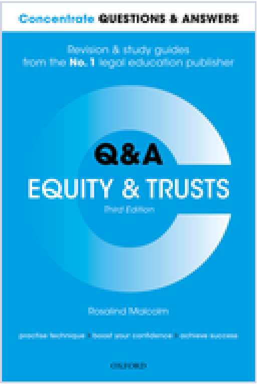


Concentrate Questions and Answers Equity and Trusts: Law Q&A Revision and Study Guide (3rd edn)

Rosalind Malcolm

p. 169

12. Administration of Trusts

Rosalind Malcolm, Barrister, Professor of Law, University of Surrey

https://doi.org/10.1093/he/9780198853213.003.0012
Published in print: 06 August 2020
Published online: September 2020

Abstract

The Concentrate Questions and Answers series offer the best preparation for tackling exam questions. Each book includes typical questions, bullet-pointed answer plans, suggested answers and author commentary. This book offers advice on what to expect in exams and how best to prepare. This chapter covers questions on administration of trusts.

Keywords: trusts, administration, case law, Trustee Act 2000, trustees, investment, delegation, advancement, benefit, consent

Are You Ready?

In order to attempt the questions in this chapter you will need to have covered the following topics:

- Administration of trusts
- Powers of trustees
- Investment duties of trustees
- **Trustee Act 2000**

Key Debates

Debate: the general principle that a trustee may not benefit from the trust is an important cornerstone principle. But it is subject to challenge and exceptions have emerged.

Some of these appear in the **Trustee Act 2000**. So the Act sets out circumstances where a trustee of a private trust who acts in a professional capacity may be entitled to receive reasonable remuneration out of the trust funds for any services that he provides to the trust. It is a key debate as to how these statutory exceptions marry up with the case law which is strict on the point.

p. 170

Question 1

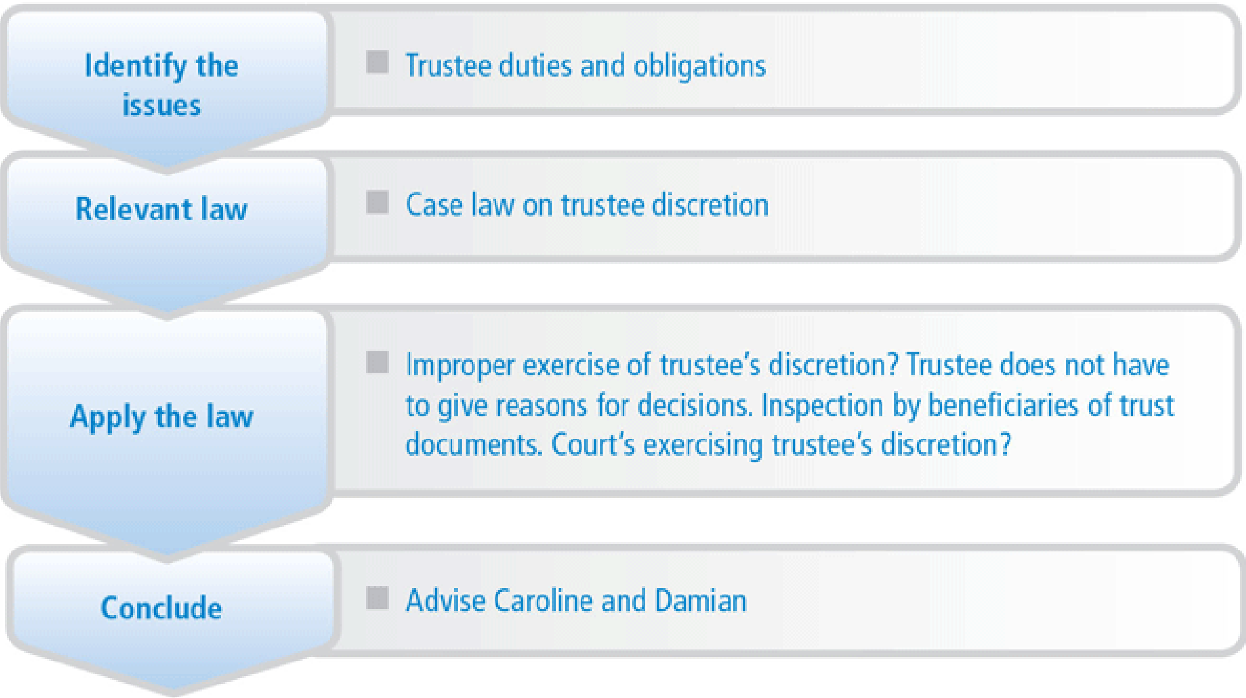
Trevor is the sole trustee of an exhaustive discretionary trust of income, the objects of which are the nephews and nieces of Sally. Sally has two nephews, Benjy and Damian, and one niece, Caroline. Six months ago Trevor lent Benjy the sum of £20,000 out of his (Trevor's) own money. Caroline and Damian have now learned that Trevor has decided to pay the entire income of the trust for the present year, some £15,000, to Benjy. Caroline and Damian claim that Trevor exercised his discretion under the trust in Benjy's favour only in order that Benjy would be in sufficient funds to repay that loan. Caroline and Damian wish to have the proposed exercise of the discretion prevented, and further wish to compel Trevor to distribute the income for the present year among all three objects equally.

