

(e) Investment Duties

Introduction

T has duty to invest trust property and cannot simply sit on assets: *Adamson v Reid*, s 7(2)(b) TA

- If duty inconsistent w trust instrument, latter prevails: s 7(1) TA

At CL, T must invest within 6 mths of appointment (*Cann v Cann*, *Adamson v Reid*)

- If property received under CT/RT, must transfer unless time to invest: *Fan v Tang*
- Prima facie breach BUT qn whether statutory duties complied with?

Step 1: Is there an investment?

It is not contentious that [investment] is an investment for our purposes.

Term is broadly defined (s 5 TA)- all required is that profit or return expected from exchange or purchase (*Cheyne*, *Harris v Church*)

Yes	No
<ul style="list-style-type: none"> ▪ Purchasing shares (<i>Byrnes</i>) ▪ Purchasing land to lease (<i>Byrnes</i>) ▪ Acquire income-producing asset (<i>Somerset</i>) ▪ Variation of existing investment (s 5(b) TA) 	<ul style="list-style-type: none"> ▪ Transferring funds to super (not return)

This element likely met.

Step 2: What standard of care applies to T?

Standard depends on type of T.

Here, T is [TYPE] so held to [HIGH/LOW] standard, i.e. prudent [BUSINESS / ORDINARY] person:

Type	Standard
Professional T (financial advisor, lawyer)	High – prudent business person managing own affairs: s 6(1)(a) TA Even higher if experienced managing trusts/investing \$
Amateur T (not professional)	Low – prudent lay person managing affairs of another: s 6(1)(b) TA Need not be business savvy If experienced, may impute higher standard
Corporate T	Same as professional T: <i>AS Nominees</i>

T may argue however standard modified by trust deed: s 6(1)-(2) TA

Step 3: Has T complied with review rules?

1. T must review trust investment at least once per annum: s 6(3) TA

- Unless altered by trust deed: s 6(3) TA
- Unless investment comprises 50%+ portfolio – more than twice annually (*HLB*)

2. T breached the review rules by [conduct]:

- Looking at individual isolated investments and not portfolio as whole – inconsistent with MPT (*Debeljiak*)
- Failing to review existing investments upon making new investment: s 8(1)(o) TA
 - ST v LT
 - Comparable performance

3. Ultimately, [likely/unlikely] review rules satisfied.

Step 4: Has T complied with investment rules?

In making investment, T must comply with specific duties.

Here, B will argue T's investment violates [duty] under s 7 TA – unless inconsistent with trust deed.

Act in BIs	7(2)(a) TA	GO TO 7.2 > (d)(iii)
Invest non-speculatively	7(2)(b) TA	<p>Must not make speculative investments</p> <ul style="list-style-type: none"> • Inherently hazardous: race horses, lottery tickets (BVT) • Avoid conditional investments: property development where no guarantee of council approval (Bartlett) • Diversified portfolio – balances high return with low return investments: s 8(1)(b), MPT <p>Exception:</p> <ul style="list-style-type: none"> • Speculative investment that is: <ul style="list-style-type: none"> ○ (a) Limited to market risk (Manns) (cf. inherently risky: Bartlett) ○ (b) Likely yield high returns ○ (c) Small % of investment portfolio (British Museum) ○ = investment supported by MPT in this case
Act impartially b/w Bs	7(2)(c) TA	<p>GO TO 7.2 > d(i)</p> <p>Applies to selection of investment: Mulligan, Wendt v Orr</p> <p>In assessing impact on each class, qn is whether T took into account needs of Bs? (Nestle)</p> <ul style="list-style-type: none"> • Special case: <ul style="list-style-type: none"> ○ Widow with children not well off / fallen upon tough times ○ Ok to prefer income B to capital B (Mulligan, VBN v Apra) • Total impartiality not needed: individual needs, r/s to S, dependents <p>Policy: Conflicts w MPT which is concerned w 'total return' (BVT)</p>

Ultimately, [likely/unlikely] specific investment rules satisfied.

Step 5: Has T obtained advice?

1. Although TA provisions somewhat contradictory, GR is that T has must take advice (s 7(2)(d), (4), 8(2) TA) – unless inconsistent w trust deed (s 7(1) TA)

2. Qn is whether advice necessary or 'reasonably required' in circo (CCR, s 8(2)(a) TA)

Yes	No
<ul style="list-style-type: none"> • T lacks relevant financial / investment k • Proposed investment was huge • Advisor is independent + impartial + competent: 8(2)(a) TA 	<ul style="list-style-type: none"> • No prudent T would need advice for this type of investment • T is professional / has experience

3. Thus, advice [likely/unlikely] necessary.

- If no: T incurred costs to trust unnecessarily – may breach duty of prudence
- If yes:
 - T can apply trust funds to pay 'reasonable costs' of advice (s 8(2)(b), 7(4) TA)
 - Likely unreasonable if not competent / independent
 - If use own funds, then can seek ROI [GO TO 8]
 - T may be exempt from liability if finding of breach (s 12C(d) TA)

Step 6: Was T prudent?

