS: <ul style="list-style-type: none"> • Mrs Mulligan, a very forceful beneficiary – fettered discretion of trustees case. • Facts re: impartiality → most of capital assets eroded – nieces and nephews received a lot but capital beneficiaries completely ignored • At start of trust, value of fund was around \$108,000. By the time she died, couldn't even afford one house. • It was all invested in capital investments, no diversification
HELD: <i>The trustee should consider the interest of the trust as a WHOLE – Cannot choose whether to apply to capital or income</i> <ul style="list-style-type: none"> • Professional trustee were sued for allowing her to dictate the course of action for all the investments • The trustees gave the remainder people no thought at all • There must be a PROPER/FAIR ALLOCATION AS TO EXPENSES in addition to balancing portfolio to take care of benefits • Trustee company tried to argue – in same position as Nestle – investment practices at the time. Court disagreed – trustees should have tried harder to persuade her – they didn't bring this to anyone's attention. Should have gone to court to ask for directions.

DUTIES IN EXERCISING POWER AND DISCRETION

DUTY TO KEEP ACCOUNTS & INFORM (CORE DUTY)

- [T] is under a core duty to keep proper accounts and records of the trust fund in a timely, faithful and accurate manner. Further, [B] is entitled to inspect accounts and trust docs and make copies.
- There is an underlying clash between the rights of Bs to access trust properties and T/ees to protect their own information. The law is currently unsettled as to whether Bs have an automatic right to inspect trust docs and when this right can be rejected.

*When asked, [T] has a duty to give [B] full information as to the amount of the trust property and to its investments. However as [B] wants access to [DOCUMENT], it must be determined **whether it is a trust document** and **whether [B] has access**.*

IS [] A 'TRUST DOCUMENT'?

Although not determinative, Doyle CJ in **Rouse** states as a rule of thumb, anything that an incoming trustee gets handed prior to starting as a t/ee would be regarded as a trust document

- Rule in **Karger v Paul** sets out that trustees do not have to **disclose reasons** for decision making. However, they are duty bound to permit access to **'trust documents'**
- [] is a trust document since it: [Salmon L] definition in **Re Londonderry**
 - Is a doc in possession of trustee while carrying out their role as trustee
 - Contains info about trust which [B] is entitled to know
- Legal docs, letters, accounts, minutes, agendas, all trust docs

Wish Letter?

- A letter of wishes is not normally a trust doc, as it is not binding, but is instead directed to the administration of the trust (**Hartigan; Breakspear**). However, in dissent, Kirby J in **Hartigan** states that a wish letter is a trust doc. There is a difference between a trust instrument and a memo of wishes. The wish letter should be regarded as confidential (**Breakspear**) whereas a trust document is never confidential
- Wish letter is **unlikely to be a trust doc**. [DOC] was found amongst [SETTLOR]'s personal possessions. This has not been handed over at the same time as the trust doc. It is a private letter. Accordingly, it is likely that it is confidential, but not a trust doc (**Breakspear**).
- NB: T may take wish letter into acc – **doesn't invalidate duty of unfettered discretion**, so long as it doesn't dictate to T (**Hartigan**). T should regard wish letter as invested w confidentiality designed to be *maintained, relaxed or abandoned* as they feel would best serve interests of beneficiaries (**Breakspear**)

However, whether or not [DOC] is a trust doc does not answer whether or not [B] will get access to it.

ACCESSIBILITY

Law surrounding accessibility is unsettled. There are 3 lines of approach as to whether [B] can get access to [DOC]

RULES:

- Traditional position (**Re Londonderry**) = Bs have a proprietary interest in anything described as a trust document, but Ts can refuse access when this would reveal reasons for a decision.
- The main Aus authority remains **Hartigan**, where the majority held that Ts were entitled to refuse access to a memorandum of wishes on the basis of an **implied obligation of confidentiality** (Kirby P dissenting)
- In **Schmidt**, however, the Privy Council held that the decision of whether or not to disclose trust docs lies **within the discretion of the court**, not the trustees. There is competing NSW authority on the status of **Schmidt** under Australian law (**McDonald v Ellis**). In **Breakspear**, however, Briggs J held that T/ees have a discretion to release or withhold wish letters, taking into account the best interests of beneficiaries
- Noting Kirby J's dissent in **Hartigan**, there is no need to protect the discretion of the trustees if they were acting bona fide.

APPLICATION:

- Applying the majority in **Hartigan**, it may be that access to the [LETTER/DOC] can be refused on the basis that the [LETTER/DOC] was confidential (although if there is a discretion, there is a question as to whether this was appropriately exercised to deny access). However, basing it off the **fiduciary duty** [T] has a duty to keep [B] informed and render accounts.
- A distinction can be drawn between a genuine claim of confidentiality and a claim that information was simply 'private' (**McDonald**).

LEGAL BASIS FOR ACCESS TO TRUST INFORMATION? WHO CAN ACCESS?