Advise Caroline and Damian.

Caution!

- The question concerns review of trustees' decisions. It is based on case law which looks at the context and deals with trustee discretion.

Diagram Answer Plan



p. 171

Suggested Answer

If Trevor has exercised the discretion vested in him in order to ensure that he is repaid the debt Benjy owes him, this is an improper exercise of the discretion.[1] It is improper because the power of selection must be exercised in good faith and for its proper purpose: the trustee must consider the objects' interests, not his own. If Caroline and Damian can prove that the exercise was so motivated, they can apply to the court to have the improper appointment set aside, and Trevor will be personally liable to them for any loss resulting from the breach of trust: ***Molyneux v Fletcher [1898] 1 QB 648***.

[1] Start by stating in what circumstances it is improper and then explain how and why.

The problem for Caroline and Damian, however, is essentially one of proof. A trustee is not obliged to give reasons for the exercise of his discretions: ***Re Beloved Wilkes' Charity (1851) 3 Mac & G 440*** and ***Re Londonderry's Settlement [1965] Ch 918, CA***. If, however, a trustee does give reasons, and these are improper, the objects can have the exercise set aside: ***Klug v Klug [1918] 2 Ch 67***.

In ***O'Rourke v Darbishire [1920] AC 581***, at pp. 626–627, Lord Wrenbury expressed the view that a beneficial interest under a trust carried with it a proprietary right to see trust documents. On this analysis, it would be important to determine whether objects of a discretionary trust, such as Caroline and Damian, have proprietary rights under the trust, and also whether the documents at issue can be characterised as trust documents: ***Re Londonderry's Settlement [1965] 1 Ch 918***, at p. 938.

Lord Walker, however, delivering the advice of the Privy Council in ***Schmidt v Rosewood Trust Ltd [2003] 2 AC 709***, said that the right to seek disclosure of trust documents was not based on any proprietary right, but was rather an aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts. Although not strictly binding in English law, the views expressed by the Privy Council in this case are highly persuasive.[2] Applying the principles there laid down, it would seem that, although an individual object of a discretionary trust (such as Caroline or Damian) does not have any proprietary right under the trust, such object may seek the protection of equity.

2 Always good to point out the status of a Privy Council decision.

Whether any protection will be awarded to Caroline and Damian, and the nature of any such protection, is at the court's discretion, and will vary with the circumstances. In the ***Schmidt*** case, Lord Walker said that, in determining whether an object may see trust documents, the court may have to balance the interests of the different beneficiaries or objects, the trustees, and third parties.[3] In performing this balancing exercise, the court will accord greater weight to the claims of an object
p. 172 with a real (as opposed to a mere theoretical) possibility ↵ of benefit. The fact that Caroline and Damian are members of a very small class of discretionary objects is therefore favourable to their claim.

3 Shows good knowledge to quote the judge.

Lord Walker said[4] that the balancing of the various interests must also take into account any issues of personal or commercial confidentiality. In ***Re Londonderry***, the object of a fiduciary power complained of the small amount of capital allotted to her by the trustees. She asked to see copies of the minutes of trustees' meetings and other correspondence in the hope that these would reveal the basis for the trustees' allocation. The Court of Appeal held that the trustees were not bound to disclose the documents: it considered that the disclosure of such confidential information could cause trouble in the family out of all proportion to any resulting benefit. It also said that, if the trustees knew that they could be required to make such disclosure, it might interfere with the proper exercise of their discretion. In ***Breakspear v Ackland [2008] EWHC 220 (Ch)***, the beneficiaries sought disclosure of a wishes letter provided by the settlor to the trustees in a family discretionary trust. It was held that the confidentiality in the letter was, in the absence of some express term by the settlor, in the trustees, and they were under no obligation to disclose it. The discretion would be exercised in accordance with what was judged to be the best interests of the beneficiaries and the due administration of the trust, and on the basis of an assessment of the objective consequences of disclosure rather than by reference to the subjective purpose for which the disclosure was sought (***Dawson-Damer and Others v Taylor Wessing LLP [2015] EWHC 2366 (Ch)***).

[4] This paragraph is an 'extra marks' section. It also adds to the length of the answer and could safely be summarised in exam conditions.

As the discretionary trust in the question involves a very small group of family members, there is a real possibility of family strife[5] were Trevor to be compelled to disclose the documents giving the reasons for his decision to pay the entire income to Benjy. This factor might lead the court either to decline to order Trevor to reveal such documents to Caroline and Damian, or to compel them to reveal only such parts of them as do not indicate the reasons for his decision.

