

To what extent has  
the balance shifted  
since the enactment

Law



This question involves an evaluation of the manner by which the courts have managed to regulate the law of trusts with regard to the interests of beneficiaries prior to the Trustee Act 2000 and its impact at present. The importance in this essay is that here we are dealing with the idea that a trust should be administered in the 'best interests' of the beneficiaries. Significant questions arise when we mention this phrase with regard to the way trusts are administered, let alone in any other branch of the law. When we talk about the 'best interests', it is in essence a very subjective issue.

Each trust having different facts and different terms will inevitably have different interests, which will logically need to be for the best. An important aspect in trusts law that must be mentioned before starting this essay is the concept of a fiduciary relationship that will always carry a weight in law. This is the idea that the trustees are always expected to act in the best interests of the beneficiaries with the implication that they are not permitted to take advantage of their position for their own benefit. The standard of probity expected of a fiduciary is extremely high, as was confirmed in *Boardman v Phipps*.

It is the management of these trusts that we are concerned with, as the question seeks to ask how trusts are 'administered'. As the history of trusts has shown, it is investment, remuneration and delegation of responsibilities that prove to be of most importance, all of which are mentioned in the Trustee Act 2000, and affect the interests of beneficiaries. So in this essay I will make a critical evaluation of the law prior to the Trustee Act 2000 with regards to the way trustees manage trusts, making a comparison to the Act

itself and conclude to whether its impact is really in the best interests of beneficiaries.

Before moving on to these areas, it is vital to mention a key element that affects the whole process by which trusts are managed. This is the statutory duty of care now imposed by the Trustee Act 2000. Prior to the Act the trusts were administered from the test found in *Speight v Gaunt*<sup>2</sup>, and was confirmed in *Re Whiteley*<sup>3</sup>, with regards to investment. It was Lord Blackburn in the *Speight* case that stated that the general duty of trustees was to act honestly and fairly and to take... " all those precautions which an ordinary prudent man of business would take in managing similar affairs of his own. "

In the *Whitely* case Lindley LJ refined this dictum and applied it to investment by stating that the 'prudent man' test should not be used *sui generis*, rather it should be used for the benefit of others and be morally binding. Also to note is that a higher standard of care was expected of a professional trustee. 4 So before the enactment of the 2000 Act this prudent man test was the main test used when trustees exercised their power. It is important to note however that in the Law Commission's report which led to the Trustee Act 2000 the view was taken that the statutory duty of care codified the liability of a trustee in equity.

Assuming this is correct, the principles laid down in case law prior to the Act still apply. Section 1 (1) of the 2000 Act requires trustees to 'exercise such care and skill as is reasonable in the circumstances'. This standard of care is further heightened if the trustee has any specialist knowledge or is acting in a professional capacity. 6 So what exactly should be 'reasonable in the

<https://assignbuster.com/to-what-extent-has-the-balance-shifted-since-the-enactment/>

circumstances'? This is a hugely significant change to the 'prudent man' test and gives a wide subjectivity to the whole idea of what standard of care a trustee should exercise.

In this respect the balance of power given to a trustee has shifted from a robust and more rigid test of the prudent man, to a more open and subjective test and in hand has affected the whole way trusts are administered. This test shall be examined further when applying it to investment and delegation of powers as the essay develops. The first area I will focus on is that of remuneration as this greatly affects the interests of beneficiaries and the change that has occurred over the last 300 hundred years in accordance with the way that trusts are being used.

Prior to the 2000 Act, the general rule was that a trustee is not entitled to claim remuneration for carrying out his office. <sup>7</sup> Now this is clearly in the best interests of all beneficiaries as they are losing nothing and gaining everything. This general rule is however subject to exceptions. Firstly a trustee is entitled to charge if the trust instrument so provides. This of course is the most common method by which trustees could have established and still can establish a right to receive remuneration, by an express clause in the trust instrument authorising the trustees to be paid.

This method is still common for professionally drafted trusts, especially for trusts that employ professional trustees such as banks and investment managers. Another way of receiving remuneration is by the inherent courts jurisdiction. <sup>9</sup> However this would only be exercised and payment of remuneration made if it were for the 'better administration' of the trust. So

prior to the enactment of the 2000 Act it was difficult to receive remuneration, one would think this is perhaps in the best interests of the beneficiaries.

