

## INVESTMENT DUTIES: DUTY TO INVEST

The TA must be complied with, unless excluded or modified by the trust instrument (**s 2(3)**)

[T] has a statutory duty to invest the trust funds to yield a profit (**s 5**)

- The duty exists, notwithstanding no explicit requirement in the instrument
- [T] must exercise power of investment in accordance with the trust instrument (**s 6(2)**)
  - But, unless prohibited, may invest in any form of investment (**s 5(a)**)
- At any time, [T] may vary an investment (**s 5(b)**)

### Is it an investment?

The usual meaning of 'investment' is to 'expend (money, effort) in something from which a return or profit is expected' (**Cheyne, Edelman J**)

#### Examples of an 'investment'

- The letting of land (**Byrnes**)
- Unsecured loans
  - While previously at CL it was held that they were not 'investments', it is likely that the scope of the statute is wider and includes them (**Cheyne**)

#### Examples that are not an 'investment'

- Some investments are so inherently hazardous that they cannot properly be termed an 'investments'
  - eg lottery tickets, horse races
- Placing the money in a superannuation fund (**Cheyne**)
  - Because [T] disposes of the legal estate in the money without the receipt of anything in return
    - **Cheyne**: T was not allowed to transfer money into a superannuation trust for B, even though it would have been financially advantageous for B → The membership in the fund would be owned by B not T, hence impermissible

### No scope for investment?

Not all assets are held for investment purposes. If there is no scope for investment, investment is not required

- **Harries**: the trust owned a lot of property (church buildings), which was not a high yielding investment. However, owning churches was central to the charity's purpose → These assets were not held for investment

## INVESTMENT DUTIES: DUTY OF PRUDENCE

[T] must invest prudently and must invest in accordance with the provisions of the trust instrument

- This includes where [T] is required to obtain consent/approval with respect to the investment (**s 6(2)**)
- Note: [S] may set a different SOC in the trust instrument

### **Professional trustees**

#### **Professional?**

[T] will be a professional trustee because his profession, business or employment is or includes (**s 6(1)(a)**):

- Acting as a trustee; OR
- Investing money on behalf of other person

#### **Examples**

- Solicitor charging a fee to act as [T]
  - The section does not require the person's sole business to be acting as a trustee. Thus, the charging of a fee is a clear indication of engaging in business as a trustee
- Corporation acting as [T]
  - If the CO's constitution allows it to act as a trustee, its business necessary includes acting as a trustee

#### **Standard of care**

Thus, the standard of care imposed on [T] throughout investment of [trust's] funds is that of a prudent [occupation] when managing the affairs of other persons (**s 6(1)(a)**)

- This standard is lower than that at CL
  - Reference to 'moral obligation' has been removed (Cf **Bartlett**)
- But a higher standard than required in day-to-day trust management (Cf **Speight**)

#### **Examples**

- Solicitor not charging a fee
  - Solicitors do not regularly act as trustees. It is unclear whether ad hoc acting can be said to form part of his business. However, the fact that he has not received remuneration suggests that he may be considered a lay trustee
- Professional investment advisor
  - This will be a question of fact. Where he merely provides advice (as opposed to actually engaging in investment), he may not be caught by (a).

### **Lay trustees**

#### **Lay?**

[T] will be considered a lay trustee because his profession, business or employment does not include (**s 6(1)(b)**):

- Acting as a trustee; OR
- Investing money on behalf of other person

The standard is determined based on [Ts] current occupation

- Previous occupations are irrelevant

### Standard of care

Thus, the standard of care imposed on [T] throughout investment of [trust's] funds is that of a prudent person when managing the affairs of other persons (**s 6(1)(b)**)

- The standard is lower than that at CL
  - [LTs] are not expected to behave as 'business persons' (Cf **Bartlett**)
- But a higher standard than required in day-to-day trust management (Cf **Speight**)

### Mixed lay-professional trustees

Where professionals and lay [Ts] have been appointed, it is likely that they will be judged according to the professional standard

- LT may be excused from liability under s 67 for a breach that could be excused under the lower standard but not the higher standard

### Was the standard breached?

Prudence will be determined, at least in part, by consideration of the other duties

- Duty to review (**s 6(3)**)
- Others

#### Trustee expected to:

Take reasonable steps to prevent the loss/breach

- **Bartlett**: Trust had 99.8% share of CO (but no appointed DRs). Ts were liable for speculative investments that CO made → they were negligent → they did not insist on appointing DRs themselves, or on regular financial reports (only updated at AGM)