[5] Family strife—the stuff of much litigation.

The Court of Appeal in ***Re Londonderry*** commented that the position would be different if an object were to make a case of *mala fides*.[6] The problem for Caroline and Damian, however, is that evidence of *mala fides* might be difficult to obtain without recourse to such documents. Unless Trevor has made statements disclosing bad faith, the objects might find it difficult to prove that the exercise was improper.

[6] This is the language used in the cases. You could just say 'bad faith' if you prefer.

In ***O'Rourke***, Lord Parmoor did not consider it important to determine whether the right of a beneficiary to inspect trust documents was based on a primary proprietary right, or whether it was a
p. 173 right under the law of disclosure to be enforced in the course of litigation: ↵ ***O'Rourke***, at pp. 619–620. In the light of these and other comments in ***Re Londonderry***, it was suggested that where objects have no initial right to ask to see the documents in question, they might circumvent this problem by bringing an action alleging an improper exercise of the trustees' discretions, and then obtaining disclosure of documents in the proceedings: ***Megarry (1965) 81 LQR 196***.[7] In ***Scott v National Trust [1998] 1 WLR 226***, Robert Walker J opined[8] that trustees might be compelled through disclosure to

reveal the substance of their reasons for their decision if such decision were directly attacked by legal proceedings. On the other hand, the courts are unwilling to award disclosure in a claim that is merely a 'fishing expedition', i.e. where the substance of the claim depends entirely on what might be revealed by the disclosure itself. In ***Re Murphy's Settlements [1999] 1 WLR 282***, Neuberger J said that the absence of any suggestion that the trustees have acted wrongfully is a factor affecting whether the court will compel them to reveal information; and this seems to be consistent with the view of the Privy Council in the ***Schmidt*** case.

[7] A nice academic 'extra marks' point (albeit made by a rather eminent judge). It adds extra words and could safely be cut out in exam.

[8] This is really the correct word as it is quoting the ***opinion*** of His Lordship.

The fact that Trevor exercised his discretion in favour of an object to whom he had lent some of his own money only a short while before, might raise a suspicion that Trevor has not exercised his power for its proper purpose, and this might just weigh the scales in favour of disclosure in an action for breach of trust brought by Caroline and Damian.

Even if Caroline and Damian succeed in having the exercise set aside, they cannot themselves compel Trevor positively to exercise his discretion as they direct. All three objects together, assuming they are all *sui iuris* and form a closed class, could compel the distribution of the income to them under an extension of the rule in ***Saunders v Vautier (1841) 4 Beav 115***. Caroline and Damian, however, are only two of the three objects of the discretionary trust of income.

It is unclear, however, whether the court would itself be able (or willing) to exercise the trustee's dispositive discretion under a discretionary trust.[9] In ***Klug v Klug*** itself, the court did order the advancement to be made; but it may be that it was merely giving effect to the wishes of the remaining trustee whose decision was not tainted by improper considerations. In ***McPhail v Doulton [1971] AC 424***, the House of Lords stated that the court would, if called upon to do so, execute a discretionary trust in the manner best calculated to give effect to the settlor's intentions; and, ultimately, where a proper basis for distribution appears, this could be by itself directing the trustees so to distribute. In so holding, it revived the authority of eighteenth-century cases where the court had itself executed a discretionary trust: ***Warburton v Warburton (1702) 4 Bro PC 1*** and ***Richardson v Chapman (1760) 7 Bro PC 318***.[10] This jurisdiction will be exercised p. 174 ↵ only in the last resort: cf. ***Mettoy Pension Trustees v Evans [1990] 1 WLR 1587***, where the court exercised the same jurisdiction to execute a fiduciary power.

In practice, therefore, where a trustee persistently fails properly to exercise his discretion to appoint amongst the objects, the latter might be better advised to seek such trustee's removal and replacement: ***Re Gestetner Settlement [1953] Ch 672*** admits of such possibility.

[9] This point is unclear because of the precedents—so say so.

[10] Always fun to be able to cite a couple of really old cases.

Looking For Extra Marks?

- Using the academic reference from Megarry's article in the LQR (see the answer) will gather extra marks.
- Dealing with the precedents as above—likewise.
- Citing some earlier authority which is relied on in the leading case.
- Discussing the judgments—as the suggested answer does. Note that this does add extra words to the normal length of an exam answer so you might not manage it in the exam—but bear it in mind for coursework questions.

Question 2

Six months ago, Topaz, a trustee, wished to sell some jewellery which belonged to the trust. He asked Jade, a jeweller whom he knew to have been fined for smuggling stones into the country a few years earlier, to carry out a valuation. Jade valued the jewellery at £100,000. In reliance upon this, Topaz instructed Jade to sell the jewellery for that amount to Sapphire, which he did. A month later, Sapphire sold the jewellery at an auction for five times that amount.

