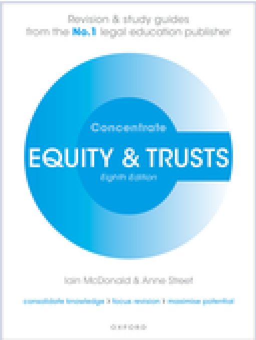

Equity and Trusts Concentrate: Law Revision and Study Guide (8th edn)
Iain McDonald and Anne Street

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11. Trustees' duties and powers

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Abstract

Each Concentrate revision guide is packed with essential information, key cases, revision tips, exam Q&As, and more. Concentrates show you what to expect in a law exam, what examiners are looking for, and how to achieve extra marks. This chapter discusses the main duties and powers of trustees. Rather than rigidly separating duties and powers, it presents the duties and powers of trustees in a way which reflects how they might arise during the operation of a trust. It first addresses the initial questions of the appointment, removal, and payment of trustees. It then examines issues arising on appointment to the trust and the fiduciary nature of trustees' duties. Finally, it examines issues likely to arise during the administration of the trust, including the trustees' powers of investment, beneficiaries' right to information about the trust, and trustees' powers of maintenance and advancement.

Keywords: trustees, appointment, removal, payment, trust administration, fiduciary, investment

Key facts

- Trustees' duties are obligatory and must be carried out.
- Trustees' powers are entirely discretionary.
- Trustees are in general not entitled to **remuneration**, but the **Trustee Act 2000 (TA 2000)** provides for the remuneration of trust corporations and trustees acting in a professional capacity.
- Trustees are the archetypal fiduciary and are subject to strict duties designed to prevent any risk of conflict between their duties and their own personal interests.
- When a beneficiary is entitled to an income from trust property, trustees have a duty to invest. This duty is predominantly dealt with by the reforms of the **TA 2000**.

- Trustees have a duty to provide beneficiaries with information about the trust, but this is not absolute.
- Powers of maintenance and advancement allow trustees to assist certain beneficiaries before their entitlement vests.

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Introduction

This chapter deals with the main duties and powers of trustees. Rather than rigidly separating duties and powers, this chapter presents the duties and powers of trustees in a way which reflects how they might arise during the operation of a trust. Therefore, after dealing with the initial questions of the appointment, removal, and payment of trustees, the chapter turns to issues arising on appointment to the trust and then those likely to arise during the administration of the trust.

The appointment and removal of trustees

Anyone with the capacity to hold property can be a trustee, for example adults of sound mind and corporations. Trustees are typically appointed by the settlor or testator in the trust instrument or will. If a person is named as a trustee but is unwilling to accept the role, that person may disclaim (refuse) the trust. This should be done by a deed. A trustee cannot disclaim *part* of the trust—acceptance of part of the trust is acceptance of the whole: ***Re Lord and Fullerton’s Contract [1896]***. A trust should typically have no more than four trustees (although the settlor may expressly require more, and the court may authorize further trustees where appropriate).

- Trusts of realty (trusts including land) should have a minimum of two trustees.
- Trusts of personalty (trusts which involves only personal property) may operate with a single trustee.

How can additional trustees be appointed?

- An express power in the trust instrument.
- **Section 36(6) Trustee Act 1925**—as long as there are no more than three trustees, additional trustees may be appointed by either the person expressly given the power to do so (**s 36(6)(a)**) or, if there is no such person, the other trustees (**s 36(6)(b)**).
- **Section 19 Trusts of Land and Appointment of Trustees Act (TOLATA) 1996**—where all beneficiaries are *sui juris* and collectively absolutely entitled to the trust property, they may direct the trustees to appoint an additional trustee of their choosing. This power cannot be exercised where (i) the trust instrument has expressly conferred a power to appoint trustees to someone else; or (ii) there are already more than three trustees.
- **Section 20 TOLATA 1996**—beneficiaries may direct trustees to appoint a substitute if a trustee becomes mentally incapable of carrying out his or her role. (**Section 20** only applies where the power under **s 36 Trustee Act 1925** is not exercised.)
- **Section 41 Trustee Act 1925**—the court may appoint an additional trustee where it is impracticable or inexpedient for others to act without the court’s involvement.

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How can trustees be removed?

Revision tip

The rules relating to the appointment of trustees are uncontroversial and you are unlikely to be asked to discuss them in any detail. However, if you are answering a problem question in which it seems that the trustees have acted inappropriately, you may gain extra credit for discussing whether the beneficiaries or the courts can remove the trustees from their position.

Retirement

Trustees can only retire in certain circumstances. If their retirement is ineffective, their liability to the trust will continue. Trustees can retire in the following ways:

- The trust instrument expressly allows trustees to do so.
- It is intended to *replace* the retiring trustee.
- **Section 39 Trustee Act 1925**—a trustee may retire if:
    - there are at least two remaining trustees or a trust corporation;
    - the remaining trustees or person with the power to appoint trustees consents by deed to the retirement.
- **Section 19 TOLATA 1996**—unless the trust instrument expressly confers the power to appoint trustees to someone else (**s 19(1)(a)**), where all beneficiaries are *sui juris* and collectively absolutely entitled to the trust property, they may direct a trustee in writing to retire (**s 19(2)(a)**). **Section 19(3)** places conditions on the use of this power:

  reasonable arrangements must have been made to protect any rights of the trustee in connection with the trust;

  there must be at least two remaining trustees or a trust corporation;

  either the trustee is to be replaced by another or the remaining trustees consent by deed to his or her retirement; and

  the retiring trustee has made a deed declaring his or her retirement.
- The court may exercise its inherent jurisdiction to supervise trusts to permit a trustee to retire. This jurisdiction does not require the consent of the remaining trustees.

How can trustees be replaced?

- **Section 36(1) Trustee Act 1925**—lists eight situations in which a trustee can be replaced, for example death, retirement, unfitness to act. The power can be exercised by a hierarchy of persons in the following order:

  person expressly given the power (**s 36(1)(a)**) or, if there is no such person,

  p. 160 the surviving trustees or the personal representative of the last surviving trustee (**s 36(1)(b)**).
- **Section 19 TOLATA 1996**—beneficiaries may direct the trustees in writing to appoint a trustee of their choosing, subject to the same conditions set out in relation to retirement (see the section 'Retirement', p *).
- **Section 41 Trustee Act 1925**—the court may replace a trustee where it is impracticable or inexpedient for others to act without the court's involvement.

Removal by the court

The court may exercise its inherent jurisdiction to remove a trustee. Its primary motivation will be the welfare of the beneficiaries. Therefore, a trustee's dishonesty may warrant her removal, as might hostility between the trustees and beneficiaries, even though, in the latter case, the trustees have committed no wrong: ***Letterstedt v Broers (1884)***. However, as each case is decided on its facts, minor errors (***Isaac v Isaac [2005]***), or the expense of replacing a trustee (***Re Wrightson [1908]***) may persuade the court not to remove a trustee.

