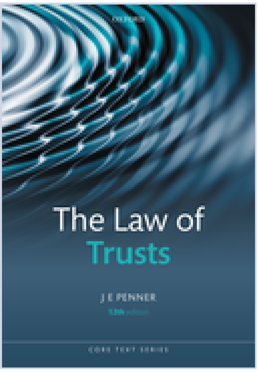

The Law of Trusts (12th edn)

J E Penner

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8. The trust up and running

J E Penner, Kwa Geok Choo Professor of Property Law, National University of Singapore, and Barrister of Lincoln's Inn

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Abstract

Titles in the Core Text series take the reader straight to the heart of the subject, providing focused, concise, and reliable guides for students at all levels. This chapter discusses the powers and obligations of trustees, the most important of which are the duty of investment and the powers of maintenance and advancement. The power of maintenance enables a trustee to spend income, but not capital, for the benefit of infant beneficiaries. The power of advancement is the power to expend the capital of the trust fund to benefit a beneficiary who has only a future or contingent interest in it. The discussions also cover the delegation of trustee functions; the appointment, retirement, and removal of trustees; custodian, nominee, managing, and judicial trustees; and variation of trusts.

Keywords: duty of investment, prudence, power of maintenance, power of advancement, delegation by trustees, retirement of trustees, removal of trustees, custodian trustee, nominee trustee, managing trustee, judicial trustee, variation of trusts

Summary

8.1 Once a trust is constituted, and until it comes to an end with the last distribution of the trust assets (traditionally when the capital interests 'fall in' or 'vest in possession or interest' (**3.21**, **3.85**)), trustees must administer the trust assets and comply with the trust terms. In this chapter we will deal with some of the important duties and powers of the trustee, such as the duty of investment, and other things that may have to occur to keep the trust administration going, such as the appointment of new trustees, or the variation of the trust so the trust best serves the beneficiaries' interests.

The duty of investment

8.2 The duty of investment has two main aspects: (1) a duty to invest the trust property so as to be 'even-handed' between the different classes of beneficiary; and (2) a duty to invest so that the fund is preserved from risk yet a reasonable return on capital is made.

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Even-handedness between the beneficiaries

8.3 In many trusts the benefit of the property is divided between income and capital beneficiaries (**3.16**–**3.18**). In legal terms, income is whatever property actually arises as a separate payment as a result of holding the capital property. Thus, on shares the dividends are the income, on land the rent is income, and so on. The income beneficiary is entitled to whatever income arises. On the other hand, if holding the property yields no new property rights, rental payments, or dividends or so forth, there is no income, even if the shares or the land double in value, making a huge economic return on the investment. Some investments produce no income, such as currency, gold, and antiques. Conversely, some investments will be 'all' income, ie what are called 'wasting assets'; an example is a 20-year lease, on which the rent is income: although in economic terms it also represents the return on the initial capital investment in the lease, in legal terms the capital just slowly reduces to zero as the lease runs its course.

8.4 It follows the trustees may favour the income beneficiary at the expense of the capital beneficiary, or vice versa, by making particular kinds of investments. The law therefore imposes a duty of even-handedness, which requires the trustee to balance their interests fairly in making his investment decisions. (For a case where the trustees thoroughly failed to do so, see the New Zealand case of *Re Mulligan* (1998) (**13.87**); the trustees invested so as to maximise the income of the life tenant, with the result that there was little capital left in the fund on her death.) This is a fiduciary obligation (**3.29**–**3.30**), because only by being even-handed in exercising his discretion as to the trust investments does the trustee act in the best interests of all of the beneficiaries of the trust.

8.5 The two chief characteristics of any investment are risk and return, and they correlate directly. That is, the higher a risk an investment presents, the greater the percentage return on capital any investor will demand. You will (at the time of writing) win a greater sum betting on Scotland to win the next World Cup than on Italy (alas). Historically, the law has favoured the safety, or non-riskiness, of trusts investments over high return. In particular, following the bursting of the 'South Sea Bubble' in 1720—an orgy of speculation in shares of the South Sea Company that ended, as one might expect, in tears—equity regarded investment in company shares as a risk quite beyond the pale. Therefore, until the twentieth century trustees were restricted to investment in 'consols', fixed-interest government securities.

8.6 Of course, the trust instrument itself may, and if professionally drawn up, invariably does, include a bespoke, or tailor-made power of investment, for the reasons given in **2.20**. Originally, again out of concern for the safety of the trust property, investment clauses were interpreted restrictively, but now are given their plain meaning (*Re Harari's Settlement Trusts* (1949)). If there is no express investment clause, the statutory regime provided by the Trustee Act 2000 governs the trustee's investments.

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The Trustee Act 2000

8.7 Section 3 of the Trustee Act 2000 provides a general power of investment by which:

> *a trustee may make any kind of investment that he could make if he were absolutely entitled to the assets of the trust.*

That is, he may make any investment he could make as if the funds were his own.

8.8 Section 1 of the Act outlines a general duty of care applicable to trustees, and by Sch 1 this duty applies to the trustee when exercising any power of investment, either under the statute or conferred by the trust instrument (although the duty of care may be ousted by the trust instrument (Sch 1, s 1)). By s 1, the trustee must:

> *exercise such care and skill as is reasonable in the circumstances, having regard in particular to*
>
> (a) *any special knowledge or experience that he has or holds himself out as having, and*
>
> (b) *if he acts in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting in the course of that kind of business or profession.*

The Act does not further elaborate upon the content of this duty of care, so recourse must be had to the case law to assess how the courts will apply the duty (**8.13** et seq).

8.9 Section 4 of the Act does, however, require the trustee when exercising any power of investment to have regard to 'standard investment criteria', and to review the investments from time to time with these criteria in mind. These criteria are (a) the suitability of particular kinds of investment for the trust, and (b) the need for diversification of the trust investments.

8.10 With regards to diversification, investment strategy today is informed by 'modern portfolio theory', by which the risks of particular investments are balanced against the risks of others. Different investments are chosen that have offsetting risks; thus, for example, if natural gas sales rise at the expense of oil sales, investing in both offsets the risks of one against the other—if gas does well and gas shares rise, then oil shares will fall, and vice versa. Thus, the overall risk of investing in both is less than the individual risk of either. The watchword, then, is 'diversification': by diversifying the investment portfolio investments that singly pose substantial risks together provide a portfolio with a much more reasonable risk. Thus, as stated by Hoffmann J in *Nestle* v National Westminster Bank plc (1988) (at 115):

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

p. 179 **8.11** Section 5 of the Act also requires the trustee, before exercising any power of investment, to take advice from someone the trustee reasonably believes is able to provide proper advice of this kind by virtue of his ability and experience in such matters, unless it would be reasonable in the circumstances to forgo such advice. Such circumstances are not specified, but it would be reasonable not to seek advice in the case of a trust with very limited funds, such as the funds of, say, a student law society held by its treasurer, or a trust of short duration. The only sensible option in such cases might be to place the trust funds in a bank account.

What counts as an investment?