Three months after the sale, Jade had still not accounted to Topaz for the proceeds. Topaz then began to press Jade for payment, but was met with evasive replies. Last week, Topaz learned that Jade lost the entire £100,000 proceeds whilst gambling, and is now insolvent.

a. Advise the beneficiaries of the trust as to their rights against Topaz.

b How would your advice differ if the trust had contained a clause excluding the trustee from all liability other than for ‘wilful default’?

Caution!

■ Do be careful to answer only what is asked and no more. Part (a) only asks for you to deal with their rights against Topaz. It earns no marks whatever to consider any rights the beneficiaries may have against any other parties mentioned. Differently worded, it could easily have become a question on tracing and third party receivers or dealers—but it is not. If you know your stuff, your answer should be a little gem.

p. 175 ■ The powers of a trustee to delegate have been considerably extended by the **Trustee Act 2000**; the examiners will expect you to be fully acquainted with the law. It should be noted that the appointment of an ‘agent’ under the statutory provision is not restricted to the appointment of an agent in the contractual sense, i.e. for entering into agreements with third parties. Thus, although a person appointed to value property is not a contractual agent, the **Trustee Act 1925, s. 22(3)**, expressly permits trustees to have the trust property valued ‘by duly qualified agents’. It seems likely that the term ‘agent’ is used in a similarly wide sense in the **Trustee Act 2000**. A trustee is, for example, under a duty to keep proper accounts (***Pearse v Green (1819) 1 Jac & W 135***, at p. 140). Such a duty comprises a ‘delegable function’ (**s. 39(1)**) of a trustee of a private trust, so it seems that an accountant might be appointed to maintain the trust accounts as an agent under **s. 11**.

■ Part (b) concerns the validity of trustee exclusion clauses. Don’t forget to answer this part. It is a common technique to add at the end of a question: ‘How would your answer differ if …’. It is like the sting in the tail and you would be surprised how many students forget to answer it.

Diagram Answer Plan

Identify the issues	Delegation of trustee powers
Relevant law	Trustee Act 2000
Apply the law	(a) Appointment of agent (**Trustee Act 2000, s. 11**) • In compliance with statutory duty of care? • Did Topaz actively consider valuation? • Asset management function • Supervision of agent (**Trustee Act 2000, ss. 21–22**) (b) Meaning of 'wilful default' in earlier Trustee Acts Express exclusion clause • cannot exclude liability for dishonesty • dishonesty in context of solicitor-trustee
Conclude	(a) Advise the beneficiaries of the trust as to their rights against Topaz (b) Advise as to how would your advice differ if the trust had contained a clause excluding the trustee from all liability other than for 'wilful default'

p. 176

Suggested Answer

Part (a)

The sum of at least £100,000 has been lost to the trust as a result of Jade's gambling.[1] It may be that a further £400,000 has been lost through a sale to Sapphire at a considerable undervalue. The beneficiaries have a personal right of action against Topaz to require him to make good this loss if they can establish that Topaz has committed a breach of trust.

[1] This opening paragraph sets out the key issues and the relevant law.

In the absence of any provision in the trust instrument,[2] trustees may authorise[3] any person to exercise any delegable function as their agent; and the appointment of an agent to value and to sell trust assets is a delegable function (**Trustee Act 2000, s. 11(1)**, **(2)**). More specifically, trustees may have trust property valued by duly qualified agents (**Trustee Act 1925, s. 22(3)**). Topaz may nevertheless be liable to the beneficiaries on various grounds.

[2] You always need to include this caveat.

[3] What follows is the statement of the trustees' powers.

First,[4] it could be argued that the appointment of Jade as an agent was wrongful in itself. In appointing a person to act as agent, a trustee is under the statutory duty of care set out in the **Trustee Act 2000, s. 1(1)** and **Sch. 1, para. 3(1)(a)**. In appointing an agent, Topaz must therefore exercise such care and skill as is reasonable in the circumstances, having regard in particular to any special knowledge or experience he holds himself out as having or, if he acts as a trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect such a person to have. A trustee will not be liable for any act or default of the agent unless he has failed to comply with that duty of care (**Trustee Act 2000, s. 23(1)**). In its Report which led to the **Trustee Act 2000**, the Law Commission took the view that the statutory duty of care codified the liability of a trustee in equity: *Trustees' Powers and Duties* (Law Com No. 260, 1999), para. 3.24.[5] Assuming that this is correct, the principles laid down in the case law before the **Trustee Act 2000** continue to apply. The cases establish that a trustee is to be judged by the test of the prudent man of business acting in his own affairs: ***Speight v Gaunt (1883) 9 App Cas 1***. A prudent man of business would employ an agent only in his proper field (***Fry v Tapson (1884) 28 ChD 268***); and in appointing a jeweller to value and sell jewellery, Topaz has probably satisfied this requirement. A prudent man of business, however, would probably not appoint as his agent to value and sell jewellery belonging to the trust a person whom he knows to have been convicted of a crime involving dishonesty. It is therefore likely that the choice of Jade as agent was itself a breach of trust, so that Topaz is personally liable for the loss to the trust.

