

AF1/J02

Part 3: Trustees

Questions about the role and responsibilities of trustees are common in both exams. The trustees are the legal owners of the trust property and are primarily responsible for administering the trust in accordance with the trust deed.

The milestones are to understand:

- How trustees are appointed and replaced
- The duties and powers of trustees
- The investment powers of trustees
- The action beneficiaries can take against trustees

Initial Appointment of trustees

The initial choice of trustees is made by the settlor and shown in the original trust deed. To be capable of acting as a trustee an individual must be over 18 and sane. In choosing whom to appoint the settlor is likely to take the following factors into account:

- The complexity of the trust and its provisions.
- The settlor's view of the trustees
- When the trustees are likely to have to take action.

Rivka, who is 30 has put a twenty-year level term policy into trust with her two children who are 5 and 3 as the beneficiaries. The trustee(s) will not need to do anything unless Rivka dies during the term of the policy. The trustees will then make the claim and pay the money to the children. This is fairly simple so Rivka might ask her husband and sister to be the trustees. It might not be appropriate to ask her father as he is less likely to be alive when Rivka dies

Sometimes it is appropriate for the settlor and possibly their spouse to be the trustees.

Pat has set up a Discretionary trust with the intention of providing for her grandchildren's higher education. She decides to appoint herself and her husband, Tony, to be the joint trustees.

There is no minimum number of trustees although there must be at least two if the trust includes land. Nor is there a maximum although if the assets include land there can be no more than four. It is probably unwise to have too many trustees since trustees must act unanimously and too many may lead to deadlock.

If the trust is particularly complex the settlor may decide to use a professional trustee. There are several benefits in doing this.

- Unlike an individual, a professional trustee, if set up as a business (as in the trustee department of a bank) cannot die. This might be an important factor if the trust is expected to continue for many years.
- Professional trustees bring expertise to the role which may be very important in a complex trust.
- They will charge for their services and this might be uneconomic for a small trust.
- They may be slower to make decisions than individual trustees.

Replacing trustees

A trust may be in existence for many years and the original trustees may no longer wish to or be able to act. Many trust deeds name a person as the appointer who is entitled to appoint new trustees. In the absence of such a provision the power to appoint new trustees rests with the surviving trustees.

The Trustee Act 1925 allows a new trustee to be appointed when an existing trustee:

- Is dead
- Remains outside of the UK for more than one year
- Wishes to step down
- Refuses to act
- Is unfit or incapable of acting
- Is an infant

The “unfit or incapable of acting” is probably the most contentious. The most common situation is when the trustee becomes bankrupt. This does not in itself mean the person cannot act as a trustee but some trust wordings will require the bankrupt to step down.

A trust can still function even if there is only one trustee provided it does not include land. Should the last surviving trustee die, his or her executors can continue to act as trustee or can appoint a new one. A trust can never fail because there are no trustees as the court will appoint one.

The beneficiaries can direct a trustee to retire and direct the remaining ones to appoint a specified replacement. To do this there must be no appointer and all the beneficiaries must be over 18. All the beneficiaries must agree to make this request.

Duties and powers of Trustees

Trustees have various duties and powers. Duties are what the trustees **must do** and powers are what they **can do**.

Duties of trustees

The overarching duty of the trustees is to hold the trust property and administer it for the benefit of the beneficiaries as directed by the trust provisions

Their four key duties are:

- To observe the terms of the trust
- To act impartially between the different beneficiaries. This is particularly significant in a life interest trust where the life tenant is entitled to income and the remaindermen to capital.
- To provide information to the beneficiaries including accounts.
- To exercise reasonable care and ensure correct distribution of assets.

To do this they should:

- Hold title documents to any trust property
- Ensure they are registered as the legal owners of the property
- Must act in the best interests of the beneficiaries
- Exercise care in the management of the trust
- Invest any cash that comes into the trust unless it is to be paid out to a beneficiary
- Keep proper accounts of trust property
- Invest the trust property and monitor the investments regularly

Powers of trustees

These are actions which the trustees are permitted to carry out at their discretion to fulfil their duties. Their powers will normally be contained in the trust deed but as a general rule trustees can:

- Buy & sell investments and give receipt for property passed to them
- Insure property
- Settle debts or renegotiate their liabilities
- Maintain minors by advancing money for their maintenance, education or benefit
- Advance capital to a beneficiary.
- To lend funds to beneficiaries
- To delegate certain matters to an agent or beneficiary

Delegation of powers

Running a trust can be complex and trustees will often wish to pass certain duties to other people. For example, they might instruct a solicitor to deal with the legal issues and an accountant to prepare the tax return. Whilst trustees can delegate powers they cannot transfer their responsibility fully to another person.

Certain powers cannot be delegated. These are

- Distribution of trust assets
- How fees are dealt with
- The appointment of new trustees
- Delegation of trustee' powers to a beneficiary

Any decision on delegating powers, for example appointing a financial adviser must be made unanimously by all trustees but an individual trustee can delegate the exercise of all or any of their powers to an attorney using a Power of Attorney provided:

- It is for a period of not more than one year
- Written notice and the reason for it must be given to the appointer and all other trustees within 7 days of its execution
- The donor of the POA is liable for the acts and faults of the attorney

Investment powers of trustees.

Under the Trustee Act 2000, trustees can make the same types of investments as if they owned them outright unless this is restricted by the trust deed. In exercising this power, they must:

- Have an appropriate amount of diversification
- Keep investments under review and vary them where appropriate
- Ensure all investments are suitable
- Obtain and consider proper advice unless the trustees have the necessary skills to do this themselves or the amount of trust property is too small to make getting advice economic
- Keep accounts and records
- Invest cash that is not required for other purposes in a timely manner

Rights of beneficiaries over trustees

Beneficiaries cannot force the trustees to do something other than what is authorised by the trust deed. For example, a beneficiary who will become entitled to the trust property at 25 cannot make the trustees pay this at an earlier age.

Beneficiaries can however take legal action against the trustees for a breach of trust. Examples of these would be:

- Failure to pay beneficiaries their appropriate entitlement
- Use of unauthorised investments
- Using assets for the trustees' personal benefit
- Not keeping proper accounts
- Trustees didn't take professional advice
- Trustees haven't taken account of recent economic, legal or taxation changes

If action is taken a court could:

- Issue an injunction
- Order trustees to make restitution
- Order the return of any trust property
- Make a third party liable to beneficiaries for consequential loss

That concludes this part so you should now understand:

- How trustees are appointed and replaced
- The duties and powers of trustees
- The investment powers of trustees
- The action beneficiaries can take against trustees

Further Reading

<https://www.duttongregory.co.uk/site/personal/tax-wills-and-probate/trusteesdutiesandpowers/>

<https://www.pruadviser.co.uk/knowledge-literature/knowledge-library/trustee-duties-responsibilities-the-facts/>

<http://www.thywill.co.uk/a-guide-to-being-a-trustee.html>

<https://www.hughjames.com/blog/how-to-remove-a-trustee-v2>