8.12 As we have seen (**8.3**), in economic terms, the purchase of any kind of asset counts as an investment. Unfortunately, the Act doesn't define investment, but prior case law held that only assets that generated some form of income count as investments (see Hicks (2001)). So, for example, in *Re Power* (1947) trustees were barred from buying a house for the beneficiaries to live in. Jenkins J said (at 757) that such a purchase:

> *is not necessarily an investment, for it is a purchase for some other purpose than the receipt of income.*

On the other hand, given judges' acceptance of modern portfolio theory (**8.10**) and the generally liberalising intention behind the Act, this may no longer be good law. But this uncertainty provides another reason for including a bespoke investment clause in the trust instrument. Section 8 reverses *Re Power*, providing the trustee with the power to acquire land to provide a place to live for a beneficiary or beneficiaries.

The standard of prudence in making trust investments

8.13 A standard of prudence cannot be spelled out in terms of black and white rules: like many other standards in the law, it is a standard that depends on a reasonable appreciation of the purposes the standard is to serve and the circumstances in which it applies. In the leading case of *Speight v Gaunt* (1883), the trustee paid some £15,000 to a broker on the strength of a written 'bought note', which asserted that the broker had bought securities in that amount. The broker never purchased the securities, and his fraud was not discovered before his subsequent bankruptcy, so all the money was lost. The trustee was not liable. The payment of funds to a broker in this way was in accord with the standard business practice of purchasing securities. Jessel MR said (at 739–740):

> *the trustee is not bound because he is a trustee to conduct in other than the ordinary and usual way in which similar business is conducted by mankind in transactions of their own. It could never be reasonable to make a trustee adopt further and better precautions than an ordinary prudent man of business would adopt, or to conduct the business in any other way.*

The judgment was affirmed in similar terms by the HL.

p. 180 **8.14** In *Re Whiteley* (1886), a trustee was found liable for imprudently investing £3,000 upon a mortgage of a brickworks. The land itself was not so valuable as to provide sufficient security for the mortgage—only if the brickworks operation continued as a going concern, which, in the event it did not, was the loan likely to be repaid. In the CA Lindley LJ framed the standard as thus (at 355):

> *The duty of a trustee is not to take such care only as a prudent man would take if he had only himself to consider; the duty rather is to take 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 bound to provide.*

8.15 In the HL (*Learoyd v Whiteley* (1887)), Lord Watson said (at 733):

> *As a general rule the law requires of a trustee no higher degree of diligence in the execution of his office than a man of ordinary prudence would exercise in the management of his own private affairs. Yet he is not allowed the same discretion in investing the moneys of the trust as if he were a person* sui juris *dealing with his own estate. Businessmen of ordinary prudence may, and frequently do, select investments which are more or less of a speculative character; but it is the duty of a trustee to confine himself to the class of investments which are permitted by the trust, and likewise to avoid all investments of that class which are attended with hazard.*

8.16 A trustee is not required to 'beat the market' or save the trust investments from declining in value due to general economic conditions. In *Re Chapman* (1896) Lindley LJ said (at 775–776):

> *[A] trustee is not a surety, nor is he an insurer; he is only liable for some wrong done by himself, and loss of trust money is not per se proof of such wrong ... There is no rule of law which compels the court to hold that an honest trustee is liable to make good loss sustained by retaining an authorised security in a falling market, if he did so honestly and prudently, in the belief that it was the best course of action in the interest of all parties. Trustees acting honestly, with ordinary prudence or and within the limits of their trust, are not liable for mere errors of judgement.*

See also *Nestle v National Westminster Bank* (1994) (**8.22** et seq).

8.17 Special considerations apply when the trust is a controlling shareholder in a company. In *Re Lucking's Will Trusts* (1967) a majority of shares in a family business was held on trust for the family members. One trustee, one of the family members, installed his friend as manager of the company, who proved most unsuitable, drawing large amounts of the company funds for his own use. The trustee failed to detect the manager's withdrawals until it was too late to recover them, and was held liable. Cross J said (at 733):

> *Now what steps, if any, does a reasonably prudent man who finds himself a majority shareholder in a private company take with regard to the management of the company's affairs? He does not, I think, content himself with such information as to the management of the company's affairs as he is entitled to as*
> p. 181 *shareholder, but ensures* ↵ *that he is represented on the board ... Alternatively, he may find someone who will act as his nominee on the board ... trustees holding a controlling interest ought to ensure so far as they can that they have such information as to the progress of the company's affairs as directors would have. If they sit back and allow the company to be run by the minority shareholders and receive no more information than shareholders are entitled to, they do so at their risk if things go wrong.*

8.18 In *Bartlett v Barclays Bank Trust Co Ltd* (1980), almost all the assets of the trust consisted of private shares of a company that managed real property. The company embarked on a programme of hazardous and, as it turned out, disastrous property development, of which the trust company took little notice, implicitly trusting in the 'professional calibre' of the company board. The trust company was liable for the losses. Brightman J said (at 533):

> *I do not understand Cross J [in* Lucking*] to have been saying that in every case where trustees have a controlling interest in a company it is their duty to ensure that one of their number is a director or that they will have a nominee on the board ... He was merely outlining convenient methods by which a prudent man of business (as also a trustee) with a controlling interest in a private company, can place himself in a position to make an informed decision whether any action is appropriate to be taken for the protection of the asset. Other methods may be equally satisfactory and convenient, depending on the circumstances of the individual case. Alternatives which spring to mind are the receipt of the copies of the agenda and minutes of board meetings if regularly held, the receipt of monthly management accounts in the case of a trading concern, or quarterly reports.*

8.19 It is not uncommon for professionally drawn trust instruments to include a '*Re Lucking*' or '*Bartlett*' clause which relieves trustees of these obligations actively to monitor companies in which the trust has a majority shareholding.

A higher standard for paid trustees

8.20 As we have seen, the s 1 duty of care requires a trustee who holds himself out as having special expertise, or who has such expertise by virtue of his business or profession, to be judged accordingly. Although reference to such a higher standard was made obiter in several decisions prior to the Act (*Bartlett v Barclays Bank Trust* Co Ltd (1980), at 535 per Brightman J; *Re Waterman's Will Trusts* (1952) at 1055 per Harman J; an obiter statement by Romer J at 76 in *Jobson v Palmer* (1893) denied such a higher standard), it does not seem as if any higher standard for professionals was ever applied as part of the *ratio decidendi* of a case; that is a decision to hold a trustee liable or relieve him of liability has never turned on a higher standard for those with special expertise. There is, therefore, no real guidance to be gleaned from the case law as to the stringency or scope of the higher standard that is to apply to professional trustees.