[4] Now list the points following the answer plan.

[5] Good to pick up this point (and may be worth a few extra marks too). It is unusual to be able to cite the Law Commission in this way.

p. 177 ↵ Secondly, whilst the **Trustee Act 2000** permits a trustee (subject to specified exceptions) to delegate discretions as well as duties, on the facts of the problem Topaz initially asked Jade merely to value the jewellery. The decision to instruct Jade to sell would therefore have needed to be made on the basis of that valuation. If Topaz simply accepted Jade's valuation without himself considering it, this would itself be a breach of trust.

Thirdly, a trustee may not appoint an agent to exercise any 'asset management function' as his agent, except by an agreement which is in, or is evidenced in, writing and on terms that the agent will comply with a policy statement which the trustee has prepared (**Trustee Act 2000, s. 15(1)**, **(2)**). An asset management function includes the acquisition of property which is to be subject to the trust (**s. 15(5)(b)**). If Jade was appointed to deal with the sale of the jewellery on the basis that the proceeds of sale would be paid to him, his appointment involved the exercise of an asset management function. Topaz will therefore be liable if his appointment of Jade did not meet the requirements of **s. 15**.

Fourthly, when a trustee has appointed an agent, he must keep under review the arrangements under which the agent acts, and must consider if there is a need to exercise any power of intervention (which includes giving the agent directions, and revoking the appointment) (**Trustee Act 2000, ss. 21**, **22**). The trustee is therefore effectively under a duty to supervise the agent after appointment, in respect of which he is again subject to the statutory duty of care (**s. 2** and **Sch. 1, para. 3(1)(e)**). It might therefore be argued[6] that Topaz was in breach of his duty as trustee to protect the trust assets, in that he left a large sum of money (the sale proceeds) in Jade's hands for an undue length of time. Three months is surely longer than a prudent man of business would allow. It is likely that Topaz's inaction amounts to a breach of trust.

[6] Brief conclusion.

Part (b)

An exclusion of liability for wilful default first appeared in trust instruments in the eighteenth century; but the exclusion of liability was put on a statutory footing in various Trustee Acts of the nineteenth century,[7] where the phrase was construed objectively, i.e. so as not to derogate from the principle laid down in ***Speight v Gaunt (1883) 9 App Cas 1*** that a trustee must act as a prudent man of business would act in his own affairs: ***Re Brier (1884) 26 ChD 238, CA***. The same phrase was used in the Trustee Act 1925, s. 30(1) (now repealed), which Maugham J in ***Re Vickery [1931] 1 Ch 572***, however, interpreted literally, i.e. as requiring consciousness of wrongdoing. Maugham J reached this

p. 178 conclusion by relying upon ***Re Equitable*** ↵ ***City Fire Insurance Co. Ltd [1925] 1 Ch 407***, a case which concerned the liability of auditors, not trustees. Maugham J's view conflicted with earlier cases such as ***Re Brier***, and effectively made the section a fool's charter. Nevertheless, in ***Armitage v Nurse [1998] Ch 241***, Millett LJ expressed support for Maugham J's interpretation.

7 A nice historical note. It shows breadth of reading and study.

The Trustee Act 1925, s. 30(1) was repealed by the **Trustee Act 2000**, so that a trustee no longer has the benefit of the statutory exclusion of liability.[8] A trustee may, however, have the benefit of an exclusion of liability clause contained in the trust instrument. The **Trustee Act 2000** does not invalidate trustee exclusion clauses; indeed, it effectively provides that the statutory duty of care may be restricted or excluded by the trust instrument (**Sch. 1, para. 7**). An exclusion clause in the trust instrument may be very wide in scope: the Court of Appeal held in ***Armitage v Nurse*** that such a clause may exclude the liability of a trustee for acts and defaults in carrying out his functions as trustee except those which involve dishonesty. This principle applies even if the trustee is a solicitor and himself prepared the trust instrument: ***Bogg v Raper***, ***The Times, 22 April 1998, CA***. The principle in ***Armitage v Nurse*** was slightly qualified in ***Walker v Stones [2000] 4 All ER 412, CA***, where it was said that, at least where the trustee is also a solicitor, the test for honesty is not purely subjective. Thus a solicitor-trustee who deliberately acts in breach of trust may be dishonest for this purpose, regardless of his subjective belief, if no reasonable solicitor-trustee could have thought that what he did was for the benefit of the beneficiaries (at p. 443, per Sir Christopher Slade).