Payment of trustees

Generally, trustees are not entitled to be remunerated for their services. The rationale for this rule is that financial motives should not be allowed to intrude upon the trustee's fiduciary obligations to beneficiaries. However, it is common practice for trust instruments to include an express remuneration clause. Where there is no express remuneration clause, trustees will be entitled to remuneration in the following circumstances (see Figure 11.1).

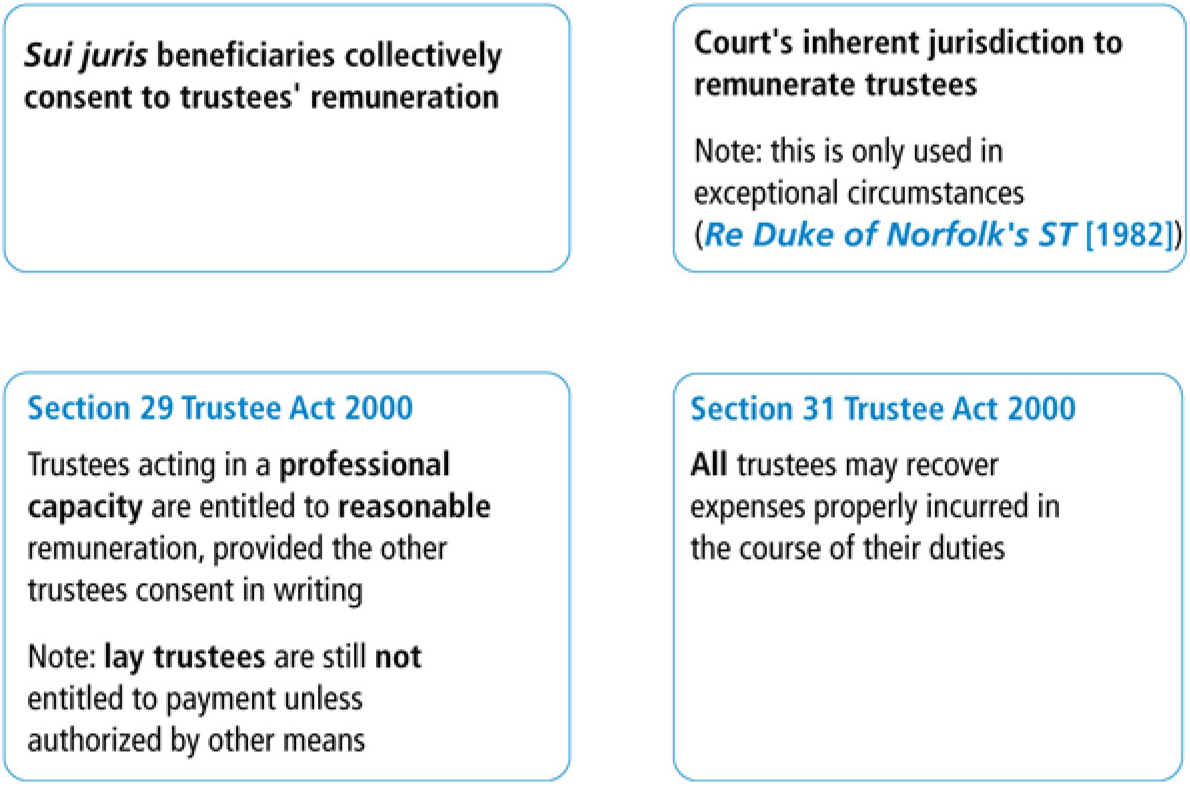

Figure 11.1 The remuneration of trustees

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Duties on taking up the role of trustee

Upon accepting a position as trustee, a trustee must do the following (see Figure 11.2):

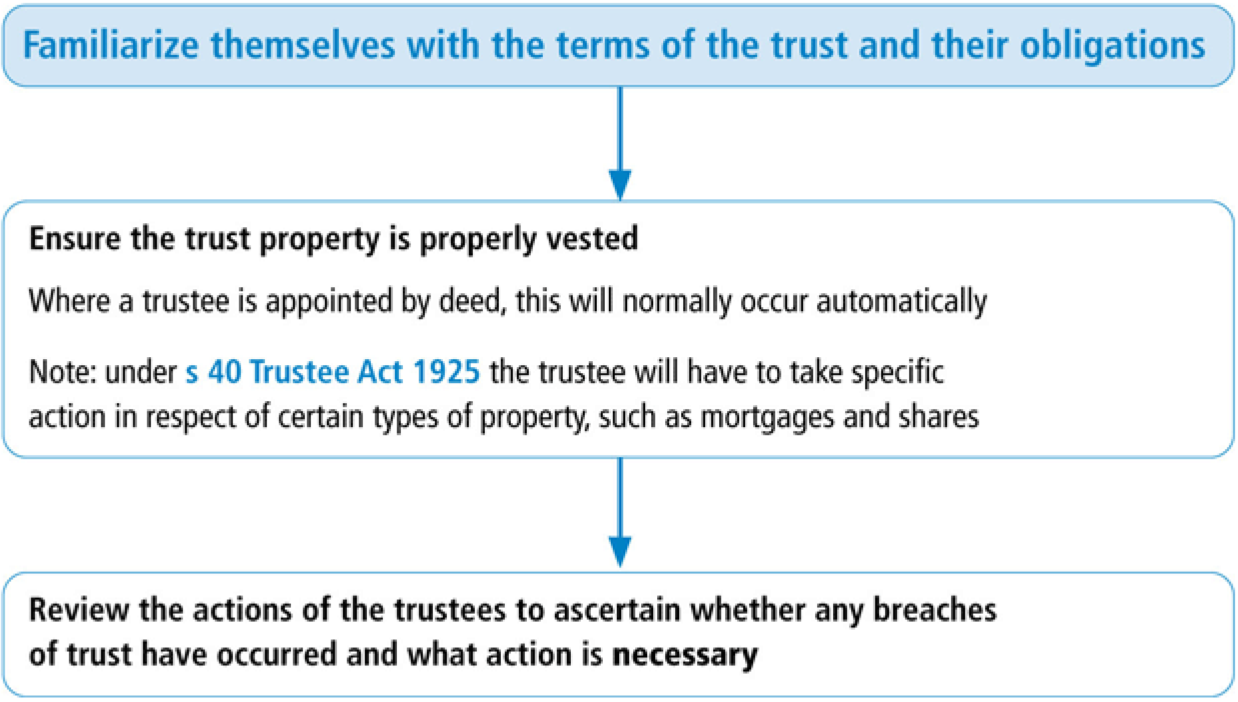

Figure 11.2 Duties on taking up role of trustee

The administration of the trust

In administering a trust, the trustees must act unanimously, unless the trust instrument allows otherwise: ***Luke v South Kensington Hotel Co (1879)***. This rule offers a degree of protection to beneficiaries by preventing majority decision-making.

Fiduciary duties

In ***Bristol and West Building Society v Mothew [1996]***, Millett LJ described the fiduciary relationship in the following terms:

> A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence. The distinguishing obligation of a fiduciary is the obligation of loyalty.