8.21 It should also be borne in mind that paid trustees will invariably insist on exemption clauses before undertaking the trust (**13.92** et seq), and such clauses provide that they will be liable only for their 'wilful default', not mere negligence, so any higher standard for paid trustees will likely be of zero practical importance.

p. 182 **8.22** In *Nestle*, a testamentary trust was created in 1922. When the holders of the life interests had all died in 1986, the value of the capital was some £270,000 and the plaintiff remainderman claimed that the fund would have been worth well over £1m if it had been properly invested. The trustees had failed to understand the investment clause of the trust instrument, largely because they had failed to seek legal advice as to its meaning, and in consequence they believed that their investment options were much narrower than was the case and failed to review the investments properly. Although it was clear that the real value of the fund fell dramatically, the CA was not convinced that the investment decisions the trustees actually made would have been in breach of trust even had they understood their investment powers and regularly reviewed the investments. In particular, the trustees' actions between 1922 and 1960 could not be judged by the standards of investment expertise of the post-1960 era, when modern portfolio theory favouring equity investment began to be generally applied. The CA accepted Hoffmann J's finding of fact that there was no provable loss to the fund given the advice of experts before the court on the standards of investment practice applicable over the history of the trust. It should not be assumed, however, that if a trust fund administered from the 1960s or later loses significant real value that will not indicate, at least prima facie, a failure to invest properly unless there are countervailing factors. Although that did happen to the trust in *Nestle*, there were such factors.

8.23 Roughly, from the 1960s onwards, the trustee adopted a policy of investing large proportions of the funds in investments that were tax exempt for foreign residents, as both the living life tenants lived abroad. This resulted in low capital growth, but also savings in estate duty. The court did not find that the trustee breached its duty of even-handedness between the life tenants and the remainderman in adopting such a policy, because the saving in estate duty accrued to the remainderman as well. Staughton LJ said this on even-handedness generally (at 1279):

> *At times it will not be easy to decide what is an equitable balance. A life tenant may be anxious to receive the highest possible income, whilst the remainderman will wish the real value of the trust fund to be preserved. If the life tenant is living in penury and the remainderman already has ample wealth, common sense suggests that a trustee should be able to take that into account, not necessarily by seeking the highest possible income at the expense of capital but by inclining in that direction. However, before adopting that course a trustee should, I think, require some verification of the facts.*

8.24 There are two especially significant points to be taken from *Nestle*: first, one cannot read the case without being impressed that the result very much turned on the defendant bank's winning the battle of the experts as to the investment expertise to be expected of a trustee, and this would seem to be an ineliminable element of adopting a prudent investor approach. Secondly, while the bank was clearly 'in breach' to the extent that it woefully misunderstood the scope of the investment clause, it was not 'in breach' in so far as the investment decisions that it did make were held not to cause loss, because they could have been justified as valid investment decisions had they known their actual investment powers.

p. 183 **8.25** In *Cowan v Scargill* (1985) Megarry VC stated this general principle as follows (at 294):

> *If trustees make a decision on wholly wrong grounds, and yet it subsequently appears, from matters which they did not express or refer to, that there are in fact good and sufficient reasons for supporting their decision, then I do not think that they would incur any liability for having decided the matter on erroneous grounds; for the decision itself was right.*

One might question whether, the plaintiff having proven that the trustee bank had breached its duty by failing properly to understand the investment clause, the burden of proof ought not to have shifted to the bank to show that its breach of duty caused no loss.

'Social' or 'ethical' investing

8.26 Trustees must invest in order to preserve and if possible, enhance the value of the trust property. This obligation is so strict that in *Buttle v Saunders* (1950) trustees were held to have a duty to 'gazump', that is accept a higher offer for the purchase of land they were selling even though this involved the dishonourable conduct of reneging upon their acceptance 'subject to contract' of a previous offer. Before the advent of 'social investing', the main effect of this concentration on the financial interests of the beneficiaries was simply to rule out benefits in kind as proper trust income (unless of course the trust instrument provided otherwise) (see eg *Re Power* (1947), **8.12**).

8.27 *Cowan v Scargill* (1985) concerned a dispute between the trustees of the National Coal Board pension fund for miners. The trustees appointed by the National Coal Board wished to approve an investment plan that included investment in overseas securities and in the oil and gas industries. The trustees appointed by the National Union of Mineworkers (NUM) refused to consent to a plan including overseas investment and investment in industries in direct competition with the coal industry. Megarry VC held (at 287) that the NUM trustees' refusal to approve the scheme would be in breach of trust:

> *When the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are normally their best financial interests.*

8.28 The fact that the NUM strategy might benefit present miners by perhaps assisting the health of the coal industry, which was by no means certain, would be of no benefit at all to retired miners who depended upon the financial performance of the investments to fund their current pensions, so the NUM strategy might also be regarded as not even-handed. Megarry VC continued (at 287):

> *In considering what investments to make trustees must put to one side their own personal interests and views. Trustees may have strongly held social or political views. They may be firmly opposed to any investment in South Africa or other countries, or they may object to any form of investment in companies concerned with alcohol, tobacco, armaments or many other things. In the conduct of their own affairs, of course, they are free* p. 184 ↵ *to abstain from making any such investments. Yet under a trust, if investments of this type would be more beneficial to the beneficiaries than other investments, the trustees must not refrain from making the investments by reasons of the views that they hold.*

8.29 However, Megarry VC also said (at 288):

> *[I]f the only actual beneficiaries or potential beneficiaries of a trust are all adults with very strict views on moral and social matters, condemning all forms of alcohol, tobacco and popular entertainment, as well as armaments, I can well understand that it might not be for the 'benefit' of such beneficiaries to know that they are obtaining rather larger financial returns under the trust by reason of investments in those activities ...*

8.30 To the extent this last passage is taken to suggest that a *trustee* might make 'ethical' investment decisions in such circumstances, Megarry VC's words should be disregarded. Nothing, of course, stops a *settlor* from incorporating ethical criteria in the investment clause of his trust instrument, and if all the 'actual and potential beneficiaries' are adults, then a trustee intending such a policy should present it to them in advance and get their consent, in which case the investment will not be in breach of trust. Otherwise, it is a breach of trust, since trustees do not have the power to determine *by their own lights* what constitutes an 'ethical' or 'moral' benefit to their beneficiaries as a whole.

8.31 Lord Nicholls (1995), speaking extrajudicially, has suggested that:

> *The range of sound investments available to trustees is so extensive that very frequently there is scope for trustees to give effect to moral considerations ... without thereby prejudicing beneficiaries' financial interests. In practice, the inclusion or exclusion of particular investments or types of investment will often be possible without incurring the risk of a lower rate of return or reducing the desirable spread of investments. When this is so, there is no reason in principle why trustees should not have regard to moral and ethical considerations, vague and uncertain though these are. The trustees would not be departing from the purpose of the trust or hindering its fulfilment.*

8.32 This thinking is misguided both in law and on the facts of investment. As to the first, trustees should never be entitled to take into account their own moral and ethical considerations in exercising any of their trust powers. Trustees are instruments of the trust. If they were ever to act on their own views in this way, they would act in breach of their fiduciary obligation never to exercise a discretion in a way that puts themselves in conflict with the purpose of the trust; applying their ethical attitudes to investment decisions gives rise to such a conflict because the trustees' ethical views are extraneous to the consideration of serving the beneficiaries' interests. Lord Nicholls does not say that the trustees must implement the beneficiaries' moral or ethical views, but presumably they may act on their own. There is no warrant whatsoever to give trustees who are placed in a position of power and who are generally paid the right to engage their ethical preferences when investing so long as the beneficiaries cannot prove (see *Nestle*, **8.22** et seq) that they have caused the trust loss by doing so. Who trusts the 'ethical' perspective of a bank or trust company anyway?