8 Another point showing depth and understanding.

The exclusion clause[9] in the trust instrument in the problem will therefore be effective to protect Topaz from liability for breach of trust according to its terms for all acts except those involving 'wilful default' or dishonesty. The question does not state whether Topaz was a solicitor-trustee, but it does not seem that he deliberately acted in breach of trust. In any event, it would not appear from the facts given that he was dishonest, and it may well be that he was not conscious of any wrongdoing. In these circumstances, it seems likely that he will be able to rely on the clause to exclude his liability.

9 A summarising conclusion.

Looking For Extra Marks?

- Trustee exclusion clauses are quite common in trust instruments nowadays, and it seems generally to be accepted that the **Unfair Contract Terms Act 1977** does not apply to trustee exclusion clauses: Goodhart, 'Trust law for the twenty-first century' (1996) 10(2) TLI 38. Since the Court of Appeal in ***Armitage v Nurse [1998] Ch 241*** upheld the validity of a very wide exclusion clause, however,
p. 179
such clauses have been a matter of concern, being the subject of a Consultation Paper, *Trustee Exemption Clauses*, produced by the Trust Law Committee in 1998. Dealing with this point would be worth extra marks.
- During the passage of the **Trustee Act 2000** through the House of Lords, some of their Lordships expressed concern that professional persons acting for a settlor in drawing up a trust instrument are effectively free to insert an exclusion clause protecting them from liability, whilst at the same time charging for their professional services to the trust. The Lord Chancellor agreed that the matter needed to be looked into and referred it to the Law Commission, which subsequently published a Report, *Trustee Exemption Clauses* (Law Com No. 301, 2006). The Report indicates that the Law Commission retreated from the view expressed in its earlier Consultation Paper (Consultation Paper No. 171, 2002) which had favoured legislation; instead the Law Commission recommended only the introduction of rules of practice. Reference to this could be worth extra marks.

Question 3

By his will, Edward, who died earlier this year, gave £500,000 to his trustees, Sam and Giles, in trust for Edward's daughter, Daphne, for life, remainder to Edward's nephew, Norris. The will gave the trustees an express power to invest in shares quoted on the London Stock Exchange, 'except in shares of Maropet plc'. Sam is a solicitor; Giles is a farmer and an old friend of Edward. Sam and Giles would like to invest part of the trust fund in Old Masters. Norris is a keen environmentalist, and he has written to the trustees asking that they do not make investments in companies which engage in the emission of greenhouse gases.

In the light of these circumstances, advise Sam and Giles:

a of their powers of investment;