Trustees owe fiduciary duties to beneficiaries, and there are a number of relationships which are also well established as fiduciary in nature, including solicitors and clients, and directors and their company. However, the question of whether a relationship is fiduciary in nature will ultimately depend on the facts. Thus, in ***Reading v Attorney-General [1951]***, a sergeant who used his position and uniform to help smugglers avoid detection was held to have breached his fiduciary obligation to the Crown. In ***Imageview Management Ltd v Jack [2009]***, a footballer's agency company was considered to owe fiduciary duties to their clients because the
p. 162 nature of ↵ their role as agents demanded that their own personal interests must always take second place to their clients' interests.

Fiduciaries have a number of duties designed to prevent any conflict arising between the interests of the trustee and those of the beneficiaries. These duties are strictly enforced by the courts. While this can sometimes be said to lead to the unfair treatment of innocent fiduciaries, the exacting nature of these duties is designed to discourage them from undertaking any action which might be said to conflict with their paramount duty of loyalty to beneficiaries.

Unauthorized profits

Fiduciaries cannot retain any unauthorized profits generated by their connection to the trust: ***Bray v Ford [1896]***. Any profits will be held on constructive trust for the beneficiaries (see chapter 9 on implied trusts):

Keech v Sandford (1726) Sel Cas Ch 61

The trustee held a lease of the profits of a market for a minor. When the lease was approaching its end, the trustee sought to renew the lease for the beneficiary. The landlord refused because he would not be able to enforce any of the covenants against a minor. The trustee then took the lease on his own behalf. Despite the fact that the landlord would not have renewed the lease for the minor, the court held that the lease was held for the benefit of the trust.

It will not make a difference if the fiduciary generates a profit for both himself *and* the trust:

Boardman v Phipps [1967] 2 AC 46

In his fiduciary capacity as solicitor to a trust, Boardman obtained information about a company in which the trust had invested. He realized that the company could be made more profitable and purchased a controlling share to enable him to carry through his plans. All of the competent trustees and the beneficiaries had been made aware of this opportunity, but due to the trust's restrictive investment powers, the trustees could not make the purchase themselves. Through his hard work, the company made substantial profits for both himself and the trust. Despite this, the House of Lords held on a three to two majority that Boardman held his profits on constructive trust for the trustees.

Note: Boardman was able to retain a portion of the profits on a ***quantum meruit*** basis for his efforts. However, this does not alter the fact that all of the profits were held on trust.

If a fiduciary makes a profit from his or her company's dealing with the beneficiary, his or her share of the profits will be subject to a constructive trust for the beneficiary: ***Williams v Barton (1927)***.

Bribes

A fiduciary who receives a bribe from a third party is clearly in breach of the fiduciary duty not to make an unauthorized profit. However, the extent of the remedy available to the beneficiary ↵ in such circumstances has been questioned. In ***Lister & Co v Stubbs (1890)***, the Court of Appeal held that the claimant could not establish a *proprietary* interest in bribes received by their fiduciary, as those monies had never belonged to the company. However, in ***Attorney-General for Hong Kong v Reid [1994]*** the Privy Council held that the claimant was able to establish a proprietary interest in the bribe monies received by Reid on the basis of the equitable maxim that *equity sees as done that which ought to be done*. This meant that the defendant held the property purchased with the bribe money (which had increased in value) on constructive trust for the claimant. Both approaches can be considered controversial: ***Lister & Co v Stubbs*** reduces the extent to which fiduciaries can be held accountable by beneficiaries and seems to run contrary to the principle that fiduciaries

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should not be allowed to profit from their position; ***Attorney-General for Hong Kong v Reid*** clearly seeks to send a strong message that any exploitation of a fiduciary relationship will not be tolerated, but did so through the creative use of an equitable maxim which trampled upon 100 years of established legal principle!

This debate was reopened in ***Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd (in administration) [2011]*** when the Court of Appeal declined to follow ***Attorney-General for Hong Kong v Reid*** and reasserted that a beneficiary will only have a *personal* claim against a fiduciary in respect of property which neither belonged to the beneficiary nor was acquired by taking advantage of an opportunity that rightfully belonged to the beneficiary. However, just a few years later in ***FHR European Ventures LLP v Cedar Capital Partners LLC [2014]***, the Supreme Court confirmed the approach taken in ***Attorney-General for Hong Kong v Reid***. In a careful and thorough review of the authorities, Lord Neuberger argues that the importance of ensuring fiduciary loyalty is the key to understanding the rules in this area and not the question of whether the bribe money belonged to the principal. As such, accepting a bribe should be considered to fall within the general principle that an agent who acquires a benefit through their fiduciary position is to be treated as having acquired it *on behalf of their principal*. This approach provides the principal with both proprietary and personal remedies from which to choose and means that the value of bribes *and* any subsequent additional profit can now be potentially recovered.

Trustees' dealings with trust property

Trustees who sell trust property have an overriding duty to obtain the best price. In ***Buttle v Saunders [1950]***, an injunction was awarded preventing a trustee from accepting an offer to purchase property for reasons of morality when a higher offer had been received.

The self-dealing rule

The sale of trust property to a trustee is **voidable** by a beneficiary. Here the nature of the fiduciary relationship operates to prevent the *risk* of a trustee putting his or her own commercial interests before the fiduciary obligation to obtain the best price for the trust. This rule is strictly enforced and, in general, it does not matter if the property is purchased in good faith and for full value (***Ex p James (1803)***) or even after the trustee retires (***Wright v Morgan [1926]***), unless a significant period of time has since elapsed (***Re Boles and British Land Company's Contract [1902]***).

p. 164 ↵ One interesting exception occurred in ***Holder v Holder [1968]***:

Holder v Holder [1968] Ch 353

The defendant had been appointed as an executor of his father's will. He sought to renounce this position but had carried out some minor administrative tasks, which rendered this ineffective. However, he played no further part in the administration of the estate. When the other executors placed two of his father's farms for sale at auction, the defendant purchased them. However, one of the beneficiaries sought to have the purchase set aside on the basis that the defendant was a fiduciary. The Court of Appeal refused, arguing that there was no conflict of interest as the defendant had paid a fair price and had not authorized the sale.

The decision in ***Holder v Holder [1968]*** sits oddly with the courts' generally strict approach to fiduciary duties, and it is often questioned whether these rules need to be relaxed. The Court of Appeal's approach in this case might be said to be more typically *equitable* in character as it pays much closer attention to the whole circumstances of the case and broader questions of fairness than the more usual strict application of rules would allow. In this sense, ***Holder v Holder [1968]*** has much in common with the minority approach taken in ***Boardman v Phipps [1967]***, in which Lord Upjohn argued that a real conflict of duty and interest must be identified before the rule is applied.

The fair dealing rule

A trustee's purchase of a beneficiary's equitable interest in property will not be voidable as long as the trustee acts honestly, makes full disclosure to the beneficiaries, and pays a fair price: ***Coles v Trecothick (1804)***.