p. 185 **8.33** As to the facts of investment, it is wrong to think that the range of investments is so great that a few ethical investment choices here and there will not affect the financial performance of the trust. As Langbein and Posner (1980) make clear (at 88), a decrease in the range of investments is not determined by the number of individual securities one does not invest in, but the percentage value of the investment market those securities represent:

> *In 1979, Corporate Data Exchange Inc, identified ninety-nine companies that a socially responsible investor should avoid. The aggregate market value of the stocks of these companies was $342 billion. Yet the only criteria for exclusion were whether the company was predominantly non-unionised, had a poor record in occupational health and safety, failed to meet equal employment opportunity guidelines, or was a major investor or lender in South Africa. Although this is an arbitrarily limited set of criteria, it results in excluding such a large fraction (weighting numbers by market value) of listed equities as to create a degree of sampling error and sampling bias inconsistent with adequate diversification of the portfolio.*

8.34 In other words, 'if a trustee refuses to invest in just two things', but those two happen to be cars and alcohol, he is unlikely to adequately diversify the trust portfolio because the car and drinks industries represent such a major fraction of the overall economy. It is irrelevant that there are, in terms of numbers, thousands of other companies or securities to invest in. The resulting inadequate diversification will entail a riskier investment of the trust funds.

8.35 To reiterate the point made above (**8.30**), there is nothing wrong with ethical investing. The point is that trustees should never have a right as just trustees to make ethical choices regarding the investments of money owned beneficially *by other people*, ie their beneficiaries.

8.36 Pursuant to regulations made under the Public Service Pensions Act 2013 (s 3, Sch 3, para 12; Local Government Pension Scheme (Management and Investment of Funds) Regulations 2016 (SI 2016/946), reg 7(2)(c), para 6.34.) which provides guidance to local authority administrators of pension schemes, in relation in relation to investment decisions:

> *In general, non-financial factors may only be taken into account if two tests are met: (1) trustees should have good reason to think that scheme members [ie the pensioner-beneficiaries] would share the concern; and (2) the decision should not involve a risk of significant financial detriment to the fund.*

The worry here is with part (1). On what facts would trustees have 'good reason to think that scheme members (all of them? most of them? some of them?) share the concern'?

8.37 In *Evans v London Co-operative Society* (1976), trustees had regularly loaned the whole of a pension fund to the employer at below market interest rates. Although such loans were authorised by the trust instrument, p. 186 the trustees were liable for breach for not adequately exercising their discretion in properly negotiating an interest rate. However, Brightman J said (at 364) that the trustees could:

> *give the parent financial concern accommodation on preferential terms if the trustees consider that the security of the employment of their members may otherwise be imperilled.*

8.38 In the Scottish case *Martin v City of Edinburgh District Council* (1989), the local authority's policy to disinvest in companies with South African interests was found to be a breach of trust, because the decision was taken without considering the best financial interests of the beneficiaries.

8.39 Charities raise particular issues. In *Harries v Church Comrs for England* (1993), the Bishop of Oxford sought a declaration that the Church Commissioners should use their assets with the objective of promoting the Christian faith, and were not entitled to act in a manner inconsistent with that objective; he thus proposed an active investment policy of seeking out investments to forward Christian purposes. The court disagreed. As with any other trust, the normal duty of charitable trustees is to seek the maximum return while investing prudently. While the Commissioners' policy of excluding certain investments—armaments, gambling, tobacco, newspapers, and companies with interests in South Africa—was considered acceptable, a more restrictive policy of requiring them generally to invest on the basis of non-commercial, pro-Christian considerations would create too great a risk to the trust.

8.40 It thus seems that charity trustees may rightly choose not to invest in activities that directly contradict the purposes of the trust, so a charity for cancer research may rightly not invest in the tobacco industry, because it is assumed that such restrictions will leave the charity with an adequate range of investments to diversify a portfolio. Secondly, charities may refuse to invest in otherwise sound investments if by so investing they would alienate those who give to the charity, thus reducing its overall financial position. But charities may not adopt a policy of accepting lower returns by treating their investments as a means of carrying out their charitable purpose. As Nobles (1992a) points out, however, charities generally give *their money away* in pursuit of their purposes. Why should one mode of 'giving', ie investing in activities that may earn below market returns, be disallowed, if it serves the charity's purpose? They are not, after all, trying to preserve and enhance the value of a sum of money for private beneficiaries. They should, therefore, be able to invest 'ethically' so long as the particular ethical investment furthers their particular charitable purpose. Note that while this licence may provide much latitude for charities such as churches, where 'Christian purposes' could be read very broadly, it would provide almost no latitude at all to, say, Dogs for the Blind.

The delegation of trustee functions

8.41 As we have seen (**2.28**), equity would only allow a trustee to delegate 'ministerial' administrative functions (see *Speight v Gaunt* (1883); *Learoyd v Whiteley* (1887)). In particular, trustees could not delegate any of their discretions, the idea being, first, that the settlor, by conferring discretions upon his trustees, reposed in
p. 187 them specifically the obligation to exercise them responsibly, and, secondly, that by undertaking the trust, the trustees undertook to use their own judgement where judgement was called for, and had no right to delegate the job to others.

8.42 The Trustee Act 2000 allows the trustees to delegate in a broader range of circumstances.

8.43 Under s 11(1) and (2) of the Trustee Act 2000, trustees may collectively delegate any of their functions to an agent to perform, except:

> (a) any function relating to whether or in what way any assets of the trust should be distributed;
>
> (b) any power to decide whether any fees or other payment due to be made out of the trust funds should be made out of income or capital;
>
> (c) any power to appoint a person to be a trustee of the trust; or
>
> (d) any power conferred by any other enactment or the trust instrument that permits the trustees to delegate any of their functions or to appoint a person to act as a nominee or custodian.

8.44 The trustees may delegate tasks to one of themselves (s 12(1)), although not to any trustee who is also a beneficiary (s 12(2)). By s 15, where the agent is to carry out any 'asset management functions' (eg investment), the trustees must first provide a written 'policy statement' to guide the agent's exercise of his powers in the best interests of the trust, so that, for example, the investments provide sufficient income to meet the level of provision the trustees intend for the income beneficiaries. By s 22, the trustees are required periodically to review any delegation arrangements, and to consider whether the 'policy statement' needs to be revised. By Sch 1, para 3, the s 1 duty of care (**8.8**) applies to the trustees' appointment of agents and their review of them under s 22.

8.45 By s 25 of the Trustee Act 1925 (as amended by the Trustee Delegation Act 1999, s 5) any individual trustee may, by power of attorney, delegate any or all of his duties, powers, or discretions, whether administrative or dispositive, for up to 12 months. Under s 25(4), the trustee must inform in writing any person entitled to appoint new trustees under the trust (see **8.60** et seq) and all the other trustees, which will allow them to consider whether the delegating trustee should be replaced. The trustee is liable under s 25(7) for all acts and defaults of his delegate by power of attorney as if they were his own acts or defaults.