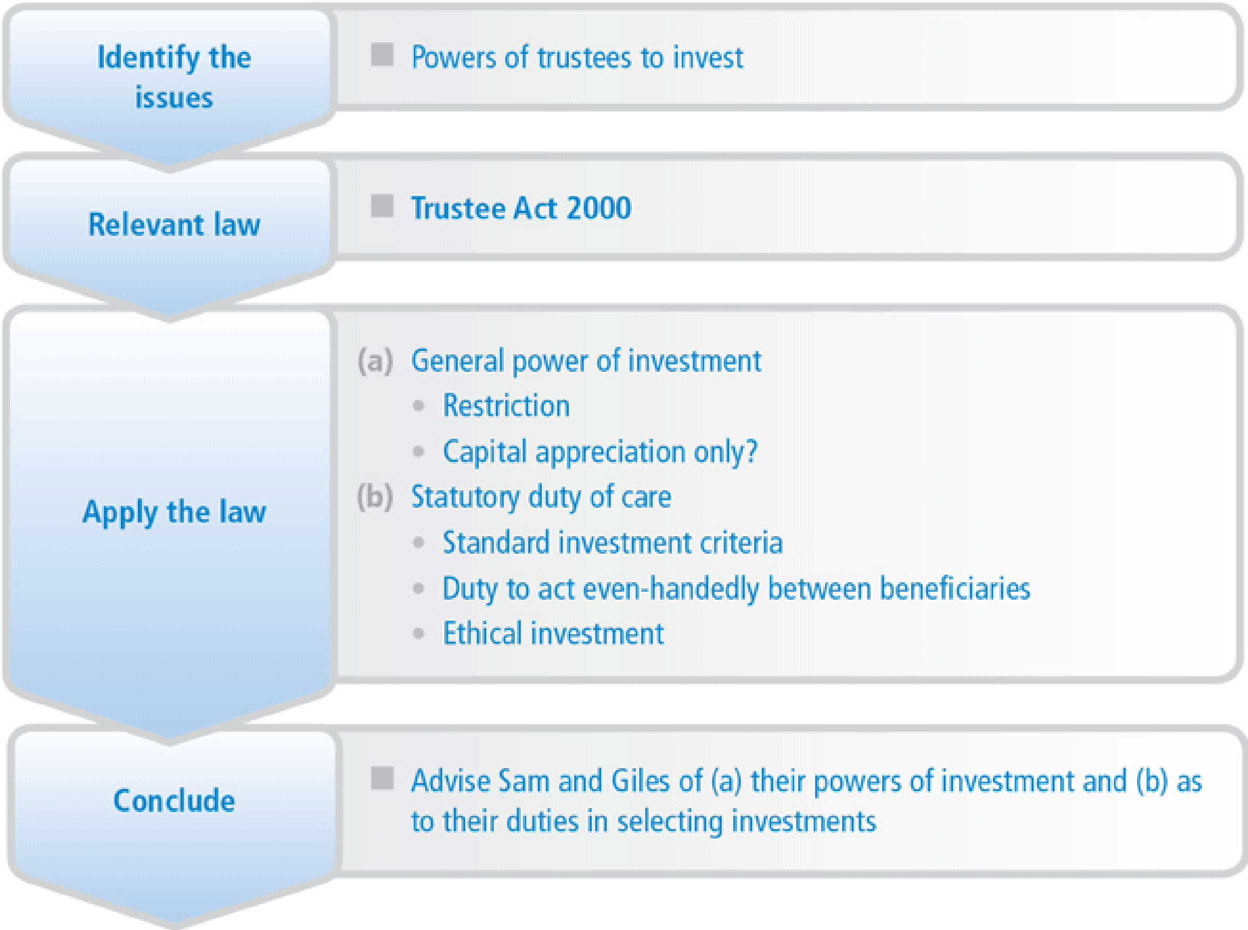
AND

b as to their duties in selecting investments.

Caution!

■ The law relating to trustee investment was considerably altered and simplified by the **Trustee Act 2000**. This question covers what qualifies as an investment, and the equitable and statutory duties of trustees relating to the selection and review of investments.

Diagram Answer Plan



p. 180

Suggested Answer

Part (a)

Subject to any provisions in the trust instrument, a trustee may make any kind of investment that he could make if he were absolutely entitled to the trust assets (**Trustee Act 2000, s. 3(1)**).[1] This power is called 'the general power of investment' (**s. 3(2)**). The general power of investment does not itself give trustees a power to make investments in land (other than in loans secured on land) (**s. 3(3)**); trustees are, however, given a separate power to acquire as an investment freehold or leasehold land in the United Kingdom (**s. 8(1)(a)**).

[1] First paragraph sets out the key issue and the law.

The general power of investment is additional to any express powers of investment, but is subject to any restriction or exclusion that the trust instrument may contain (**s. 6(1)**). Had the investment clause in the question provided that the trustees were to be empowered to invest *only* in shares quoted on the London Stock Exchange, the general power of investment would have been effectively excluded.[2] The positive inclusion of a power to invest in shares quoted on the Stock Exchange is not, however, to be treated as an exclusion of the general power of investment. Sam and Giles therefore have the general power of investment, subject only to the restriction on investing in shares in

p. 181

↵ Maropet plc. That this is the intended effect of the statute is apparent from an explanatory note which the Law Commission attached to the clause of its Draft Bill which later became **s. 6 of the Trustee Act 2000**: Law Commission, *Trustees' Powers and Duties* (Law Com No. 260, 1999).[3]

[2] Start here applying the law to the problem.

[3] Good reference point to include.

The older view of an investment is that it is the purchase of property from which interest or income is expected to accrue: ***Re Wragg [1919] 2 Ch 58***.[4] More recently, however, it has been accepted that an investment includes any laying out of money with a view to obtaining a return, which suggests that even the purchase of an asset which can produce a return only on sale is included: ***Re Lilly's Will Trusts [1948] 2 All ER 906***. The modern view is that investment may include a capital, as well as an income, return: ***Cowan v Scargill [1985] Ch 270***; ***Harries v Church Commissioners for England [1992] 1 WLR 1241***, at p. 1246. On this basis, the purchase of Old Masters, which do not themselves produce an income, could today be regarded as an investment. The risk for the trustees, however, is that if such paintings were sold soon after purchase, it might be argued that they were acquired not for investment but for purposes of trading, with the result that the profits of the sale could be liable to income tax.

[4] Bit of historical development never hurts.

Part (b)

The **Trustee Act 2000**[5] subjects trustees to a statutory duty of care, which applies when a trustee is exercising the general power of investment or any other power of investment, however conferred, or when carrying out his statutory duties in relation to the exercise of a power of investment or to the review of investments (under **ss. 4** and **5**) (**Trustee Act 2000, ss. 1** and **2** and **Sch. 1, para. 1**).

[5] First paragraph sets out the law.