Have regard to the matters listed in s 8 (although not all will be appropriate in the circumstances). Failure to consider these may evidence imprudence. [T] should regard (**s 8(1)( \_ )**):

- (a) The trust's purposes
  - **Harries**: A significant number of trust assets were church properties. Given that these were directly related to the trusts purpose (promotion of religion) Ts were not required to divest the property to diversify
- (a) The needs and circumstances [B]
- (b) The desirability of diversifying trust investments
  - The Act appears to embrace MPT. Thus, [T] should seek a diverse portfolio, unless there are compelling reasons not to
    - **HBL**: Ts failure to take into account diversification of the portfolio (almost all of the \$4.2M were in a 2% cash management account) (s 8(1)(b)) was careless and indicative of his failure to achieve the relevant standard of prudence
- (c) The nature of and risk associated with existing trust investments/property
  - **HBL**: Even though there was significant market volatility (GFC), T could have invested in other higher yielding investments, such as government guaranteed investments and bonds
- (d) The need to maintain capital and/or income
- (e) The risk of capital or income loss/depreciation
- (f) The potential for capital appreciation
- (g) Likely income return
  - Including when it is likely to be paid
- (h) The length of the term of the proposed investment
- (i) The probable duration of the trust
- (j) The liquidity and marketability of the proposed investment
- (k) The aggregate value of the trust estate
  - Larger funds requires more diversification
- (l) The effect of the proposed investment in relation to the trust's tax liability

- (m) The likelihood of inflation affecting the value of the proposed investment/property
- (n) The costs of making the proposed investment
  - Including commissions, fees, charges and duties payable
- (o) Review of existing trust investments
- (2)(a) Obtain and consider independent and impartial advice
  - There is greater expectation that [LT] will seek advice

Trustee not expected to:

- Have 'prophetic vision' to anticipate [unexpected event] (**Nestle**)
- Ignore received wisdom of the time (**Nestle**)

[T's] negligence in failing to meet the standard of care by amounts to a breach of duty

## INVESTMENT DUTIES: DUTY OF REVIEW

Subject to trust instrument, [T] has a duty to review the investment portfolio at least once a year (**s 6(3)**)

- Review is to be done individually and as a whole (**s 6(3)**)
  - MPT replaces mere line by line analysis
    - **HBL:** During the GFC (market volatility), T (trust held damages payout for brain injured B) placed almost the entire \$4.2M in a 2% cash management account (at the time a 7% term deposit was available) → Given the large sum, the low interest, and the volatile market, reviewing every 6 months was unacceptable
- When exercising the power of investment a prudent [T] should review existing trust investments (**s 8(1)(o)**)
  - He should not merely rely on annual review

## INVESTMENT DUTIES: DUTY TO ACT IN BEST INTERESTS OF THE BENEFICIARIES

[T] must act in the best interests of present and future beneficiaries (**s 7(2)(a)**), where 'best interests' means financial interest—that is, the power must be exercised to 'yield the best return for [Bs]' (**Scargill**)

- **HBL**: Placing almost all of the \$4.2M in a 2% cash management account (at time 7% term deposit was available) was careless and lazy; clearly not in B's best financial interests

- [T] must 'put on one side' his own ethical/social/political views (**Cowan**)
  - [T] will be in BOT if he makes decisions on non-financial grounds, unless the course of action performs as well
- If all [Bs] share a belief and think that course of action pursued by [T] was in their interests, [T] may be able to pursue a course that does not generate the maximum financial yield (**Cowan**)
  - However, this will be rare
  - The onus would be on [T] to establish
    - **Cowan**: Union-appointed Ts were not entitled to object to the investment plan (which allowed investment in renewables—ie sectors that competed with coal) on the grounds of personal or political preference

### Charitable trusts

Charitable trusts may have more leeway. However prima facie the purposes of the charitable trust are best served by [T] seeking to obtain maximum returns on their investments (**Harries**)

- Thus, where ethical investment causes financial detriment, [T] is to make their investment decisions on grounds other than morality

However, best financial interests may be departed from if:

- The objects of the charity clearly conflict with a certain kind of investment
  - eg Abstinence charity investing in alcohol production (**Harries, obiter**)
  - eg Cancer charities investing in tobacco (**Harries, obiter**)
- The investment will hamper the charity's work
  - eg Alienating donors
- All of the beneficiaries share the belief
  - **Harries**: T was not entitled to direct investment away from higher yielding investments in apartheid SA → Not everyone in the church (the Bs) agreed on this moral issue

Thus, [T] may make the investment, even if results in financial detriment

### Superannuation trusts

[T] must not take into account the employer's interests when making decisions (**Asea**)

- However, an employer may receive coincidental benefit
  - **Asea**: Ts wanted to vary the scheme to enable the employer to take advantage of new tax benefits

### Exception: trust instrument

The trust instrument may provide investment guidelines, allowing for ethical investment

### Not an investment?

S 7(2)(a) only applies with regard to trust investment. However, as the duty to act in the best interests of beneficiaries is also imposed in equity, it applies generally to [T's] administration of trust affairs.

