



MARTINEAU JOHNSON

A GUIDE TO TRUSTEES' DUTIES AND POWERS

WHAT IS A TRUST?

A Trust is an arrangement where one or more persons (the “Trustees”) hold property for another person or persons (the “Beneficiaries”). This relationship is governed primarily by the document creating the trust (the “Trust Deed”) and by legislation and case law.

Legal ownership of Trust property is in the Trustees’ names but the beneficial interest belongs to the beneficiaries.

The idea behind a Trust is the concept of duty. Trustees are under a duty to deal with the property in their hands in the interests of the beneficiaries. If they do not do so, they will be in breach of Trust and the beneficiaries may seek relief from the courts to ensure that the terms of the Trust are carried out.

I AM CONSIDERING ACTING AS A TRUSTEE. WHAT DUTIES WOULD I BE UNDER?

The Trust funds do not belong to the Trustees personally as they are holding the funds for the beneficiaries. As such, the law places heavy duties and a high standard of care upon Trustees. In many ways the duties on Trustees are onerous and a lay person should think long and hard before agreeing to act as a Trustee. Unless he is a professional Trustee, he will not usually be able to make any charge for his time or trouble.



The principal duties of Trustees are as follows:

1. **To take reasonable care in exercising their powers as Trustee.** The main duty is contained in Section 1 of the Trustee Act 2000:

“[In acting as a trustee, a trustee] must exercise such care and skill as is reasonable in the circumstances, having regard in particular:

- (i) to any special knowledge or experience that he has or holds himself out as having, and
- (ii) if he acts as trustee 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 Court has the power to relieve a Trustee from liability where the trustee has acted honestly and reasonably and ought fairly to be excused for the breach of Trust, but this power should not be relied upon. An express provision in the Trust Deed can also relieve the Trustee of liability.

The Trustee will be personally liable for any breach of Trust and will not have recourse, unless there is anything to the contrary in the Trust instrument, to an indemnity from the Trust fund.

2. **To read and understand the trust instrument** (i.e. the Trust Deed or Will setting up the Trust)
3. **To act fairly between beneficiaries** e.g. In the case of a life interest trust, the Trustees should strike a fair balance between immediate income return for the life tenant and capital growth for the beneficiaries after the life tenant's death. In the case of a discretionary trust, the Trustees must fairly consider the interests of the beneficiaries and make a decision on reasoned grounds. Their decision must not be brought about through malice or discrimination against any one particular beneficiary.
4. **To comply with the terms of the Trust:** the Trustees will be liable for breach of Trust if they do not comply with express terms of the Trust and the law relating to the Trust. The beneficiaries may be able to take the Trustees to Court for compensation for a breach.
5. **To provide information and accounts to the beneficiaries on request.** The beneficiary can be asked to pay the cost of producing the documents.
6. **To act unanimously** unless there is express power in the Trust instrument for decisions to be reached by majority.
7. **To act without reward:** the general rule is that a Trustee cannot charge for his services, unless they are a professional Trustee.
8. **Not to make a secret profit from the trust** e.g. by supplying goods or services to the Trust through the Trustee's own business.
9. **Not to purchase trust property** without express authority in the Trust instrument.

WHAT POWERS WOULD I HAVE AS TRUSTEE?



A well-drafted trust deed gives the Trustees very wide powers so as to enable them to best carry out their duties. If they do not have these express powers, the Trustees will have to rely on statutory and common law powers, which are fairly limited and often inadequate.

The statutory and common law powers are:

1. **Power to advance capital to a beneficiary**

Section 32 of the Trustee Act 1925 empowers Trustees to advance up to half of a beneficiary's presumptive entitlement to them early.

2. **Power to distribute income to a beneficiary**

Section 31 of the Trustee Act 1925 gives the Trustees power to use the income from a Trust for the benefit of a minor beneficiary whilst he is under the age of 18 for his

maintenance, education or other benefit. To the extent that the income is not used for the beneficiary it must be accumulated for him.

3. **Power to Delegate**

As the person who set up the Trust (“the Settlor”) has expressly appointed the Trustee to look after the Trust funds, the general rule is that a Trustee cannot delegate his powers and duties unless expressly stated in the Trust Deed. However, delegation is possible in two situations:-

- (a) Through the appointment of an attorney under Section 25 of the Trustee Act 1925. This power is limited as the appointment cannot exceed 12 months and the donee of the power must not be the only other Trustee of the Trust; and
- (b) Under the Trustee Act 2000 which enables the appointment of an agent and, in particular, an investment manager to look after the investment of the Trust fund.

WHAT ABOUT INVESTING THE TRUST FUND?

Trustees have at the same time the power to invest and the duty to do so. Without appropriate investment, the funds in the trust will be “eaten away” by inflation.

What particular considerations should the Trustees take into account when considering investment?

1. **Duty of Care:** to comply with this Trustees should act prudently and conservatively. They should try and preserve the Trust funds rather than go for speculative growth.

2. **Take proper advice**

Under the Trustee Act 2000 if the Trustee decides on the investments himself without appointing a professional investment advisor, then in effect he is under a duty to show that he has the necessary skill and expertise to do so. Unless the Trustee has special knowledge or skills he should appoint a professional investment advisor. The terms of engagement will need to be agreed with that professional advisor, as will the policy for investment and what the aims of the Trust are. The Trustee cannot delegate all responsibility: he must also ensure that the performance of the investment manager is monitored.



3. **Duty to balance the interests of the beneficiaries:** as discussed above.
4. **Duty to diversify investments:** this duty is set out in the Trustee Act 2000 and applies unless the Trust Deed provides otherwise.

I HAVE STRONG ETHICAL BELIEFS. CAN I RESTRICT THE INVESTMENT OF THE TRUST FUND TO ONLY ETHICAL INVESTMENTS?

Unfortunately, unless the Trust Deed provides otherwise, Trustees cannot make investment decisions based on ethical reasons unless those investments could also be justified on a pure investment basis. That is because the Trustees' duty is to obtain the best return for the beneficiaries rather than to make ethical statements.

HOW CAN MARTINEAU JOHNSON HELP?

- We can help with the creation of a Trust for whatever reason and liaise with the settlor to ensure that appropriate powers and duties are given to the Trustees;
- We can help with the ongoing administration of Trusts, including preparing annual accounts and completing the yearly Tax Return;
- We can put you in touch with independent financial advisors with experience of advising Trusts on their investments;
- We can advise Trustees on their powers and duties under the Trust Deed or under statute;
- We can act as professional Trustees and relieve you of the risk the role entails; and
- We can help bring Trusts to an end when required.



This guide is based upon the law as at June 2007. Please note that this is intended as a guide and should not be relied upon in substitution for proper legal advice. For advice in relation to your specific circumstances please contact any of the Lawyers in the Private Client Group, or either of the contacts below.

Key Contacts:

Keith Dudley
Partner & Head of Private Client
Direct Dial: 44(0)870 763 1474
Email: keith.dudley@martjohn.com

Ian Flavell
Partner
Direct Dial: 44(0)870 763 1485
Email: ian.flavell@martjohn.com

© Copyright Martineau Johnson 2007