The duty of care requires a trustee to exercise such care and skill as is reasonable in the circumstances, having regard in particular to any special knowledge or experience that he has or holds himself out as having, and (if he acts as a trustee in the course of a business or profession) to any special knowledge or experience that it is reasonable to expect of such a person (**Trustee Act 2000, s. 1(1)**). It would appear that this puts into statutory form a distinction which had been previously drawn in the case law, under which a professional trustee (namely a trust corporation) is treated as subject to a higher standard of care than an unpaid (lay) trustee: ***Re Waterman's Will Trusts [1952] 2 All ER 1054***; ***Bartlett v Barclays Bank Trust Co. Ltd (No. 1) [1980] Ch 515***, at p. 534 and ***Pitt v Holt [2011] EWCA Civ 197, [2011] 3 WLR 19***. It would appear from the question that Giles is a lay trustee; he will therefore be judged by the standard of care established in the case law, namely that of the prudent man of business investing for the benefit of persons for whom he feels morally bound ↵ to provide: ***Re Whiteley (1886) 33 ChD 347***, at p. 355 (Lindley LJ). In investing, therefore, Giles may not take more than a prudent degree of risk: ***Learoyd v Whiteley (1887) 12 App Cas 727***, at p. 733; ***Bartlett v Barclays Bank Trust Co. Ltd (No. 1) [1980] Ch 515***, at p. 531. Although he is not a professional trustee, Sam is a professional person, so that it would seem that he will be required to exercise a higher degree of skill in relation to the legal work which he performs for the trust.

p. 182

In exercising any power of investment, whether under the **Trustee Act 2000** or otherwise, a trustee must have regard to the standard investment criteria, and must from time to time review the investments of the trust and consider whether, having regard to such criteria, they should be varied (**Trustee Act 2000, s. 4(1), (2)**). The standard investment criteria require the trustee to have regard to the suitability of the investment to the trust and to the need for diversification so far as is appropriate to the circumstances of the trust (**s. 4(3)**). The statutory duty to select suitable investments is twofold: if, for instance, trustees are considering investing in shares in X plc, they must consider both whether investment in shares is suitable for the trust, and whether shares in X plc are a suitable investment within that class. Diversification is important in order to spread the risk of investment. Sam and Giles might therefore be in breach of trust were they to invest the entire trust fund, for instance, in the shares of one company. The trustees are not, however, guarantors of the success of their investment policy, and so are not liable merely because the investments do not, in the course of time, turn out to have been the most profitable that could have been made: ***Nestle v National Westminster Bank plc [1993] 1 WLR 1260, CA***.

Both duties effectively require the trustees to have regard to the particular trust; and the trustees must act even-handedly between the beneficiaries. In the problem, therefore, the investments should be selected so as to provide, so far as possible, both a reasonable income for Daphne for her life, and reasonable capital growth for the remainderman, Norris. The trustees would therefore probably be in breach of trust were they to invest the entire trust fund in Old Masters, since, apart from breaching the duty to diversify, they would be investing in a way that would produce no income for Daphne.

In selecting investments, and having regard to the above, the trustees' duty is to secure the maximum financial return for the trust: ***Harries v Church Commissioners for England [1992] 1 WLR 1241***, at p. 1246. The consequence is that, in a private trust (such as that in the question), the trustees may not have a policy of ethical investment which would be likely significantly to reduce financial returns. The only
p. 183 exception to this in the case of a private trust is where all the ↵ beneficiaries are *sui iuris*, form a closed class, and unanimously agree to such a policy: ***Cowan v Scargill [1985] Ch 270***. Therefore, even assuming Norris is at least 18 years of age, the trustees would probably be in breach of trust in pursuing the ethical policy he proposes unless Daphne expressly agrees to it.[6]

[6] This last concluding sentence is probably as far as you can go in presenting a firm conclusion.

Looking For Extra Marks?

- Including some development of the law to show how it stands today and how it has travelled is worth marks as showing depth of study and understanding of the topic.

Taking Things Further

■ Hayton, D., ‘The irreducible core content of trusteeship’, in *Trends in Contemporary Trust Law* (A. J. Oakley, ed.), Oxford University Press, 1996, chapter 3.

This chapter provides some highlights for your revision.

■ Luxton, P., ‘Trustee exclusion clauses: lost in the heather?’, in *Modern Studies in Property Law: Volume 1: Property 2000* (E. Cooke, ed.), Hart Publishing, 2001, chapter 3.

This chapter provides a good critique of trustee exclusion clauses.

Online Resources

www.oup.com/uk/qanda/ *<http://www.oup.com/uk/qanda/>*

For extra essay and problem questions on this topic and guidance on how to approach them, please visit the online resources.

Related Books

View the Essential Cases in equity & trusts

Related Links

Visit the online resources for this title *<https://oup-arc.com/access/equity-qanda3e>*

Test yourself: Multiple choice questions with instant feedback *<https://learninglink.oup.com/access/content/mcdonald-concentrate8e-student-resources/mcdonald-concentrate8e-diagnostic-test>*

Find This Title

In the OUP print catalogue *<https://global.oup.com/academic/product/9780198853213>*