The powers of maintenance and advancement

The power of maintenance

8.46 The power of maintenance enables a trustee to spend income, but not capital, for the benefit of minor p. 188 beneficiaries, ie those under 18, where property is held on trust for the minor. A settlor may specifically confer on trustees this power, or deny it, directing instead that the income should be spent on someone else or accumulated. If the trust instrument is silent, the Trustee Act 1925, s 31 confers on trustees a power to apply, in their sole discretion, income for the minor's maintenance. The section applies whether the minor's interest is vested (eg '10,000 shares of XYZ plc on trust for Benjamin absolutely'), or contingent (eg '10,000 shares of XYZ plc on trust for Bella if she obtains the age of 25') (**3.21**). Once the beneficiary of a vested interest turns 18 then of course he is entitled to any income arising on the property, but under s 31(1)(ii), trustees must pay the income to a beneficiary even of a contingent interest upon his turning 18.

8.47 Under s 31(1)(i) the trustees may in their sole discretion apply such portions of the income for the minor's maintenance,

> whether or not there is—
>
> (a) any other fund applicable to the same purpose; or
>
> (b) any person bound by law to provide for his maintenance or education.

In *Wilson v Turner* (1883), the trustees paid the income to the infant beneficiary's father without inquiring as to the beneficiary's actual needs, and the father's estate was required to repay the money.

8.48 Under s 31(2), income that is accumulated instead of being spent on maintenance in one year may be spent for the beneficiary's maintenance in later years. Thus, income accumulated in the beneficiary's tenth and eleventh years may be spent in his seventeenth when his expenses are greater. Also, under s 31(2), in general, where a beneficiary has a vested interest or an interest that vests upon his turning 18, any accumulations will then be held on trust for him absolutely—he can demand the immediate payment of them. There are several exceptions to this rule, where the accumulations are added to capital (s 31(2)(ii)).

8.49 The income available for maintenance payments is only that income which arises on the property to which the minor beneficiary is, or will be, entitled. This is straightforward in the case of a beneficiary with a present vested interest. All of the income (ie dividends) on the shares in XYZ plc will be available to make maintenance payments to Benjamin in the earlier example (**8.46**). In the case of contingent or future interests, however, only income from property held on trust that 'carries the intermediate income' is available. The rules on whether a trust of property 'carries the intermediate income' are complicated, and we shall not pursue them here (see further Penner (2019a), [10.38]–[10.40]).

The power of advancement

8.50 The power of advancement is the power to expend capital of the trust fund to benefit an adult beneficiary who has only a future or contingent interest in it. Thus, if Betty is entitled to the trust property for life, and Barney in remainder, Barney has a vested future interest. If he is advanced capital before Betty dies, then he receives the benefit of the capital early. If Beatrix is given trust property conditional upon her
p. 189 attaining the age of 30, and she is advanced property at the age of 22, not only does she receive the benefit early, but if she dies at the age of 28, she receives property she would not have received at all but for the advancement—there is no 'clawback' of advanced property if it turns out that at the end of the day the beneficiary does not meet the conditions entitling him to the contingent interest. An advancement is traditionally a significant sum intended to 'advance', or establish, a beneficiary in life (**7.35**), although 'benefit' is now interpreted much more broadly (**8.53**), and 'to advance' therefore generally simply means 'to advance' or bring forward, a beneficiary's capital interest. This does not mean that the beneficiary will actually receive the benefit of the property sooner, since the capital may be brought forward and then resettled on trusts that actually delay the vesting of a beneficiary's interest (**8.53**).

8.51 A power of advancement may be provided by the trust terms but, unless expressly excluded, s 32 of the Trustee Act 1925 empowers trustees to advance up to the entirety of the capital to beneficiaries of future or contingent interests of that capital. Section 32(1A) allows a trustee to treat an advance in one of two ways; this is best explained by an example. Bertrand and Beatrix, twins, aged 20, are entitled to equal shares of trust assets worth £1m upon their attaining the age of 30. The trustees advance £250k to Bertrand. Over the next 10 years the trust fund grows in value from £750k (£1m minus Bertrand's advancement of £250k) to £900k. Bertrand and Beatrix turn 30 and are entitled to their shares of the capital. If, at the time of the advancement, the trustees' treated it as an advancement of half of Bertrand's proportionate half share of the capital, then he will only be entitled to one third of the capital, and Beatrix two thirds, so £300k and £600k respectively. Here the total value Bertrand receives from his capital interest is (leaving aside issues of inflation) is £250k + £300k = £550k. The other way of treating this is as a payment to be accounted for later, when Bertrand and Beatrix turn 30, under the equitable doctrine of 'hotchpot' (see Lewin 2020, ch 25). Under this doctrine, Bertrand's advancement (again leaving aside issues of inflation) will be notionally added back to the fund, raising the notional total to £1.15m, and Bertrand will be entitled to a half share of that, £575k *minus* the prior advancement, so £575k - £250k = £325k. On this accounting then, Bertrand receives a total £250k + £325k = £575k, therefore allowing him to benefit from the increase in value of the trust fund over the past 10 years.

8.52 Section 32(1)(c) provides that where A has an interest in the trust assets which is 'prior' to B's interest, the trustees may only advance capital to B if A is *sui juris* and consents to the advancement in writing. A clear example is where A has a life interest, as in a trust of shares 'to A for life and then to B'. B has a future interest in the shares and is a candidate for advancement. But clearly, any advancement to B will reduce the capital in the trust, ie the number of shares, so A's income, which comes from the dividends on the shares, will decline.

8.53 What counts as 'advancement' under s 32 is very wide indeed: in *Pilkington v IRC* (1964), Viscount Radcliffe said, '[i]t means any use of the money which will improve the material situation of the beneficiary', and in that case the HL would, but for the rules against perpetuity, have approved a proposed advancement
p. 190 that would have resettled a 5-year-old's expected interest when she attained the age of 21 upon a new trust, which would delay the vesting of her interest in the capital until she reached the age of 30, in order to avoid

the effects of death duty. In *Re Clore's Settlement Trusts* (1966), the court approved an advancement to a rich beneficiary allowing him to make a charitable donation he felt morally obliged to make; it was a material, although not decisive, consideration that by the advancement of capital the beneficiary could make the donation with much less severe tax consequences than if he did so out of his income.

8.54 Trustees have an obligation to see that the money advanced actually goes to benefit the beneficiary. In *Re Pauling's Settlement Trusts* (1964), it was held (at 334) that trustees could not advance money:

> *without any responsibility … even to inquire as to its application.*

There, large sums were advanced that the trustees were aware were being spent by the beneficiaries' father on the family's living expenses; the advancements were therefore in breach of trust and the trustees were required to repay the money thus frittered away.

8.55 In *Pilkington*, the HL decided that an advancement on resettlement, to pay funds to a new trust in which the person advanced was a beneficiary, was permissible under s 32. This raises the possibility that funds advanced may be settled on discretionary trusts. A question arises as to whether an advancement under s 32 can validly be made that creates a trust under which the advanced beneficiary is, or may become (as under a protective trust), a discretionary beneficiary. The trustees under the new trust will have a discretion to benefit the beneficiary, and the general rule is that a trustee cannot delegate his discretion (**8.41** et seq); by making an advancement on these terms it appears that that is just what he is doing. The better view is that there should be no hard and fast rule about impermissible delegations in this context; rather, the resettlement should be judged by whether or not it confers a real 'benefit' on the beneficiary (Lewin (2020), [32-020]).