The trustee must not compete with the trust

The fiduciary obligations of trustees towards beneficiaries entail that they should not compete with the trust: ***Re Thomson [1930]***.

Revision tip

The consequences of a breach of a fiduciary relationship can extend beyond the liability of the fiduciary herself. See chapter 12 to explore this issue further.

Looking for extra marks?

The question of how strictly fiduciary duties should be enforced raises many questions about the nature of the fiduciary relationship and the courts' attitude towards them. Impress your examiners with a good knowledge of these issues: read Jones, 'Unjust Enrichment and Fiduciary's Loyalty' (1968) 84 LQR 472; Conaglen, 'The Nature and Function of Fiduciary Loyalty' (2005) 121 LQR 452; and Collins, 'The No-conflict Rule: The Acceptance of Traditional Equitable Values?' (2008) 14 Trusts & Trustees 213.

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The duty of investment

Whenever property is held on trust to benefit both **life tenants** and remaindermen, the trustees have a duty to invest the trust property in order to generate an income for the life tenant.

The previous law contained in the **Trustee Investments Act 1961** (as amended) favoured an overly protective approach to investment which was ill-suited to deal with the complexities of the modern financial world.

The **Trustee Act (TA) 2000** significantly widens the investment powers of trustees while enhancing protection for both beneficiaries and trustees; broader investment powers that enable trustees to provide better returns for beneficiaries are balanced with guidance to trustees on how to exercise their investment powers appropriately.

The duty to act even-handedly

Investment is about the *management of risk*. When considering their duty of investment, trustees must consider both the need to provide an income for life tenants and how to preserve and ideally increase the capital for remaindermen. ***Nestle v National Westminster Bank plc [1993]*** confirms that trustees have a duty to act even-handedly towards the different classes of beneficiary:

Nestle v National Westminster Bank plc [1993] 1 WLR 1260

Georgina Nestle, a remainderman of a trust, received £269,203. However, she argued that if the funds had been properly invested, the capital would have been worth £1 million. While the court held that the bank had clearly misunderstood the extent of its investment powers, the policy it had undertaken had produced some savings in terms of estate duty. Even though the funds' overall growth was slow, the court was of the opinion that the trustees had not breached their duty to act even-handedly.

Staughton LJ added that the duty of even-handedness was one to be exercised in light of all the circumstances. Therefore, if a life tenant was living in poverty while the remainderman was already wealthy, the trustees could invest in such a way as to produce a greater income for the life tenant, as long as this did not unduly jeopardize the capital.

Looking for extra marks?

The defendant in *Nestle* escaped liability despite being shown to have discharged its duties very poorly. Stauch and Watt, (1998) 62 Conv 352, argue that the court incorrectly conflates breach with loss, so that where some small gains could be shown, no breach of trust could be said to have occurred. They argue that the issue of breach must be determined separately from any consideration of loss and consider how such losses might be appropriately evaluated in an investment context.

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The Trustee Act 2000: a modern approach to investment

Consider the following issues when addressing a question on investment.

The **TA 2000** provides a set of default provisions for trustee investments. All of the provisions in relation to investment, including the **s 1** duty of care, can be expressly altered or excluded by the trust instrument (see Figure 11.3).

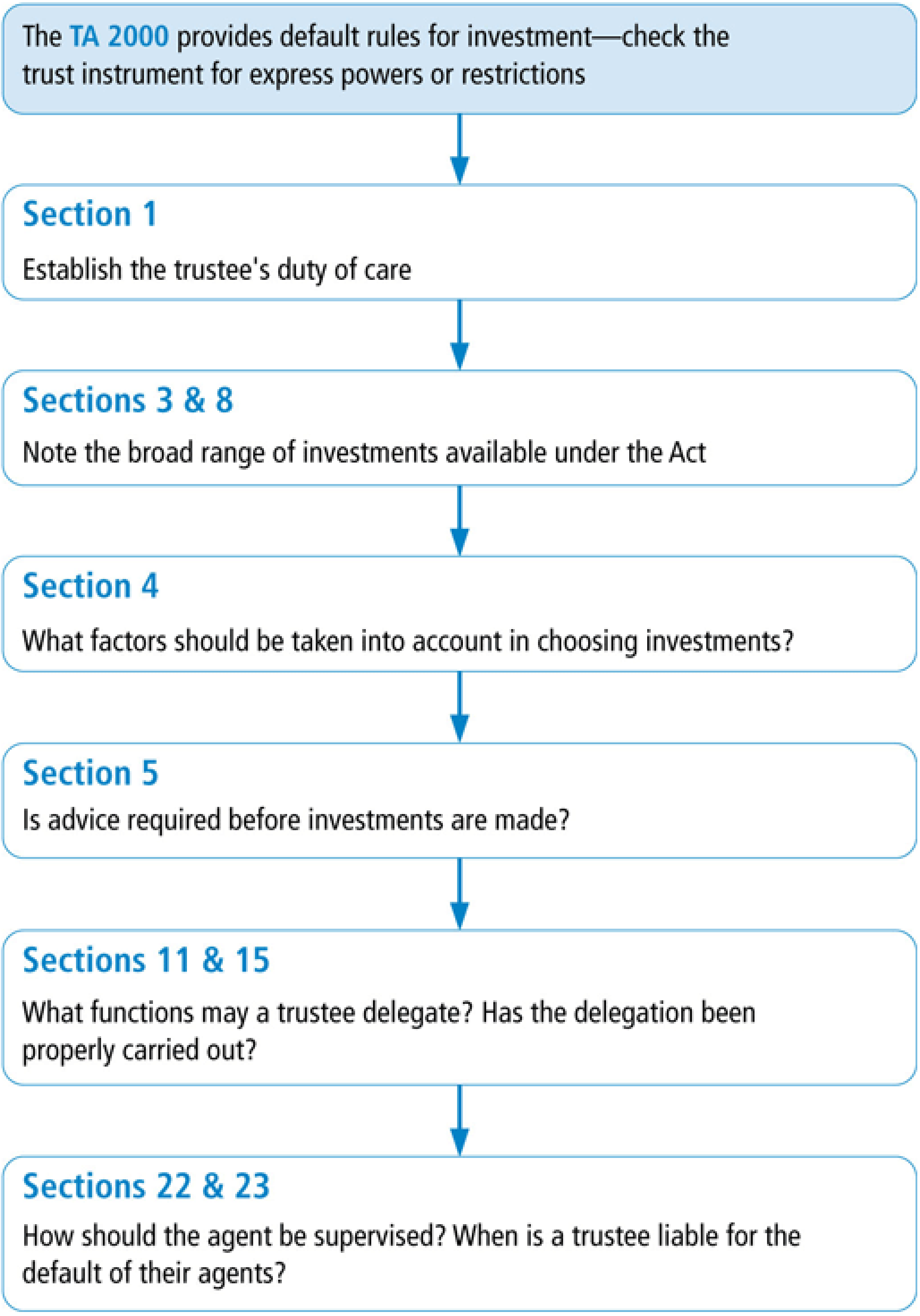

Figure 11.3 Central investment issues in the Trustee Act 2000

Section 1: the duty of care

Section 1 TA 2000 imposes a statutory duty of care upon trustees and plays a key role in controlling the greater powers the Act grants to trustees. **Section 1** states:

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1. Whenever the duty under this subsection applies to a trustee, he must exercise such care and skill as is reasonable in all the circumstances, having regard in particular:

   (a) to any special knowledge or experience that he has or holds himself out as having, and

   (b) if he acts as a trustee in the course of a business or profession, to any special knowledge or experience that is reasonable to expect of a person acting in the course of that kind of business or profession.