- In non-investment contexts, it is likely that best interests also means 'best financial interests' (**Cowan**)

## INVESTMENT DUTIES: DUTY NOT TO SPECULATE

Section **7(2)(b)**, precludes [T] from engaging in speculative investment. However, the Act's embrace of MPT likely allows some degree of speculation.

- Thus, the crucial questions are:
  - Whether trust funds were sufficiently diversified (**s 8(1)(b)**); AND
  - Whether the trust was overly exposed to risk (**ss 8(1)(c), 8(1)(e)**), specifically in regard to the aggregate value of the trust (**s 8(1)(k)**)
- Nonetheless, [T] is not required to ignore the received wisdom of his time (**Nestle**)
  - If investments were made a very long time ago, arguable that it was acceptable for [T] to have adopted a more conservative approach

### Sufficiently diversified?

The rationale behind diversification creating a portfolio that includes multiple investments in order to reduce risk.

- Should not invest large sums:
  - In a single company;
  - In a single industry;
  - In a single asset class (bonds, shares, real estate, commodities, cash)
- Should:
  - Offset high risk investments with low risk investments
- Consider:
  - Funds that have longer-term goals can afford to be a more aggressive, while shorter-term funds should be more conservative

### Over exposed to risk?

Diversification is undertaken to reduce risk. Where a fund is sufficiently diversified it will not be over exposed to risk.

## INVESTMENT DUTIES: DUTY TO ACT IMPARTIALLY

[T] must act impartially between [Bs] and must act fairly in making investment decisions that have different consequences for different classes of [Bs] (**Nestle; s 7(2)(c)**)

- This is not a mechanical rule requiring exact equality between different classes (**Nestle**) and will be judged by reference to the best interests of the trust as a whole (**VCN**)
  - **VCN**: Superannuation trust could not pay out all Bs. After negotiation with employers (who paid into fund), agreed to reorganise in such a way that a certain class of Bs (former employees) would be worse off → The Ts of the fund were satisfied that this deal was in the best interests of the trust as a whole (if they didn't make it, all Bs would be badly affected) → Thus, even though only one class suffered they were not held to have acted with partiality
- [T] has wide discretion and may take into account (but they cannot be overriding considerations) (**Nestle**):
  - Life tenant's income needs;
    - Especially in light of the capital Bs' needs
      - eg CB well off, while LT is testator's widow fallen on hard times
  - [S's] wishes
    - eg That the life tenant was intended to be the primary object, while the remainderman was more remote/a stranger to [S]
      - **Nestle**: CB argued that the fund (initially 53k) could have become 1.8M, but on the LT's death (it was only 270k); T was not required to invest the whole fund for CB's benefit
      - **Re Mulligan**: M (testator's widow), was co-T and life tenant B; she pursued investment strategy that drained the trust fund (almost nothing to pass onto capital B) → Ts were entitled account for the trust's main purpose—providing income to M during her life and then, on her death, provide remainder to the nephews and nieces → It was fair for the trustees to give some preference to M, but it was unfair to totally disregard the position of the capital beneficiaries

### Apportionment of expenses and loss

[T] must fairly apportion any expenses and losses made by the trust between different classes of [Bs] (**Nestle**)



## INVESTMENT DUTIES: DUTY TO TAKE ADVICE

It is likely that trustees are only required to take advice if advice is reasonably required in the circumstances (**ss 7(2)(d); 8(2)(a)**).

- As the extent to which [T] followed independent advice is relevant to assess whether [T] was prudent and whether should be liable for a BOT (**s 12D(d)**), [T] is well advised to take advice unless satisfied that it is particularly unnecessary in the particular circumstances
  - **CCR**: A T with no relevant financial or investment expertise needed independent advice in order to act prudently

### **Professional trustees**

A [PT] is less likely to require independent advice, especially regarding everyday trust management.

- However, this will depend on [PT's] own skill and experience—ie [PTs] should take advice where necessary

### **Lay trustees**

There is greater expectation that [LT] will seek advice

### **Getting the advice**

When seeking advice, [T] should seek advice that is independent and impartial from a person he reasonably believes to be competent to give the advice (**s 8(2)(a)**)