Appointment, retirement, and removal of trustees

8.56 Over the course of any trust, old trustees may retire and occasionally trustees must be removed, and, in both cases, depending upon how many trustees remain, new trustees may need to be appointed. Trustees may be individual persons or companies that specialise in acting as trustees. The court of equity, in its inherent jurisdiction over trusts, has the power to remove trustees and replace them with new ones. For an example of a case in which the courts replaced trustees who had completely failed to appreciate their duties as trustees, and had made decisions concerning the trust property with the interests of non-beneficiaries in mind, see *Jones v Firkin-Flood* (2008).

8.57 Any number of persons may be co-trustees of a trust where the corpus is made up entirely of personalty.
p. 191 There are restrictions upon any trust that contains interests in land: the Trustee Act 1925, s 34 sets a maximum of four (there are exceptions for charitable and other public purpose trusts); the Act also effectively sets a minimum of two trustees. While a sole trustee, ie a lone human trustee (not a trust corporation), of land is not prohibited, s 14(2) provides that a sole trustee cannot give a valid receipt for the purchase money to a purchaser of the land, and so no purchaser will knowingly deal with a sole trustee of land.

8.58 Trustees invariably hold property as joint tenants, so if one dies the survivor(s) alone continue(s) as trustee(s). Only if a sole trustee dies does the legal title to the trust property pass to his personal representative, who in that case becomes a trustee. In the case of a trust created by will where all the intended trustees have predeceased the testator, the testator's personal representatives will be trustees until new trustees can be appointed, who may, of course, be themselves.

8.59 A trust will not fail for want of a trustee, but neither will anyone unwilling be forced to serve as a trustee. If there is no one willing, as a last resort the court may appoint the Public Trustee, an office created by the Public Trustee Act 1906. While the Public Trustee may refuse to undertake a trust, he may not do so only because of its small value (Public Trustee Act 1906, s 2(3)). The Public Trustee is entitled to charge for his administration of the trust. Alternatively, the court may appoint a trust company, authorising it to charge for its services (Trustee Act 1925, s 42).

8.60 The terms of the trust may give some individual(s), typically the settlor and the trustees for the time being, the power to appoint new trustees. However, such provisions are typically supplementary to the powers to appoint provided by s 36 of the Trustee Act 1925, which are generally regarded as adequate.

8.61 The basic purpose of s 36 is to ensure that there will be someone who can appoint trustees so that a court appointment is not required. It provides that where a trustee:

- has died, which includes the case of a trustee named in a will who has predeceased the testator (s 36(8)); or
- has remained outside the UK for over a year; or
- wishes to retire from the trust; or
- refuses to act, ie disclaims the role of trustee at the outset; or
- is unfit to act (eg bankrupt); or
- is incapable of acting, ie has a personal incapacity such as mental or physical infirmity; or
- is an minor; or
- has been removed by the exercise of a power in the trust instrument (s 36(2)),

then a new appointment may be made, first, by anyone nominated to do so in the trust instrument and, failing that, by the trustees for the time being and, failing that because they have all died, by the personal representatives of the last surviving trustee. By s 36(8), p. 192 ↵ refusing or retiring trustees are considered trustees for the time being so as to enable them to appoint their successors.

8.62 It has been held (*Re Coates to Parsons* (1886)) that where some trustees intend to undertake the trust or continue as trustees, but some refuse or intend to retire, respectively, the appointment of new trustees by the continuing trustees without the concurrence of a refusing or retiring trustee will make the appointment invalid if it is shown that the latter was competent and willing to act. It is therefore advisable that all trustees for the time being participate in any appointment. Section 36(6) permits the appointment of additional trustees up to a maximum of four trustees in total. An appointment must be made in writing, although a last surviving trustee may not appoint a successor by will (*Re Parker* (1894)). An appointment is usually made by deed in order to vest the property in, ie transfer the legal title to, the new trustees at the same time (**8.65**). Nevertheless, s 36(7) provides that a new trustee becomes fully liable as a trustee as soon as he is appointed, even if the vesting of the property occurs sometime later. Even if a purported appointment is void, a new trustee who deals with the property as a trustee will be liable as a *de facto* trustee (**13.110**).

8.63 Section 19 of the Trusts of Land and Appointment of Trustees Act 1996 gives beneficiaries what amounts to a power to both remove and appoint trustees, although the power can be excluded by the settlor. If all are *sui juris*, the beneficiaries may unanimously direct any trustee to retire from the trust, or direct the trustees to use their power to appoint new trustees in favour of any person they choose (reversing *Re Brockbank* (**3.66**) on this point).

8.64 Although the court has the power to appoint trustees under its inherent jurisdiction over trusts, s 41 provides that the court may appoint trustees where it is found 'inexpedient, difficult, or impracticable to do so without the assistance of the court', and in particular to replace a trustee who is mentally incompetent, bankrupt, or where a corporate trustee is in liquidation or has been dissolved. Clearly, then, this power is regarded as a long-stop provision where no one empowered by the instrument or s 36 may practicably appoint. The court has also appointed where, for example, all the trustees nominated by will predeceased the testator (*Re Smirthwaite's Trusts* (1871)), where an elderly trustee was physically and mentally incapable of carrying on (*Re Lemann's Trusts* (1883)), and where a trustee had permanently left the UK (*Re Bignold's Settlement Trusts* (1872)). In appointing trustees, the court will be guided by criteria stated by the CA in *Re Tempest* (1866): (1) the wishes of the settlor, (2) the interests of all the beneficiaries, and (3) the efficient execution of the trust. Following the enactment of s 19 of the 1996 Act, recourse to the court should be rare.

8.65 Except in the case of managing/custodian trustees (**8.67**), the trust property must be vested in the new body of trustees when a new trustee is appointed. Section 40 of the Trustee Act 1925 allows a deed of appointment of new trustees also to serve as a vesting instrument, which vests the legal title in the new body of trustees. In the case of registered land, the Registrar must give effect to such an instrument by revising the
p. 193 registered title accordingly. Some property cannot be vested in this way: the most important example of this is company shares. The shares must be transferred into the names of the new trustees in the normal way so that the new trustees are registered as owners.

8.66 A person may disclaim the role of trustee from the outset, may retire from the trust, or may be removed. Although one should disclaim by deed, a disclaimer may be expressed or implied from words or conduct. Once a person has accepted a trust, which in general is found whenever he exercises any function of a trustee in respect of the trust, he cannot disclaim—he may then only retire from the trust. Under s 36 of the Trustee Act 1925 a trustee may retire from the trust on the appointment of a replacement; under s 39, a trustee may retire by deed if there remain at least two individuals or a trust company as trustee(s), and he obtains the consent of the other trustees and anyone else entitled to appoint new trustees. The beneficiaries may now direct a trustee to retire, which is tantamount to removing him, and the court under s 41 may remove one trustee to replace him with another. The court may also remove a trustee in exercise of its inherent jurisdiction without necessarily appointing a replacement, although the grounds for doing so are not well defined. Clearly, any trustee in breach of trust or otherwise in dereliction of his fiduciary duties is a suitable candidate for removal; in *Letterstedt v Broers* (1884), the PC refused to lay down any rule governing the exercise of the power, except to say that the general interest of the beneficiaries should guide any decision.