There are a number of things to note about this duty of care:

Section 1 codifies the previous common law duty of care, which was to act as an 'ordinary prudent man of business': ***Speight v Gaunt (1881)***. It is useful to read **s 1** alongside the previous common law guidance. In ***Speight v Gaunt***, the House of Lords approved Lindley LJ's description of this test in ***Re Whitely (1887)*** as 'such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally obligated to provide'. In ***Richards v Wood [2014]***, the Court of Appeal confirmed that this previous test had not been materially altered by **s 1**. Therefore, a couple who had sold property subject to a trust below a suggested market asking price but within a range accepted by professional valuers was held to have acted reasonably in the circumstances, as an ordinary prudent man would have.

- The duty of care is an objective one—a trustee's personal view will not excuse liability unless it was reasonable in the circumstances.
- The duty of care varies according to the expertise of the trustee. Therefore, a professional trustee will be expected to meet a higher standard of conduct than a lay trustee.
- Remember: the duty of care applies to all trustees' powers under the Act, unless altered by the trust instrument (**Sch 1 TA 2000**). It also applies to a number of powers under the **Trustee Act 1925**, such as the **s 19** power to insure trust property.

Revision tip

Students often set out the relevant provisions of the **TA 2000** but then forget to apply the **s 1** duty of care; for example, trustees must supervise their agents under **s 22**. However, just because an agent steals trust money does not mean that the trustees will be liable for the loss, unless they have failed to supervise with reasonable care and skill.

Sections 3 and 8: the scope of trustees' investment powers

Section 3(1) TA 2000 confers a 'general power of investment' upon trustees to 'make any kind of investment that he could make if he were absolutely entitled to the assets of the trust'.

Section 8(1) gives trustees the *power* to acquire freehold or leasehold land in the United Kingdom as (i) an investment; (ii) for occupation by the beneficiary; or (iii) any other reason.

p. 168 ↵ The **TA 2000** embraces a much broader definition of investment than previously operated. The previous law, contained in the **Trustee Investments Act 1961**, only allowed investment from a list of proscribed 'authorised investments'. In addition, the ability of trustees to invest in land was previously very restrictive. Section 8 makes it clear that 'investment' can now include capital as well as income growth.

Ethical investments

A common aspect of problems on trustee investments is whether trustees can pursue an ethical investment policy. This question was considered in ***Cowan v Scargill***.

Cowan v Scargill [1984] 2 All ER 750

The trustees of a pension fund for coal miners were divided on how best to invest. One side, led by Arthur Scargill, argued that the pension's fund should not be invested in companies abroad and especially not with industries which competed with the coal industry. This policy would avoid helping the competition and risking miners' jobs in an increasingly competitive energies market. However, his plan was rejected by Megarry V-C, who said that trustees must put aside their own personal views: '[u]nder a trust for the provision of financial benefits, the paramount duty of the trustees is to provide the greatest financial benefits for the present and future beneficiaries.'

Despite this general rule, there are a number of ways in which an ethical investment policy may be legitimately pursued:

- The trust instrument expressly imposes an ethical investment policy.
- In ***Cowan v Scargill***, Megarry V-C suggested (*obiter*) that where beneficiaries collectively held strong views on the matter, these might be taken into account.
- In ***Harries v Church Commissioners [1992]***, Sir Donald Nicholls V-C considered that *charitable trusts* might be able to avoid investments which clashed with their ethical objectives, even if this caused a loss.
- Trustees should be able to pursue an ethical investment policy as long as they consider the best financial interests of the beneficiaries first, ie the wealth of investment opportunities should make it possible to invest ethically without affecting the beneficiaries' best financial interests. However, adopting an ethical policy without considering the best financial interests of the beneficiaries will be a breach of trust: ***Martin v City of Edinburgh District Council [1988]***.

Sections 4 and 5: controlling trustees' choice of investments

Sections 4 and 5 TA 2000 provide trustees with guidance on how to manage their investment choices. In choosing investments, under **s 4(3)**, trustees must have regard to the 'standard investment criteria' of:

- suitability; and
- the need for diversification.

p. 169 ↵ Suitability: the Explanatory Notes of the **TA 2000** state that trustees must consider the suitability of proposed investments in general and in particular. This means that they should first consider whether the type of investment (eg shares) is suitable for the trust. They must then consider whether, for example, shares in a particular company are appropriate for the trust.

Diversification: this section reflects the **TA 2000**'s adoption of the 'modern portfolio theory' set out in the first instance decision of ***Nestle v National Westminster Bank plc [1993]***. Hoffmann J stated that:

> Modern trustees acting within their investment powers are entitled to be judged by the standards of current portfolio theory, which emphasises the risk level of the entire portfolio rather than the risk attaching to each investment taken in isolation.

This encourages trustees to formulate an investment strategy that balances riskier investments (which could bring greater returns) with more secure investments (which will produce lower returns but expose the trust fund to less risk). If trustees give due consideration to this, they will not be judged for the failure of individual investments.

The Act does not *require* diversification, merely that trustees consider whether there is a need. For example, it may be more sensible for a smaller trust to invest in largely low-risk investments, whereas a bigger trust fund has the scope to take more risks, as long as those risks are appropriately balanced.

Section 4(2)—trustees must review their investment strategy 'from time to time'. This encourages trustees to be diligent in responding to changing circumstances. For example, if a trust generated its income from purchasing and renovating property for resale, a drop in property values would reasonably require trustees to consider reinvesting at least part of the trust fund elsewhere.

Section 5(1)—trustees should take and consider 'proper advice' from someone 'reasonably believed to be qualified … by his ability in and practical experience of financial and other matters' (**s 5(4)**) whenever considering or reviewing their investments.

Section 5(3)—advice is not required if the trustee reasonably concludes that it is unnecessary or inappropriate to seek advice. For example, this exception might apply where the trustee is professionally experienced in investment.

Sections 11 and 15: the power of delegation

The responsibilities of trustees are often onerous, especially for the ordinary lay trustee. Allowing certain roles to be delegated allows trustees to ensure that the trust is properly managed.

Section 11 outlines the roles which can be *collectively* delegated by trustees. Note: the *individual* delegation of trustees' functions is still governed by **s 25 Trustee Act 1925**.