To determine prudence of T, court will have regard to s 8 matters

- Only relevant matters – usually (a) + (b) + (l)

Trust Needs

Purpose of trust B's needs	8(1)(a)	Is investment consistent with trust deed? <ul style="list-style-type: none"> CT for religion: mainly income + some capital growth (Harries) Will to wife w kids in remainder: balance income + capital (Mulligan) – unless in financial straits (that is nature of disc trust) Is investment consistent with needs of Bs? While no positive duty, sensible to consult Bs: Jacobs, Ford
Need to maintain income / generate capital	8(1)(d)	Apply same analysis as (a)
Aggregate value of trust estate	8(1)(k)	May be informed by (b)

Review

Diversification	8(1)(b)	Important + required by MPT Diversification achieves optimisation of portfolio Is there mix of speculative and non-speculative? If yes, then ok
Existing investments / trust property	8(1)(c)	Determined by (o) Reconcile with trust needs
Results of review rules	8(1)(o)	

Risk

Probability of inflation	8(1)(m)	Inflation affect all markets (ok) or specific industry (not ok)? GFC?
Risk of loss / depreciation	8(1)(e)	
Potential for appreciation	8(1)(f)	
Amount + time of return	8(1)(g)	Reconcile with trust needs

Proposed Investment

Length of investment	8(1)(h)	Reconcile with trust needs
Liquidity + marketability (during + after)	8(1)(j)	Reconcile with risk
Tax liability	8(1)(l)	Important
Costs (commission, fee, duty)	8(1)(n)	Reconcile with trust needs and risk

Ultimately, [likely/unlikely] T considered any matter under s 8 TA.

- If no: Failure = evidence of imprudence: **HLB, CCR**
- If yes: Indicates prudence + following **MPT**: **BVT**

Step 7: Conclude

In light of above, it is [likely/unlikely] T has breached investment duties in relation to [investment].

Step 8: Defences

Even if T in breach, T may argue:

- Loss resulting from breach can be set off against gains from other profitable investments (s 12D TA, **Bartlett, MPT**)
- An exemption under s 12C applies bc:
 - T considered s 8 matters thus acting prudently: s 12C(b)
 - T followed formulated investment strategy (esp if **MPT** diversification: **BVT**): s 12C(c)
 - T followed independent competent advice: s 12C(d)
- Conclude
NB. Unclear if s 12C are positive defences or merely 'further matters' in determining qn of liability

6. Right of Indemnity

T may seek to exercise Right of Indemnity (ROI) to recover expense incurred in performing trust (s 36(2) TA, Worral)

NB. Trust is not legal entity so can never be liable. Can only hold T liable (primarily) or B (secondarily).

6.1 Is there ROI available?

B will argue no ROI available as ROI excluded by [term] of the trust [deed/instrument] (RWG Management per Brooking J 395 / s 197(1)(b)(iii) Corps Act – if applicable)

- Is exclusion clause explicit and in very clear language?
- This view is consistent with Vic authority and s 2(3) TA which promotes supremacy of trust instrument

T will rebut that ROI is 'intrinsic element' of trusteeship so would be contrary to (a) purpose of trust and (b) public policy to permit exclusion (Jonco per Santow J; Moyes v J&L).

- Brooking J's comments were qualified as not 'final opinion'
- Even tho T relies on authority of other Aus Js, the exclusion is impractical and unrealistic for 2 reasons.
 - (1) While Ts may accept trusteeship waiving ROI, this would be very rare (esp. if corporate trustee as T would be liable themselves under s 197 Corps Act as D of co)
 - (2) Exclusion clause not likely enforceable against trade creditors who would not likely have seen terms of trust (Ford) (esp. if purpose of exclusion to (fraudulently) defeat those creditors per Franknelly)

Ultimately, it is likely that ROI is not excluded by [term].

6.2 Is the expense within protection of ROI?

To gain benefit of ROI, T must show that [expense] is 'properly incurred' (Nolan, Wales).

Qn is whether [expense] was not improperly incurred by T when [performing duty/exercising power] in all the circs. (Nolan per Ormiston JA).

- Broadly interpreted (Re Raybould)
- Negligence (Raybould) / unreasonableness not a bar to ROI (Gatsios)
- Excludes personal expenses of T (e.g. holiday, personal tax liability) (Gatsios)

T will argue [expense] was properly incurred bc in good faith and:

- Required to discharge [duty].
 - No breach alleged? ROI available
 - Breach alleged? Depends on nature of duty.
 - [Duty] does not require strict compliance.
 1. ROI available only if prudent business person would have paid [expense] in conducting own affairs (Nolan).
 2. Includes:
 - a. Church v Bishop: Costs to run trust (daily management, rates, agent fees)
 - b. Balkin: Taxes
 - c. Raybould: Damages + costs where judgment creditor subrogated to Pltf (e.g. insurer, guarantor)
 - [Duty] requires strict compliance.
 1. If breach made out, then ROI will not be available (Beath v Kousal, Nolan).
 2. May also lead to set-off [GO TO B]
- Required to defend litigation for breach of trust: Hayman; Church v Bishop

B will argue T acted [criminally / fraudulently] (Gatsios) bc

- T will respond that Nolan rejected this test bc too narrow and leaves law 'rudderless' to 'improper depredations of trust funds' (Nolan)
- Only applies to tort (beyond mere negligence) + crime

On balance, [expense] is 'properly incurred' for purpose of ROI.

