

## • INVESTMENT OF TRUST PROPERTY AND INVESTMENT MANAGERS

### INTRODUCTION

In the recent economic turmoil, trustees have to be mindful of the manner in which they invest trust property. Beneficiaries suffering investment losses might question if trustees did everything reasonably possible to protect the trust fund against such losses. Therefore, trustees must understand their investment powers, duties and investment policy in order to manage and minimise risk and avoid possible litigation. This article intends to provide a brief overview of the most popular schemes, but also highlight the potential opportunities for Jersey trust companies.

### POWERS AS TO INVESTMENT & THE INVESTMENT POLICY

The Trusts (Jersey) Law 1984 (the "Law") and modern Jersey trust instruments prescribe wide investment powers, but are limited by the duty to exercise those powers in the interests of the beneficiaries and in accordance with the terms of the trust. Therefore it is essential that trustees know and act within the limitations of their powers.

Having understood their investment powers and restrictions, trustees must: (i) understand what is meant by "investment"; (ii) undertake an appropriate investment policy; (iii) understand their standard of care and duties; and (iv) implement a system for monitoring investment performance.

When devising an investment policy, trustees must take into consideration the purpose of the trust, investment objectives, restrictions and performance benchmarks. Beneficiaries' interests are crucial; for example if they have vested or discretionary interests, their tax or religious prohibitions, ages, education requirements, attitude to risk, liquidity and capital needs.

### DUTIES AS TO INVESTMENT

Once the investment policy is set, trustees are required to exercise investment powers with due diligence, prudence, to the best of their ability and skill and observe the utmost good faith. Therefore trustees must consider the suitability of investments to the investment policy and the appropriateness of the exercise of their powers in all the circumstances.

Furthermore, trustees, so far as is reasonable, should exercise their powers to preserve and enhance the value of the trust property. Prudent trustees will diversify investments in order to lower risk and to preserve the value of the trust fund. However, the Law does not contain an express duty to diversify and diversification can only be implied by the duty to preserve. Yet, the duties to preserve and enhance are subject to the terms of the trust which can either expressly exclude or alter the duties depending on the settlor's requirements and investment policy. Nevertheless, no prudent trustee would invest trust property in one investment without ensuring that they have been relieved by the terms of the trust of the duties to preserve and enhance and diversify investments.

If trustees do not possess investment expertise or understanding, it is their duty to seek advice on such matters and when receiving that advice to act with the same degree of prudence. In such circumstances it would be prudent and reasonable to employ or delegate the management and investment of the trust property to a professional investment manager.

### POWER TO DELEGATE AND EMPLOY MANAGERS

The Law allows trustees, except where the terms of the trust specifically provide to the contrary, to delegate management of trust property to and employ investment managers to manage the investment of

trust property. However, this does not mean trustees can abdicate all investment responsibility to a manager. Rather trustees have a duty to ensure that they only delegate or employ investment managers in good faith and without neglect who they reasonably consider are competent and qualified to manage the investment of trust property. Therefore before any formal appointment, trustees must be reasonable in their deliberation and selection process, undertake a quantitative and qualitative due diligence exercise to ensure any manager has the appropriate qualifications and investment experience in the required areas.

The trustees should select a manager from a group of potentials who demonstrate the required understanding of the investment policy. Once the manager is selected, the trustees and manager should execute an investment management agreement outlining inter alia the services to be provided and the investment objectives. Care must be taken to ensure the investment mandate thereunder is appropriate and clear. Thereafter trustees must regularly review the performance of the manager as trustees cannot permit the continued delegation or appointment of a manager if his performance is not acceptable.

The investment management agreement should require the manager to provide performance reports to the trustees (usually quarterly, but as required in all the circumstances) to assess the investment manager against, for example, agreed performance benchmarks and the performance of other comparable investment portfolios under different management. Where the investment manager has underperformed, it might be necessary for the trustees to remove him and restart the appointment process. If they do not, the trustees might be liable for any losses to the trust fund.

**LIABILITY AND EXONERATION**

Trustees who invest imprudently resulting in losses will be in breach of trust. They will be personally liable for the loss or depreciation in value to the trust property and the profit (if any) which would have accrued to the trust property. However, trust instruments will often include an exoneration clause which can validly relieve trustees from all liability for breach of trust apart from liability arising from the trustees own fraud, wilful misconduct or gross negligence.

**CONCLUSION**

Trustees' investment duties do not change because of a harsh economic climate. Therefore trustees must demonstrate that they have at all times acted in accordance with their duties, the terms of the trust, the investment policy and carried out all that would be expected of them as an ordinary prudent business man which may include the employment or delegation of an investment manager.

Where trustees have failed investments or are experiencing problems due to the economic climate, it is important they show reasonable and reasoned decisions based upon inter alia appropriate research, risk and analyses reports, independent credit ratings, professional advice and regular reviews of performance in order to manage and minimise risk against beneficiaries who might question investment decisions or losses.

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