Section 11(2) lists the functions which non-charitable trusts *cannot* delegate. These include the distribution of trust assets, the discretion to decide whether payments or fees should be made out of the trust fund (eg claims for maintenance and advancement), and the power to appoint trustees. Note: this means that trustees' power of investment *can* be delegated.

p. 170 ↵ **Schedule 1, para 3**—the **s 1** duty of care applies in selecting an agent. ***Fry v Tapson (1885)*** establishes that trustees should not employ agents to carry out tasks outside their ordinary course of business.

Section 15 places special requirements on the delegation of 'asset management functions'. These are functions which include the investment, acquisition, management, and disposal of trust property (**s 15(5)**). Where such a function is delegated, **s 15** requires:

- an agreement in or evidenced by writing (**s 15(1)**);
- preparation of a written policy statement for agents to provide guidance on how to carry out their role (**s 15(2)(a)**);
- that the agreement should contain a term ensuring that an agent complies with the policy statement (**s 15(2)(b)**).

Sections 22 and 23: review of agents and liability for their default

Section 22 states that trustees must keep their agents' actions under review and, if necessary, intervene. In ***Appleby Corporate Services (BVI) Ltd v Citco Trustees (BVI) Ltd [2016]***, a trustee failed to check regularly on an investment manager's actions, despite evidence that the trust was suffering losses over a five-year period. The trustee was held liable for failing to supervise its agent appropriately and was ordered to restore the trust fund to the value it had at the time the trustee should first have identified a problem.

Section 23 states that the trustees will be liable for the defaults of their agents if they have failed to satisfy the duty of care in appointing or reviewing their agents.

The duty to provide information

If beneficiaries are to hold trustees to account, they clearly require access to information about the trust. But what is the extent of trustees' duty to provide such information?

Trustees do not have to give reasons for how they use their discretion

Trustees frequently have to exercise their discretion in carrying out their duties. For example, trustees may have a duty to take advice before making an investment, but they must ultimately decide whether or not to follow the advice. Another common example is the trustees' discretion to choose which members of a class to benefit in a discretionary trust.

The case of ***Re Beloved Wilkes' Charity (1851)*** established that *trustees do not have to give reasons for the use of their discretion*. While this limits trustees' accountability, it also allows trustees to fulfil their role as fiduciaries:

- For trustees to act impartially, they must be free of pressure from beneficiaries.
- In the context of family trusts, protecting trustees from having to explain their decisions may prevent family conflict.

Note: Lord Truro added that where there is evidence of bad faith or dishonesty or the trustees provide reasons for their actions, the court can intervene and evaluate their conclusions.

p. 171 ↵ If trustees are not required to give reasons for the use of their discretion, to what information are beneficiaries entitled?

Other information about the trust

Accounts

All trustees must keep accounts and make them available to the beneficiaries: ***Pearse v Green (1819)***. This includes beneficiaries under a **discretionary trust**, although this right may be limited where they are part of a large class: ***Murphy v Murphy [1999]***.

Information about the trust

The beneficiaries' right to information was originally based on their proprietary interest in the trust: ***O'Rourke v Darbishire [1920]***. This entitled beneficiaries to access all 'trust documents'.

In ***Re Londonderry's Settlement [1965]***, Salmon LJ attempted to define 'trust documents':

1. they are documents in the possession of the trustees as trustees;
2. they contain information about the trust, which the beneficiaries are entitled to know;
3. the beneficiaries have a proprietary interest in the documents and, accordingly, are entitled to see them. If any parts of a document contain information which the beneficiaries are not entitled to know, I doubt whether such parts can be truly said to be integral parts of a trust document.

However, this definition does little to clarify the scope of the term 'trust documents'. In addition, the court stressed that the beneficiaries' right to see 'trust documents' did not include:

- documents which might reveal how the trustees had exercised their discretion;
- confidential information, including the agendas of trustee meetings and correspondence among trustees or beneficiaries.

A more workable and conceptually satisfying approach has been advocated by the Privy Council in ***Schmidt v Rosewood Trust***:

Schmidt v Rosewood Trust [2003] 3 All ER 76

The claimant sought disclosure of the accounts and information on trust assets in relation to a discretionary trust. The trustees resisted the claim on the basis that as a mere potential beneficiary under a discretionary trust, the claimant had no proprietary claim to see the requested documentation.

Lord Walker stated that while the beneficiaries' right to information *could* be described as a proprietary interest, such an interest was neither sufficient nor necessary to found the claim. Instead, the beneficiaries' right to information was better described as *an aspect of the court's inherent jurisdiction to supervise the administration of trusts*.

Following ***Schmidt***, beneficiaries no longer have an automatic right to demand information. This could also be said to permit trustees to be secretive, as the cost of litigation may discourage beneficiaries from complaining.

p. 172 ↵ However, the Privy Council's approach means that the court could potentially order the disclosure of *any* documentation it deems relevant, thus enhancing the accountability of trustees.

Schmidt also offers the court the flexibility to respond to different circumstances by allowing the court to balance the interests of trustees, beneficiaries, and any third parties. See ***Breakspear v Ackland [2008]***, where the court refused to disclose a settlor's **letter of wishes** on the basis it would cause family conflict.

The ability of beneficiaries to hold trustees to account effectively remains debateable. However, interestingly, the case of ***Dawson-Damer v Taylor Wessing LLP [2017]*** suggests that beneficiaries might also be able to access personal information held by trustees through Data Protection legislation, including information that trustees might otherwise be entitled to withhold. While such an approach may risk the sort of family conflict the court is keen to avoid, it is to be hoped that this might also help prevent trustees from being able to hide poor decisions from scrutiny.

Looking for extra marks?

The unsettled nature of the law in this area makes it a prime subject for an essay question on the accountability of trustees. Improve your marks by demonstrating knowledge of both the current law and calls for greater accountability. Kirby P argues for greater accountability in his minority judgment in the Australian case ***Hartigan Nominees Property Ltd v Rydge (1992)***. A good discussion of the debate can also be found in Sir Gavin Lightman's article 'The Trustees' Duty to Provide Information to Beneficiaries' [2004] PCB 23.

The duty to distribute

Trustees are under a duty to distribute the trust property in accordance with the terms of the trust. Failure to distribute or distributing the trust property to the wrong person is a breach of trust: ***Re Diplock [1948]***. The law provides a variety of options for trustees who are uncertain about who the beneficiaries of a trust are or the extent of their entitlement.

Applying to the court for directions

Trustees can apply to the court for directions if there is any uncertainty as to how the trust should be carried out. Moreover, if the trustees follow the court’s directions, they will not be liable for any losses arising from that advice.

What if the trustees cannot find the beneficiaries?

Revision tip

These different methods protect trustees should a missing beneficiary appear. Remember: while the trustees will be protected from liability for breach of trust, the beneficiary may pursue his share of the trust against the other beneficiaries (see Figure 11.4).

