

## TRUSTS AND TRUSTEES

The law concerning the powers and duties of trustees is complicated and some of it is archaic; trusteeship dates back to the time of the Crusades although there have been some recent changes, most notably in the Trustee Act 2000. This note cannot provide a definitive guide to your powers and duties in all circumstances but rather is intended to point you in the right direction and in particular to point you in the direction of the questions you should ask, if you are made trustee of a trust.

If you have been asked to act as trustee it is because the person appointing you trusts your judgment. The law expects trustees to act prudently and sensibly; you have a statutory duty of care when exercising your trustee powers. Your prime duty is to take personal responsibility for ensuring that the trust assets are properly managed and used for the benefit of the beneficiaries in the way required by the trust document. To do this you need answers to these questions:

- **What are the terms of the trust document?** You need to have a copy of it and to ask for an explanation of anything you do not understand. You need to know who the beneficiaries are, when they are entitled to capital and income and whether the trustees have any discretion as to who should benefit and when.
- **What are the trust assets?** They may be listed in a deed appointing you but you should also have a copy of the latest accounts if you are being appointed trustee of an ongoing trust.
- **How are the assets used to benefit the beneficiaries?** It should be clear from the accounts what is happening to the income and whether any capital was paid out; what has happened should accord with the terms of the trust document. If there is land you would normally expect it either to be occupied by a beneficiary entitled to occupy it or to be let to produce an income. If you have any doubt about how the assets are being used, again you should ask for an explanation.
- **In whose name are the assets held?** Assets should normally be held in the name of all the trustees, but they may be held by nominees. You need to know what the arrangements are and to be satisfied that, with the other trustees, you control the assets.
- **Who manages the trust assets and how do they report to the trustees?** It is common for investment managers to be given complete discretion but this is not always the case and again you need to know what the arrangements are.
- **How do the trustees conduct their business?** Many trustees meet annually, some more frequently but some not at all. If there are no meetings you need to be sure that you are in close enough touch with your co-trustees to ensure that the trust is running properly. Generally trustees must act unanimously, so you need to be able to make your decisions together.
- **Can a trustee benefit?** In principle, no. Unless you are acting as a trustee in the course of your profession or the trust document specifically permits it (or your co-trustees agree in writing), you cannot charge for acting as a trustee and cannot keep any benefit which you receive because of your ownership of trust assets. You cannot even buy a property from or sell a property to the trust at market value. However, this rule that a trustee cannot charge for acting as

trustee does not prevent a trustee from being reimbursed for expenses properly incurred as a trustee. Moreover, if you are a beneficiary of the trust you can still benefit as a beneficiary, but not as a trustee.

These are questions you should ask initially. From time to time you should also make sure that the answers are still satisfactory.

You may be concerned about personal liability: You can be personally liable to beneficiaries for breaches of trust. Trustees only have the powers given to them by law or by the trust document; a belief that a particular course of action will benefit beneficiaries is not in itself enough, so there are two further questions you should ask when, as a trustee, you come to make decisions:

- ◆ Do the trustees have power to do this?
- ◆ Even if the trustees have this power is it sensible and prudent to use it?

You may also be liable to anyone with whom you enter into a contract. So long as you are acting within your powers in what you do, your obligations will be met from the Trust Fund (if large enough). Before entering into a contract you should ask again:

- ◆ Do the trustees have power to do this? and also:
- ◆ Is the Trust Fund large enough to meet all liabilities which could arise out of the contract? If it is not, the trustees will be personally liable.
- ◆ Is it sensible and prudent to enter into the contract and is it right to put the Trust Fund at risk in this way?

You may not need professional advice to arrive at the answers to all of these questions but if you need some help it is part of our role as solicitors to the trustees to provide it.