

## CHAPTER 35

## INVESTMENT BY TRUSTEES

## 1. STATUTORY POWERS OF INVESTMENT

**The general power of investment conferred by the Trustee Act 2000**

- 35–02** AFTER THE FIRST SENTENCE ADD: The statutory power extends to all property within the trust, whether at the time in a state of investment or not.<sup>5a</sup>

## 2. EXPRESS POWERS OF INVESTMENT

**Such investments as the trustees think fit**

- 35–16** AT THE END OF THE TEXT ADD: Where the clause does give the trustees the investment powers of a beneficial owner, they have the power to give warranties on the sale of shares in a private company.<sup>56a</sup>

**Investment in companies**

*“Public company”*

- 35–25** NOTE 83. Companies Act 2006, s.4 came into force on October 1, 2009: Companies Act 2006 (Commencement No.8, Transitional Provisions and Savings) Order 2008 (SI 2008/2860).

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<sup>5a</sup> The words, “whether at the time in a state of investment or not” were expressly contained within the provisions of the former Trustee Investments Act 1961, s.1, but their omission in the 2000 Act does not entail any restriction in the statutory power of investment: *Gregson v HAE Trustees Ltd* [2008] EWHC 1006 (Ch); [2009] 1 All E.R. (Comm) 457 at [86].

<sup>56a</sup> *Jones v Firkin-Flood* [2008] EWHC 2412 (Ch); [2009] All E.R. (D) 175 (Oct) at [213]. Where the giving of the indemnities enabled the best price to be obtained, no objection could be taken by the beneficiaries on the ground that the trustee’s discretion as to the distribution of the trust fund had been fettered.

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**4. AUXILIARY POWERS****Power to vary investments**

- 35–42** NOTE 32. ADD: This statement was approved in *Hawksford Trustees Jersey Ltd v Stella Global UK Ltd* [2011] EWHC 503 (Ch); [2011] All E.R. (D) 154 (Mar) at [124], where it was said that a power to invest extends to a power to sell investments.

**5. EXERCISE OF POWERS OF INVESTMENT****The investment power is fiduciary**

- 35–62** NOTE 96. AT THE END OF THE FIRST SENTENCE ADD: *Re David Feldman Charitable Foundation* (1987) 58 O.R. (2d) 626, Ont. Surr. Ct.

**Excluding ulterior purposes**

- 35–63** NOTE 2. Companies Act 2006, s.172(1)(d), (2) came into force on October 1, 2007: Companies Act 2006 (Commencement No.3, Transitional Provisions and Savings) Order 2008 (SI 2007/2194).

NOTE 3. ADD: For a discussion of the problems occasioned by this rule, and of proposals for its reform, see Thornton (2008) 67 C.L.J. 396.

NOTE 7. AT THE END ADD: Pension trustees cannot, however, use this rule by analogy by contending that they are acting in the interests of the beneficiaries to justify exercising their powers in such a way as to bring about an insolvency event and thus to bring the fund within the Pension Protection Fund: *Independent Trustee Services Ltd v Hope* [2009] EWHC 2810 (Ch); [2009] All E.R. (D) 234 (Nov) at [111]–[113].

*Diversification*

- 35–70** DELETE THE FOURTH AND FIFTH SENTENCES AND REPLACE BY: The duty is to review and to consider diversification of the assets of the trust, not a duty to diversify as such. Whilst section 4(3) speaks of diversification as a need, there will be circumstances where the trustees will be justified in retaining an undiversified portfolio, particularly where the initial

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trust property contains a shareholding in an unlisted company.<sup>30a</sup> The duty in section 4(3) will necessarily be excluded by a direction by the settlor to retain a particular shareholding or other asset.<sup>30b</sup> However, it should be borne firmly in mind that Parliament has referred to diversification as a need. In normal circumstances, a trustee will properly fail to diversify only where there is a compelling argument for such a course of action.

AT THE END OF THE TEXT ADD: A failure to consider at all whether the investments of the trust should be diversified may justify the removal of the trustee.<sup>31a</sup>

**Fairness as between beneficiaries with different interests**

**35–74** IN THE FIRST SENTENCE AFTER trustees must INSERT: , subject to the terms of the trust,<sup>52a</sup>

NOTE 53. AT THE END ADD: *Jeffery v Gretton* [2011] W.T.L.R. 809 at [68].

DELETE THE FINAL SENTENCE AND REPLACE BY: In a 2004 Consultation Paper,<sup>56</sup> the Law Commission made proposals for the duty to balance the interests of capital and beneficiaries to be put on a statutory basis and also for the trustees to have a power to allocate receipts between capital and income so as to discharge the duty to balance. Both of these proposals were subsequently rejected in a Law Commission Report in 2009.<sup>57</sup>

<sup>30a</sup> See *Gregson v HAE Trustees Ltd* [2008] EWHC 1006 (Ch); [2009] 1 All E.R. (Comm) 457 at [90]. These comments were, strictly, *obiter dicta*, as the claim was struck out on other grounds.

<sup>30b</sup> *ibid.* at [88].

<sup>31a</sup> *Jones v Firkin-Flood* [2008] EWHC 2412 (Ch); [2009] All E.R. (D) 175 (Oct) at [240], where this was one of the factors said to justify the removal.

<sup>52a</sup> *Canada Trust Co. v Browne* [2010] ONSC 4118; (2010–11) 13 I.T.E.L.R. 648 at [62]–[94] (provisions for income beneficiaries' entitlement to be determined by reference to the total return of trust assets impliedly excluded duty to act impartially).

<sup>56</sup> Law Commission Consultation Paper No.175, *Capital and Income in Trusts: Classification and Apportionment*.

<sup>57</sup> Law Commission Report No.315, *Capital and Income in Trusts: Classification and Apportionment*, at paras.5.26 and 5.81. See § 25–03 (online supplement).

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**Review of investments**

**35–77** AFTER THE FIRST SENTENCE ADD: The reference to the investments of the trust is to be read as a reference to the trust property, and was almost certainly not intended to confine the scope of section 4(2).<sup>62a</sup>

NOTE 63. AT THE END ADD: The duty is certainly not excluded by virtue of the trustees being given the investment powers of an absolute owner: *Jeffery v Gretton* [2011] W.T.L.R. 809 at [69].

**6. INVESTMENT ON MORTGAGE****Trustees should not employ same solicitor as borrower**

**35–119** NOTE 99. AT THE END ADD: *Hilton v Barker Booth & Eastwood (a firm)* [2005] UKHL 8; [2005] 1 W.L.R. 567.

**7. ACQUISITION OF LAND****Trustee Act 2000***Exclusion of investment in land from the statutory general power of investment*

**35–123** NOTE 17. FOR THE REFERENCE TO Megarry and Wade, *The Law of Real Property*, SEE NOW (7th edn), §§ 23–001 *et seq.*

NOTE 23. FOR THE REFERENCE TO Megarry and Wade, *The Law of Real Property*, SEE NOW (7th edn), § 10–030.

*What land may be acquired under section 81(1) and (2)*

**35–127** NOTE 91. FOR THE REFERENCE TO Underhill and Hayton, *Law of Trusts and Trustees*, SEE NOW (18th edn), §§ 49.35 to 49.38.

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<sup>62a</sup> See *Gregson v HAE Trustees Ltd* [2008] EWHC 1006 (Ch); [2009] 1 All E.R. (Comm.) 457 at [84].