

## Duties of Private Trustees

A private trustee's duties, which are found in statute, case law and the trust deed, can be onerous and it is important that a trustee is aware of them before accepting the office of trustee.

The following statement made in 1747 by Lord Hardwick in the case *Knight v Earl of Plymouth* is as true today as it was then (apart from the clear assumption that a woman would not be involved with trusts at that time!):

“A trust is an office necessary in the concerns between man and man, and which, if faithfully discharged, is attended with no small degree of trouble and anxiety. It is an act of great kindness in anyone to accept it”

A trustee's duties and powers include the following:-

### (1) Care

A trustee should take all the precautions which a “prudent man of business” would take in managing similar affairs of his own; aspects that a trustee should consider include:-

- A trustee must do what is required if he had a moral obligation to provide for others; for example, although an individual may be prepared to risk a substantial amount on speculative ventures this would not be appropriate for a trustee.
- It is no defence for the trustee to say that he was doing his incompetent best as the standard is “ordinary prudent man of business”.

- The level of the standard of care may increase according to the actual expertise of the trustee.
- If a trustee is in breach of trust he has a personal liability to reconstitute the trust or by paying compensation for losses that would not otherwise have occurred but for the breach of trust. (See (9) below).

### (2) Trust property

A trustee must be aware of the property within the trust and take control of it, for example, by arranging for land to be placed in his name by completing appropriate Land Registry forms together with the other trustees. If the trust contains chattels there should be an inventory. Generally it is permissible for trust property to be held by properly appointed nominees and this will often apply in cases where there is an investment portfolio.

A trustee should ensure the preservation of the trust property and safeguard it; for example, by taking appropriate advice, considering and arranging suitable investments, reviewing the investments from time to time and by considering and arranging insurance.

### (3) Terms of the trust

A trustee must be aware of the terms of the trust (which will be in the trust deed) and observe them. For example, the trustees will need to know who the beneficiaries are and details of their entitlements or interests.

### **(4) Accounts**

A trustee must keep trust accounts especially as a beneficiary will be entitled to inspect such accounts and to receive explanations as to the investment of trust property.

### **(5) Unanimity**

Trustees must act unanimously unless the trust document provides otherwise.

### **(6) Impartiality**

A beneficiary should not benefit from the trust at the expense of another beneficiary and therefore beneficiaries “of the same class” must be treated equally and beneficiaries of “different classes” must be treated fairly. Trustees must consider both the present and the future beneficiaries of their trust and at times it will be necessary to achieve a balance between the interests of competing beneficiaries.

### **(7) Not to Profit from the Trust**

A trustee must not profit from the trust and he should avoid being in a position where his personal interest and his duty to the trust may conflict. Generally a trustee should not purchase trust property nor sell his own property to the trust and, in the event of such a transaction, a beneficiary may have the transaction set aside; it is irrelevant that the trustee acted honestly in the transaction.

If a trustee becomes a director of a company in which the trust holds shares he will generally be expected to account to the trust for director's fees that are paid to him although there are exceptions to this rule.

Trustees can claim out of pocket expenses for trust work, e.g. for their travel costs in order to attend meetings. Generally a trustee cannot charge fees for his/her work relating to the trust unless they are acting professionally.

### **(8) Disclosure of Information**

A beneficiary must be able to enforce a trust and make a trustee account for his conduct in the administration and, in order to do this, a

beneficiary will need information about the trust. There has been considerable litigation upon the matter of disclosure of information to beneficiaries by trustees and the position is not entirely clear; any request for information by a beneficiary needs to be considered carefully.

### **(9) Breaches of trust**

If a trustee commits a breach of trust (even if committed honestly and in good faith), for example, if funds are paid incorrectly to a beneficiary or invested in an unauthorised investment, he/she will be liable personally for any loss caused to the trust. Often the trust deed will exonerate a lay trustee for breaches of trust unless he/she acted fraudulently; prospective trustees should check any exoneration provisions before accepting the office of trustee.

The above is not a complete list of trustee duties and powers but it includes the main ones. Nearly always trustees will appoint professional advisers who will advise on the above and any other relevant matters. The advisers would also keep annual accounts, arrange trustee meetings (usually one each year), advise on taxation and complete necessary tax returns/accounts for signature by trustees. The decision making process on trust matters will rest with the trustees.

The principal statutes to consider on trust matters are: The Trustee Acts of 1925 and 2000, Trusts of Land and Appointment of Trustees Act 1996, The Trustee Delegation Act 1999 and Inheritance and Trustees' Powers Act 2014.

**For further information, please contact:**



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