Custodian, nominee, managing, and judicial trustees

8.67 'Custodian trustees' hold the title to the trust property, but the management of the trust, ie all the trust decisions, are taken by different persons, called 'managing trustees', which the custodian trustee executes in so far as a disposition of the title to the property is required. A custodian trustee will typically have particular duties regarding the custody of trust documents and the holding of investments (see *IRC v Silverts Ltd* (1951)). The main advantage of a custodian trustee is that once the property is vested in him, the managing trustees may retire or be removed and new managing trustees appointed, without having to revest the property each time. A 'nominee' trustee, or just 'nominee', is very much like a custodian trustee, although 'nominee' tends to be used of trustees who hold particular assets of the trust for specific purposes or transactions, while 'custodian' tends to be used of a trustee who holds all of the trust assets on an ongoing basis. Under ss 16–18 of the Trustee Act 2000, trustees are empowered to appoint nominees and custodian trustees. Section 19 provides that trust corporations, corporations controlled by the trustees, or persons who carry on the business of acting as nominee or custodian, may be appointed.

8.68 A 'judicial trustee' is appointed by the court (Judicial Trustees Act 1896) in cases where some continuing court supervision is required because the administration of the trust has broken down; the court may give such directions as to the administration of the trust as it thinks fit.

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Variation of trusts

8.69 Because trusts generally last for some years, it is not uncommon for terms that seemed reasonable at the outset to cause problems or inconvenience later, such as terms that limit the trustee's power of investment, or modes of distribution of the assets that give rise to unforeseen tax liabilities. Furthermore, the beneficiaries may, even from the outset, be unhappy with the distribution of their particular beneficial interests. If the beneficiaries are all ascertained and *sui juris*, they may at any time combine to exercise their *Saunders v Vautier* rights to collapse the trust or vary its terms. Where this is not the case, the assistance of the court must be sought.

8.70 The court has always had an inherent jurisdiction to vary trusts, although the scope of this jurisdiction is limited to variations that permit the trustees greater administrative or management powers. It was once held that the court would only authorise variations of these powers in cases of 'emergency' (*Re New* (1901)), but this appears no longer to be so. In *Duke of Norfolk's Settlement Trusts* (1982) the CA held, authorising in that case the remuneration of trustees, that the basis of the jurisdiction is 'the good administration of trusts' (per Fox LJ at 79C). The court will not rearrange *the beneficial interests* under its inherent power (*Chapman v Chapman* (1954)). The only true exception to this rule is that the court will empower the trustees to apply income to maintain a settlor's minor children even where he directed the income to be accumulated. A court has also always been able to sanction a 'compromise' between beneficiaries' rights where they are the subject of doubt or dispute, but this is better seen as the court's settling what the beneficial interests are, not its remoulding of the beneficial interests.

8.71 Section 57 of the Trustee Act 1925 extends the court's jurisdiction to enhance the trustee's administrative powers to cases of expediency generally (*Cotterell v Allendale* (2020), [50]). It clearly contemplates increasing the power of trustees to deal in particular ways with the trust assets, not a wholesale rewriting of the trust, nor one which alters the beneficial interests (*Chapman v Chapman* (1954); *Southgate v Sutton* (2011), [34]–[40]).

8.72 An application to extend the trustee's investment powers provides a nice example of a variation under s 57. In *Trustees of the British Museum v A-G* (1984), Megarry VC refused to follow the 1961 decision in *Re Kolb's Will Trusts*, which held that an extension of trust powers was to be approved only in special circumstances. He held that there should be a general power to widen investment powers based on a number of factors including: (1) the standing of trustees and their administrative plan for obtaining advice and controlling investments; (2) the size of the fund; and (3) the object of the fund (here capital growth was needed for the museum to be able to have an endowment for additions to the museum collection). In *Steel v Wellcome Custodian Trustees Ltd* (1988), Hoffmann J approved an extension of investment powers on similar principles.

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The Variation of Trusts Act 1958

8.73 The Variation of Trusts Act 1958 allows the variation of beneficial interests under trusts in cases where the beneficiaries are not in the position to do so by exercising their *Saunders v Vautier* rights. Essentially the Act allows the court to approve a variation on behalf of under-age beneficiaries and potential beneficiaries as yet unascertained. The variation is, therefore, effected by the unanimous exercise of the beneficiaries exercising their *Saunders v Vautier* rights—those who are *sui juris* and ascertained consent for themselves—and the court's consenting on behalf of those who are not (*Re Holt's Settlement* (1969); *IRC v Holmden* (1968); *Goulding v James* (1997)).

8.74 The mere extension of trustee powers, like the power of investment, should be sought under s 57 of the 1925 Act; in such a case the trustee is the proper applicant, not the beneficiaries, and, since no need for the consent of all beneficiaries is required, the s 57 application will be less costly (*Anker-Petersen v Anker-Petersen* (1991)).

8.75 The court cannot consent on behalf of beneficiaries of full age even if their interests are contingent and extremely unlikely to vest in interest, and even if obtaining their consent will be very inconvenient, as in *Knocker v Youle* (1986) where there were several dozen contingent *sui juris* beneficiaries, a goodly number in Australia, who were almost certain never to take under the trust.

8.76 By s 1(1) of the Act, the court may only approve an arrangement on behalf of a beneficiary if it would be to his 'benefit', unless (s 1(1)(d)) the beneficiary is an object of discretionary 'trust over' following the determination of the life interest under a protective trust (**3.23**) in which case no 'benefit' need be shown.

'Benefit' has been construed broadly to include not only financial but moral and social benefits (*Re Holt's Settlement*). In *Re Weston's Settlements* (1969), Lord Denning MR refused to allow the export of a trust to Jersey where the settlor and the beneficiaries had recently moved to minimise tax liability. Considering social and educational benefits he said:

> *I do not believe it is for the benefit of children to be uprooted from England and transported to another country simply to avoid tax.*

8.77 The court will not require an absolute certainty of benefit—where subsequent events might make the variation disadvantageous to the beneficiaries on whose behalf the court consents, the scheme will still be approved if the more likely result is an advantage to them; the court should undertake on the beneficiaries' behalf the same sort of risks that an adult would be prepared to take (*Re Cohen's Will Trusts* (1959); *Re Holt's Settlement*). However, where the effect of a variation might lead to a possible beneficiary under the old trust, even an as yet unborn individual, being excluded from the new trust entirely, the variation will not be approved because if such a person is born, the variation would be wholly disadvantageous to him (*Re Cohen's Settlement Trusts* (1965)).

