

Director of Legal Services :
David Tatlow

BRIEFING

The Trustee Act 2000

Introduction

1. The Trustee Act 2000 came into force on 1 February 2001.
2. It sets out the basic principles for the administration of trusts, the powers of trustees and the standard of care required in the administration of trusts. It is important that all trustees are familiar with the provisions of the Act and their practical effect.
3. It is simple and concise, filling the gaps in the old legislation such as the Trustee Investments Act 1961. It provides greater flexibility in the management of trusts particular in relation to investment powers reflecting modern investment practices.
4. The Act deals with the following:-
 - A new statutory duty of care
 - Powers of investment
 - Power to acquire land
 - Use and appointment of agents and nominees
 - Remuneration of trustees and agents.

Duty of Care

5. This is to exercise such care and skill as is reasonable in the

circumstances having regard to any special knowledge or experience that the trustee has or holds himself out as having. If a trustee acts in the course of a business or profession regard must be had 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.

6. The standard will therefore vary according to whether the trustee is an unpaid layperson, a paid professional or a professional trustee who holds himself out as such.
7. The statutory duty of care applies only to trustees and not to those persons to whom powers have been delegated who will owe a separate duty of care to the trust.
8. Trustees must comply with the duty of care when carrying out prescribed functions as follows:-
 - When exercising a power of investment or reviewing investments.
 - When acquiring or managing land.
 - When selecting, appointing or reviewing the appointment of agents, nominees and custodians.

- When exercising powers to compromise, which are not therefore required merely to be exercised in good faith (section 15 of the Trustee Act 1925).
 - When insuring trust property.
 - When dealing with reversionary interests, valuations and audits under section 22 of Trustee Act 1925.
9. Trustees have always owed a duty of care and those trustees who are remunerated have always owed a higher duty. The new statutory duty may however make the duty of care more onerous because of its subjective nature. Where there are a number of trustees administering a trust each individual may be subject to a different duty of care. For this reason trustees may wish to bear the duty of care in mind in their appointment of new trustees.
10. Trustees are also required to review the investments periodically and consider whether they should be varied.
11. Trustees are under an obligation to take proper advice unless it is considered unnecessary or inappropriate to do so. Trustees must reasonably believe that the person is qualified to give advice.
12. In light of the new investment powers trustees should as soon as possible undertake the following:-
- Review their investment policy
 - Consider the whole range of investments in light of the new and wider powers
 - Proper advice should be obtained and preferably confirmed in writing unless it is considered unnecessary and inappropriate.

Powers of Investment

10. A new general power of investment has been created which allows trustees to make any kind of investment as if they were absolutely entitled to the trust assets. However, the Act does impose some restrictions and safeguards as trustees are under a duty to take proper advice, must have regard to the statutory duty of care and must apply the standard investment criteria.
11. The standard investment criteria require the trustee to consider:-
- The suitability of the investment
 - Whether investments are of the right type
- The need for proper advice may not be necessary for smaller trusts with safer investments. Furthermore it may not be required if one of the trustees is qualified to give the advice. If trustees decide that proper advice need not be obtained it is advisable to ensure that this is minuted.
15. The Act moves away from the old and restrictive distinction between narrow and wide range investments to allow greater flexibility.

Power to Acquire Land

16. The Act creates a new power for trustees to acquire freehold or leasehold land in the UK as an investment. This is not however

technically part of the new general power of investment which specifically excludes land. Land may also be acquired for occupation by a beneficiary or for any other reason. This power is subject to the duty of care. The Act does not give the power to invest as beneficial owners. It does provide that the trustees have all the powers of an absolute owner to manage the land.

Use and Appointment of Agents and Nominees

17. The Act introduces a new framework and gives new powers to trustees to delegate certain functions. It deals with delegation by trustees as a collective body rather than by an individual trustee. The duty of care will apply to the exercise of powers of delegation
18. Trustees may appoint members of their own body or their nominees or custodians to be their agents.
19. Agents are subject to the same duties in exercising their delegated functions as those that would affect the trustees if they were to personally perform the function, except where the agent is qualified as an adviser to the trustees when there is no duty on the agent to seek advice from another adviser.
20. Where trustees delegate the functions of acquiring, managing or disposing of investments they are required to produce a written policy statement in order to ensure that the delegated functions are exercised in the best interests of the trust and to provide clear guidelines as to how the asset management functions are to be exercised.

21. Written policy statements and written agreements should be reviewed at regular intervals. In addition trustees should regularly review the agent's compliance with such agreement.
22. Trustees should consider and review the current asset management functions and decide whether any of these should now be delegated to agents.
23. Trustees would only become liable for an act or default of the agent if the trustee failed to comply with the duty of care when making the appointment or when supervising the agent.

Remuneration of Trustees and Agents

24. The Act provides that certain trustees may receive reasonable remuneration from the trust property. This reverses the former rule that trustees may not be remunerated for services in the absence of an express charging clause in the trust deed. Trustees who act in a professional capacity can receive reasonable remuneration for any services that are provided to the trust if all other trustees have agreed in writing that remuneration may be made for services. The provisions require that:-
 - There must be at least two trustees
 - The other trustees must agree in writing
 - The trustee to be remunerated must act in a professional capacity ie in the course of a professional business in connection with the administration or management of trusts and the services provided by the trustee must

fall within these limits. This would include solicitors, accountants, surveyors, financial advisers, bookkeepers, estate agents and trained administrators.

25. The remuneration must be reasonable in the circumstances for that trustee to be paid for those particular services.
26. The Act will apply where the trust Instrument fails to make suitable provision for the remuneration of trustees.

For advice contact Connie Price:-

Tel: 0121 303 3496

Fax: 0121 303 4936

E-mail: connie.price@birmingham.gov.uk