

Greta has the life interest in her family trust, the Cadbury Trust. The remainder is shared between her brothers and sisters and their children. Greta is dissatisfied with the income that she receives from the trust of £100,000 per year. She asks the trustees for more information upon how the trust fund is invested and why it is producing so little income for her. Tim and Tom, the trustees, send her a copy of the trust accounts, but refuse to give Greta any other information. Greta learns from the accounts that all the trust fund is invested in shares in the family property company, Cadbury and Co and in a house, Cadbury House, where her mother, Dolores, lives. Dolores is not a beneficiary of the trust. Greta also learns that Phillip, a solicitor who has been banned from legal practice, in fact undertakes the running of the trust, including investment decisions. Greta thinks that the trustees are not running the trust correctly and seeks your advice. Advise Greta.

Suggested Answer

This question concerns the duties of the trustees in running a trust and, in particular their duties and powers of investment. Some students will just recount everything that is in the Trustee Act 2000, but we would hope that students would work out which areas of the law are raised by the problem, explain them accurately and apply them to the problem set.

The beneficiary's right to receive information from the trustees is limited as discussed by the recent cases of *Re Murphy's Settlement* and *Schmidt v Rosewood Trust*. The older *Re Londonderry's Settlement* stated that there is a right to see 'trust documents' as they belonged to the beneficiary. *Schmidt* preferred to say that it was in the discretion of the court. Either way she can certainly see the trust instrument and the accounts, but the confidentiality of the other beneficiaries needs to be respected. It is clear though that the trustees do not have to give reasons for their decisions and so do not have to explain their investment decisions to her: *Wilson v Law Debenture*, confirming the older *Re Beloved Wilkes*.

'Investment' has a wide meaning: *Re Wragg*, and is not defined by the Trustee Act 2000. Trustees can make any kind of investment. They have a statutory duty of care and skill, updating the old cases such as *Learoyd v Whiteley*, *Speight v Gaunt* etc. We do not know whether Tim and Tom are lay or professional trustees. According to the Act and *Bartlett v Barclays Bank*, if they are professionals they have a higher duty of care. The 'standard investment criteria' apply, in particular the need for diversification. Shares in one company do not seem wise, unless the trust instrument itself requires it. Cadbury House would seem to be covered by section 8, which allows investment in land and purchase of land for 'any other reason'. It seems, however, that although section 8 can be used to buy a house in which a beneficiary may live, if a non-beneficiary is living there such as Dolores, then the trustees must not neglect to make a profit from the investment: *Jeffery v Gretton*. The trustees should also probably have taken professional advice. It is not clear whether advice was sought from Phillip. There is a distinction between advice and delegation.

Delegation is now governed by the 2000 Act, but the old case law is still useful in deciding what this Act means. The employment of Phillip seems questionable, as the trustees must exercise reasonable care and skill in selecting, appointing and supervising agents. A solicitor may not be suitable for investment advice, particularly one who is not allowed to

practice: *Fry v Tapson*. They clearly cannot delegate all the running of the trust to him and should have drawn up a proper written agreement and investment policy statement.

It is unlikely that the old case of *Re Vickery* which excused trustees from liability for the actions of an agent, if the agent was appointed in good faith, would still stand: *Speight v Gaunt* etc. Section 23 of the Trustee Act 1925 has been replaced by section 23 of the Trustee Act 2000; the trustees must now exercise reasonable care and skill to escape liability.

Greta needs to establish a breach of trust, which there probably is, not least in the appointment of Phillip. Whether she can establish any financial loss seems highly questionable in the light of cases such as *Nestlé v National Westminster*. Although *Cowan v Scargill* insisted that trustees have a duty to make money for the beneficiaries, trustees were not penalised for being cautious in *Nestlé v National Westminster*, particularly where there were other beneficiaries to be considered, as in this case. *Bartlett v Barclays* involved a bad mistake by the trustees and there clearly was a large financial loss. Greta would find it hard to prove that there was any financial loss, as in *Nestlé*. If there was financial loss the trustees would be liable even if their breach of trust had not caused it. Their breach of trust in appointing Phillip would be enough as causation is irrelevant: *Bartlett v Barclays Bank* preferred to *Target v Redferns*.