8.78 In *Re Steed's Will Trusts* (1960), the CA gave the testator's intentions significant weight where a life tenant
p. 196 under a protective trust applied for a variation to give her an absolute interest. The essence of the settlor's concern in creating the protective trust for his former housekeeper was that if absolutely entitled to the property, she would be 'sponged upon by one of her brothers'. The CA refused to consent to the variation on behalf of the possible objects of the discretionary trust over, ie those who would take if the primary trust was forfeited. This decision seems quite out of line with the obvious import of the Act, which, if anything, should favour the variation of protective trusts to give the determinable life-interest holder an absolute interest: s 1 specifically provides that the court may approve a variation on behalf of the beneficiaries of the discretionary trust arising on the forfeiture of a protective trust even if the variation is of no benefit to them. In *Re Remnant's Settlement Trusts* (1970), an arrangement that overthrew the settlor's clear intentions was approved in the interest of family harmony and marital choice (a condition defeated a trust gift for objects marrying a Roman Catholic).

8.79 In *Goulding v James* (1997), the CA made clear that the settlor's intentions are only relevant in so far as they contribute to assessing whether the proposed variation is of benefit to the class on whose behalf the court consents. The *sui juris* beneficiaries, like any other beneficiaries exercising their *Saunders v Vautier* rights, may propose an arrangement that directly contradicts the settlor's wishes for them. Although *Re Steed* was not in terms disapproved, it was largely confined to its particular facts.

8.80 The 1958 Act s1(1) empowers the court to consent to 'any arrangement … varying or *revoking* all or any *of the trusts*' (emphasis added). Given the breadth of this language, it would seem that the court should happily countenance the complete revocation of the old trust and resettlement of the property under a new one, which as we have seen (**3.74**), is perfectly possible under the principle in *Saunders v Vautier*. But there is a wrinkle here. Where, under the principle, the beneficiaries revoke and resettle the property, this may be regarded as a 'disposition' of the capital value of the trust, attracting tax liability (*Re Brockbank* (1948), 209; Lewin 2020, [53-

033]). And despite the wording of the act, the courts have held that that judges cannot approve a genuine revocation and resettlement under the Act, for that would go beyond approving a variation. Drawing the line between these two cases has been problematic.

8.81 In *Re T's Settlement Trusts* (1964), the court was asked to approve a variation of the interest of a beneficiary who would shortly turn the age of majority upon which she would be absolutely entitled to a large share of the capital. Her mother, on the grounds that her daughter was 'alarmingly immature and irresponsible as regards money' ([60]) sought to vary the trust to give the daughter only an interest under a protective trust. Wilberforce J refused to approve the variation ([62]) on the grounds that the Act was restricted to variations and what was proposed was 'a complete new resettlement'. Wilberforce did, however, ([162]–[163]) approve a variation in which, for a period of time, the daughter held under a protective trust, thus deferring the absolute vesting of her capital interest. This was held to be for the daughter's benefit because it would protect her capital interest for a period in which, it could reasonably be hoped, she would gain maturity and responsibility.

p. 197 **8.82** In *Re Ball's Settlement* (1968), Megarry J said (at 903):

> *But it does not follow that merely because an arrangement can correctly be described as effecting a revocation and resettlement, it cannot also be correctly described as effecting a variation of the trusts.*

Drawing upon terminology used in the Australian case, *Re Dyer* (1935), Megarry said (at 905):

> *If an arrangement changes the whole substratum of the trust, then it may well be that it cannot be regarded merely as varying that trust. But if an arrangement, while leaving the substratum, effectuates the purpose of the original trust by other means, it may still be possible to regard that arrangement as merely varying the original trusts, even though the means employed are wholly different and even though the form is completely changed.*

8.83 Some guidance on what amounts to changing the 'whole substratum' may be gleaned from both *Ball's Settlement* and *Re Dyer.* In *Ball's Settlement*, Megarry emphasised that whilst, under the variation, one beneficiary (the father) gave up his life interest, the other beneficiaries, his sons and their families, remained entitled under the new trust. Dyer concerned a charitable trust, and the court refused to treat as a variation the creation of a trust with completely different (though related) charitable purposes. This suggests that to count as variation under the Act there cannot be a what amounts to a wholesale change in the beneficiaries, even if the variation provides some reasonable benefit (**8.77**) for those on whose behalf the court must consent to the arrangement.

Application of law at the time of the variation

8.84 Given the forgoing, it is perhaps somewhat illogical that the varied terms are to be treated as 'new trust terms', and the varying parties as settlors of the new trusts: the new trusts are subject to whatever statutory provisions apply at the time of variation (*Re Holt's Settlement*). This means that the new terms can be tailored to take advantage of legislation in force at the time of the variation regarding, for example, the duration of trusts (**3.85** et seq), to extend the lifetime of the trust (*Swan v Gibbs* (2020); Lewin (2020), [53-055]).

Further reading

Hicks (2001)

Langbein (1994)

Nicholls (1995)

Must-read legislation and cases: Trustee Act 2000, Pts I–IV, Sch 1; *Speight v Gaunt* (1883); *Learoyd v Whitely* (1887); *Nestle v National Westminster Bank plc* (1994); *Bartlett v Barclays Bank Trust Co Ltd* (1979); *Cowan v Scargill* (1984); *Re Holt's Settlement* (1969); *Pilkington v IRC* (1962); *Re Pauling's Settlement Trusts* (1963); *Goulding v James* (1997); *Re Ball's Settlement Trusts* (1986)

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Self-test questions

1 The trustees of the substantial funds of the London Ecumenical Christian Church are given by the trust instrument a power to invest in any investments they see fit, subject only 'to their legal duty of prudent investment'. For 15 years they have left half the funds in a building society account, earning a low rate of interest. The remainder has been invested in shares of two companies. The share price of one of the companies has recently dropped by 30 per cent in line with a general collapse in the stock market. The trust has a holding of 55 per cent in the second company. The company has recently gone into receivership following the failure of a speculative venture. The trustees had not known about the venture, and generally took no interest in the company's activities.

   (a) Advise the trustees whether they have committed a breach of their duty of prudent investment (considering the prevailing 'modern portfolio theory').

   (b) Consider to what extent, if at all, the trustees are subject to a duty to ensure that trust funds are not invested in 'unchristian business activities'.

2 What limitations are there on a trustee's power to delegate his functions? In what circumstances will he be liable for the defaults of his appointed agents?

3. To what extent may trustees practice 'ethical' or 'social' investing, considering their legal obligations to preserve and enhance the trust property for their beneficiaries?

4. Bill, aged 14, and Bob, aged 23, are beneficiaries of a testamentary trust under which they are each entitled to a sum of £25,000 contingent upon their attaining the age of 25, and to a half share of a large share portfolio contingent on their attaining the age of 30.

   (a) To what extent may the trustees use their statutory powers of maintenance and advancement in Bill and Bob's favour?

(b) What are the two possible ways of calculating the allocation of the shares portfolio (to both beneficiaries) if the trustee had advanced a quarter of his allocated share portfolio to Bill (whereas Bob took no advancement) prior to him turning 30.

5. What are the different types and roles of trustees?
6. What differences are there between the rules that govern the variation of trusts (i) to modify the administrative powers of the trustees, and (ii) to alter the beneficial interests?
7. What powers have (i) the trustees, (ii) the beneficiaries, and (iii) the court, to appoint and remove trustees?

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