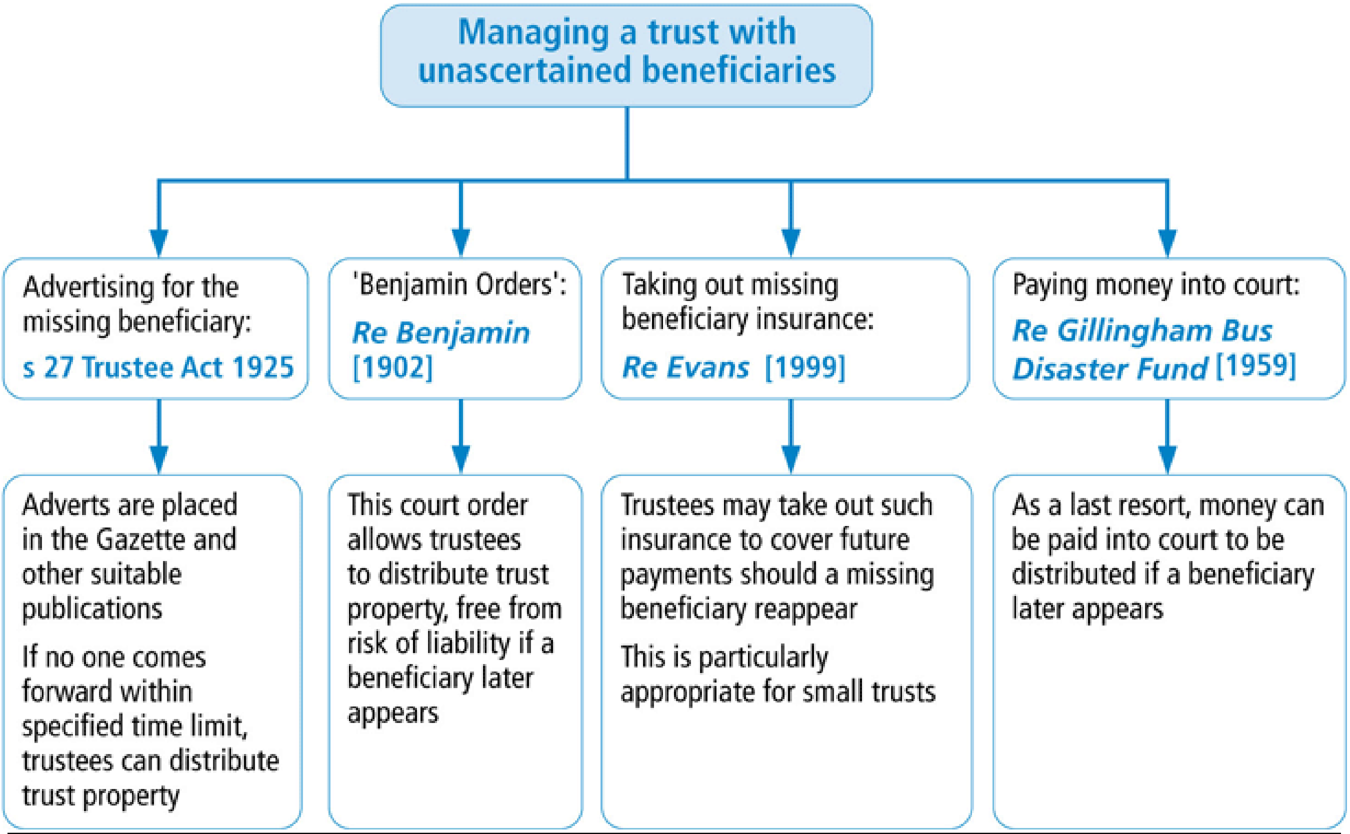

Figure 11.4 Managing a trust with missing beneficiaries

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Powers of maintenance and advancement

During the administration of a trust, trustees may be asked to assist beneficiaries financially before their interest vests. The trustees can do so, at their absolute discretion, through their powers of maintenance and advancement.

Maintenance

The power of maintenance allows trustees to use the **income** from their interest to provide for the maintenance of a minor beneficiary. Maintenance powers can arise from:

- express provision in the trust instrument;
- **s 53 Trustee Act 1925** (see chapter 10);
- **s 31 Trustee Act 1925**.

Section 31 Trustee Act 1925

- For trusts created after 1 October 2014, **s 8 Inheritance and Trustees' Powers Act (ITPA) 2014** amends **s 31(1)(i)** so that trustees may apply *part or all* of the income for the 'maintenance, education or benefit' of a minor beneficiary 'as [they] may think fit'. For trusts created before, the power is to be exercised according to what is reasonable in all the circumstances.
- p. 174 Payments will typically be made to the minor's parents or guardians, unless the minor is married.

The trustees' exercise of their discretion

- The minor's best interests should be paramount, but incidental benefits to a parent or guardian are permissible: ***Fuller v Evans [2000]***.
- Trustees must consider the use of their discretion in good faith: ***Bryant v Hickley (1894)***.
- Trustees must consider the use of maintenance powers periodically—money should not be paid over automatically: ***Wilson v Turner (1883)***.

Limitations on the power of maintenance

Section 31(3)—for a power of maintenance to exist, the trust interest must carry the entitlement to the intermediate income (see **s 175 Law of Property Act 1925**).

There are a small number of interests which do not satisfy this section. The most common is the contingent pecuniary testamentary disposition, eg '£200,000 to my daughter, Lesley, on her 21st birthday'.

If the income is already subject to a prior interest, it cannot be used for maintenance, for example 'My shares for Laura, when she turns 25. Until that time, the income shall be appointed to Clara'.

The power of maintenance can be excluded by a contrary intention on the part of the settlor (eg ***Re Erskine's ST [1971]***).

Contingently entitled adults

Section 31(1)(ii)—adults with a contingent trust interest are automatically entitled to the income from that interest, subject to any contrary intention. However, they will only be entitled to the income arising from the time they reach majority (ie 18). For example, if Patrick is left 500 shares on trust for when he turns 30, he will be entitled to the dividends on the shares from the age of 18.

Advancement

The power of advancement allows trustees, at their absolute discretion, to appoint part of a beneficiaries' entitlement to the **capital** of the trust before it vests absolutely. Advancement powers can arise from:

- express provision in the trust instrument;
- **s 53 Trustee Act 1925** (see chapter 10);
- **s 32 Trustee Act 1925**.

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Section 32 Trustee Act 1925

Trustees may apply part of the beneficiary's capital interest for the 'advancement or benefit' of a minor or adult beneficiary (**s 32(1)**). ***Pilkington v IRC [1964]*** defines 'advancement or benefit' as 'any use of money which will improve the material situation of the beneficiary'.

The trustees' exercise of their discretion

- Trustees must consider whether to exercise their power of advancement and not simply appoint money without thought.
- If trustees make an advancement for a specific purpose, they must check whether that purpose has been carried out: ***Re Pauling's ST [1964]*** (see Table 11.1).