6.3 What is the amount claimed under ROI?

Having established [expense] was 'properly incurred', \$X is prima facie recoverable under ROI.

(a) Offset by T's Breach

IF APPLICABLE

T alleged to breach duty of [insert] as trustee.

If allegation established, then amount available under ROI will likely be reduced by \$X, i.e. loss caused to trust (RWG).

- Even so, T need not 'reinstate' trust before claiming indemnity
- Thus, T relieved somewhat of any personal liability for alleged breach (Staff Benefits, RWG)

(b) 3P Creditor's Subrogation

IF APPLICABLE

As creditor of T (personally), [3P] can be subrogated to T's ROI:

- Out of trust assets (Octavo) OR
 - Against Bs directly (Marginson per HCA, Belar Qld)
- NB. Somewhat unsettled as subrogation is proprietary but ROI against Bs is in personam (Ron Kingham cf. Belar)*

Identify 3P	<ol style="list-style-type: none"> 1. Trustee in bankruptcy of T – can get trust assets needed to discharge ROI for expense (Octavo) 2. Liquidator of corporate T – can get trust assets covered by ROI to amount of L's expenses (Re Suco King CJ) 3. Secured/unsecured creditors
Rule	Set off for breach applies to [3P] too as T's lien secures only trust assets equivalent to value of [expense] (RWG cf Staff Benefits)
Exception	T may stymie action by [3P] on basis that T signed K w [3P] 'as trustee and not otherwise' = evades personal liability to 3P creditor (Robinson's)

Thus, likely that ROI value of \$X will be subject to claim of [3P].

(c) Quantum of ROI

The amount available under ROI is \$X (expense) less \$X (set off/3P amount) leaving balance of \$X.

6.4 Is recovery possible?

Option 1: Out of Assets

As there are sufficient funds in trust estate, T may exercise ROI 'out of trust assets'.

T entitled to [reimbursement / pay expense using money from trust bank acc] per s 36(2) TA.

Option 2: Directly from Bs

As there are NOT sufficient funds in trust estate, T may pursue Bs [name] personally (**Broomhead**).

- This is on basis that:
 - Bs must also bear burdens if reaping benefit (**Hardoon**)
 - Commit breach w consent/direction of B (crt can order impound of B's interest: **s 68 TA**)

T must make out requisite elements:

Single B	<p>GR: Sui juris (of age) + absolutely entitled = YES ROI (Hardoon)</p> <p>Absolutely entitled means indefeasible vested interest (immediate possession/enjoyment)</p> <ul style="list-style-type: none"> • Qn is whether B can direct T to deal with entire property (Saunders)? • Excludes: <ul style="list-style-type: none"> ◦ Objects of discretionary trust (Balkin) ◦ Life tenant (title contingent upon death) • Includes: <ul style="list-style-type: none"> ◦ B where interest in entire property vested ◦ Remainderman once life tenancy vests (life tenant dies) ◦ Life tenant where residuary disclaimed / paid off by remainderman
Multiple Bs	<p>GR: All Bs are sui juris + same class + collectively absolutely entitled = YES ROI (Broomhead)</p> <p>Exception: Bs not of same class (income B + capital B) but capital B is remainderman with vested interest (bc life tenant died) (Balkin)</p> <p>No ROI if:</p> <ul style="list-style-type: none"> • B has disclaimed beneficial interest (void ab initio) (Broomhead) • At least 1 B is infant (Broomhead) <ul style="list-style-type: none"> ◦ If Bs are mix of infants and adults = not all sui juris <ul style="list-style-type: none"> ▪ Both infants and adults may be exempt per BVT ▪ But arguably adults should be liable given Hardoon principle ◦ Adult is B of trust and ST of sub-trust for infant (Broomhead) • At least 1 B is insolvent (won't change proportion of liability) (Broomhead) • SH where B is company (CCM)

Thus, [likely/unlikely] T can exercise ROI against Bs directly.

Exception: Corporate Trustees

Arguably T is *personally* liable for [expense] as D of [company] being the corporate trustee: **s 197 Corps Act**

- Ensures recovery for unsecured creditors
- Jointly and severally liable with all other Ds

This is on basis that:

1. T was D of [company] when:
 - a. Acting as trustee **AND**
 - b. Incurred [expense] **AND**
2. [Expense] not yet discharged **AND**
3. **Trust now insolvent and cannot discharge [expense] – tho not determinative AND**
4. Min. 1 of following apply:
 - a. **[Company] in breach of trustee [duty]** – such that \$ROI set off against \$X being loss caused to trust **AND/OR**
 - b. **[Company] acted beyond scope of [power] AND/OR**
 - c. **ROI of T limited/excluded**

Thus, T [likely/not likely] liable under **s 197(1) Corps Act**