Table 11.1 Case examples of 'advancement or benefit' accepted by the courts

CASE	EXAMPLE OF 'ADVANCEMENT OR BENEFIT'
Re Williams WT [1953]	To purchase a house for the beneficiary
Roper-Curzon v Roper-Curzon (1871)	To help a beneficiary in their career

CASE	EXAMPLE OF ‘ADVANCEMENT OR BENEFIT’
Lowther v Bentinck (1874)	To pay off debts
Pilkington v IRC [1964]	To provide tax advantages for the beneficiary
X v A [2006]	To satisfy a beneficiary’s moral obligation to donate to charity

Limitations on the power of advancement

- **Section 32(1)(a)**—for trusts created after 1 October 2014, **s 9 ITPA 2014** amends **s 32(1)(a)** so that a beneficiary’s *entire* interest can be advanced. However, for trusts created before that date, no more than *half* of the beneficiary’s share in the capital can be advanced.
- **Section 32(1)(b)**—any advancements made will be deducted from the beneficiary’s final entitlement.
- **Section 32(1)(c)**—no advancements can be made where there is a *prior interest* on the capital, unless that person exists, is an adult, and consents in writing.
- The power of advancement is defeated by evidence of a contrary intention, such as a direction to accumulate: ***IRC v Bernstein [1961]***.

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Key cases

CASE	FACTS	PRINCIPLE
Bristol and West Building Society v Mothew [1996] 4 All ER 698	A solicitor’s negligence in wrongly advising the claimant was held not to be a breach of his fiduciary obligations.	The core obligation of a fiduciary is loyalty. Fiduciaries must act in good faith and avoid conflicts of interest.
Cowan v Scargill [1984] 2 All ER 750	The court refused to sanction an investment policy which put the economic interests of the mining industry ahead of the best financial interests of the beneficiaries of a pension scheme.	In general, trustees must consider the best financial interests of the beneficiaries when choosing investments.
Keech v Sandford (1726) Sel Cas Ch 61	When a landlord refused to renew a lease held on trust for an infant beneficiary, the trustee took it over. It was held that the trustee held the lease on constructive trust for the beneficiary.	Trustees cannot retain any profits deriving from their connection with the trust.

CASE	FACTS	PRINCIPLE
Nestle v National Westminster Bank plc [1993] 1 WLR 1260	The claimant argued unsuccessfully that the value of her interest should have been greater and that the defendant's overly cautious investment strategy constituted a breach of trust.	Trustees must treat all beneficiaries even-handedly. Trustees are to be judged on their investment policy overall rather than on individual failures—modern portfolio theory.
O'Donnell v Shanahan [2009] EWCA Civ 75	Two directors of a company entered into a personal property investment deal when the original deal brokered by the company fell through, depriving the company of its commission.	Fiduciaries must avoid conflicts of interest with their principal. Opportunities that arise through a fiduciary relationship are properly considered the property of the principal and full consent must be obtained before a fiduciary may take any advantage of them.
O'Rourke v Darbishire [1920] AC 581	A claimant alleged that he was the beneficiary of a trust and sought access to relevant documents pertaining to how the 'trust' had been managed.	Beneficiaries are entitled to see trust documents, as long as they do not reveal reasons for trustees' use of their discretion or confidential information.
Schmidt v Rosewood Trust [2003] 3 All ER 76	A claimant sought access to a wide range of documents relating to two trusts under which he claimed a discretionary interest.	Beneficiaries' access to information is an aspect of the court's inherent jurisdiction to supervise the trust. The court must balance the interests of trustees, beneficiaries, and third parties in deciding whether to order disclosure.

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Key debates

Topic	**Why Are Trustees' Fiduciary Duties So Strictly Enforced?**
Academic/ author	Webb and Akkouh
Viewpoint	Fiduciaries' core obligation of loyalty requires fiduciaries to be deterred from any potential conflict of interest.
Source	Webb and Akkouh, *Trusts Law* (2017), ch 10 provides an extremely accessible discussion of this complicated area.
Topic	**What is the impact of the Trustee Act 2000?**
Academic/ author	Clements

Topic	**Why Are Trustees' Fiduciary Duties So Strictly Enforced?**
Viewpoint	The **Trustee Act 2000** was urgently needed to address problems with the previous law and to allow trustees to operate effectively in the modern financial world.
Source	Clements [2004] 2 Web JCLI.
Topic	**Should beneficiaries have greater access to information about the trust?**
Academic/ author	Lightman
Viewpoint	The beneficiaries' ability to enforce the trust requires access to information. Greater accountability is needed.
Source	Lightman [2004] PCB 23.
Topic	**What are the consequences of the decision in *FHR v Cedar Capital Partners*?**
Academic/ author	Whayman
Viewpoint	The policy-focused decision in ***FHR*** is welcome but the issue of what legal principles can underpin this approach remain to be answered.
Source	Whayman (2014) Conveyancer 518.

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Exam questions

Problem question

Jan and Beth hold £500,000 on trust for Toby with the remainder for Lisa. They have little knowledge of investments. A friend recommends Paul, a computer engineer, as someone who could manage their investments. Paul recently inherited £10,000 and, after investing it, made a profit of £2,000.

Jan and Beth employ Paul, who makes the following investments in May 2012:

1. £200,000 in a range of unit trusts;
2. £100,000 in shares in Carfax, a leading UK bank;
3. £150,000 in villas to rent out on the Spanish Costa del Tan;
4. £50,000 in investment capital for IP-Ops, a computer repair company owned by Paul.

In May 2013, Paul tells the trustees that the unit trusts and villas are performing well, and that IP-Ops has had an extremely profitable first year of business. However, following a drop in consumer confidence, the shares in Carfax Bank have lost 25 per cent of their value.

The trustees instruct Paul to move the Carfax investment to a more stable company.

Three months later, the trustees meet with Toby and Lisa and inform them of the trust's performance. On investigation, Toby discovers that Paul has not yet sold the Carfax shares, which have now lost another 25 per cent of their value.

The beneficiaries are concerned that the trust is being poorly managed. Advise the beneficiaries.

See the Outline answers section in the end matter for help with this question.

Essay question

> It is an inflexible rule of a Court of Equity that a person in a fiduciary position … is not, unless otherwise expressly provided, entitled to make a profit; he is not allowed to put himself in a position where his interest and his duty conflict (Lord Herschell in ***Bray v Ford [1896]***).

Critically discuss whether fiduciary duties are enforced too strictly in England and Wales.

Online resources

This chapter is accompanied by a selection of online resources to help you with this topic, including:

- An outline answer *<https://iws.oupsupport.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-11-outline-answers-to-essay-questions?options=showName>* to the essay question
- Further reading *<https://iws.oupsupport.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-11-further-reading?options=showName>*
- Interactive key cases *<https://iws.oupsupport.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-11-interactive-key-cases?options=showName>*
- Looking for extra marks quiz *<https://iws.oupsupport.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-11-looking-for-extra-marks?options=showName>*
- Multiple choice questions *<https://iws.oupsupport.com/ebook/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-chapter-11-multiple-choice-questions?options=showName>*

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