However a balance needs to be struck here between a necessary payment to trustees for complicated trusts that require labour and skill, and those that don't. The law on remuneration prior to the Trustee Act 2000 seems a little complicated and unsatisfactory, so the introduction of the Act is perhaps welcoming as it simplifies a lot of previous law, but is it in the best interests of beneficiaries? Firstly it introduces a statutory 'reasonable remuneration' providing the trustee acts in a private trust, and in a professional capacity, and the remuneration is for the services he provides.

The requirements are that the trustee is not a sole trustee, that each other trustee has agreed in writing that he may be remunerated<sup>10</sup>, and that no provision for remuneration is made by the trust instrument. <sup>11</sup> These factors mirror and simplify the previous law and do not necessarily affect the interests of beneficiaries. It is (Section 28 (2)) and (Section 29 (4)) that show significant change. These sections introduce the idea that a trustee is entitled to remuneration under statutory provision even if the services in question could be provided by a lay trustee.

This reverses the old law with respect to 'charging clauses' which were always construed strictly against a trustee and prevented charging for work that could be regarded as not within the professional ambit of the trustee. In this respect the Trustee Act is very much in favour of rewarding trustees for their work and supports and enhances the efficacy of charging clauses in

<https://assignbuster.com/to-what-extent-has-the-balance-shifted-since-the-enactment/>

trusts. The statutory provisions in this area seem entirely appropriate in our age, where the trust has developed beyond the family trust.

On the one hand you could argue that this is not in the best interests of beneficiaries where they will be losing more money from the trust, or on the other hand it will promote a smoother administration of the trust if the trustees are content with their payment and forced to do a professional job. The second important area that will affect the interests of beneficiaries is investment. It was Sir Robert Megarry in *Cowan v Scargill* 12 that said the following in conjunction with what might be considered the 'best interests' of a beneficiary.

When the purpose of the trust is to provide financial benefits for the beneficiaries, as is usually the case, the best interests of the beneficiaries are usually their best financial interests. " Indeed investment is probably the most important power or right of a trustee in relation to what might be in the best interests of a beneficiaries. This area however will not apply to trustees who act as custodians to property and who are not required to exercise the rule of even-handedness between beneficiaries.

Here the traditional view is that investment used to be in which a man of wealth would place his property in a trust for his family for the benefit of his wife and children. It was the duty of the trustee to maintain the capital and at the same time create an income for the wife and children. These arrangements still happen today but usually in a different context, say for example the investment of capital in shares with the return of dividends as well as an overall capital gain. Before analysing the 2000 Act it is important

<https://assignbuster.com/to-what-extent-has-the-balance-shifted-since-the-enactment/>

to look at the role of the courts in controlling investment and its different meanings.

The oldest view of investment is that it is the purchase of property from which interest or income is expected to accrue<sup>14</sup>, moving along the line of case law, it has been accepted that an investment includes any laying out of money with a view to obtaining a return. <sup>15</sup> The modern view is that investment may include a capital as well as an income return. <sup>16</sup> In selecting investments, and having regard to the above definitions, the trustee's duty was to secure the maximum financial return for the trust. <sup>7</sup> Now all these definitions of what might be considered an investment have been widened considerably by the 2000 Act.

This gives greater power to the trustee, but means it is a riskier business. A trustee may now make any kind of investment that he could make if he were absolutely entitled to the trust assets. <sup>18</sup> This power is known as 'the general power of investment'<sup>19</sup> but does not include investments in land, (except loans secure on land). <sup>20</sup> They are however given a separate power to acquire as an investment freehold or leasehold in the United Kingdom.

So clearly more power is given to trustees, does this not mean then, that more power equals more risk and the likelihood of the loss of money. This would clearly not be in the best interests of the beneficiary and perhaps the more traditional robust criteria should be heeded. This is where Section 1 (1) of the Trustee Act 2000 comes into play again. This the statutory duty of care, where a trustee must exercise care and skill with particular regard to

any knowledge or experience that is reasonably to be expected of such a person in that profession.

All this really does is put into statutory form a distinction which had already been created from case law, under which a professional trustee is treated as subject to a higher standard of care than an unpaid (lay) trustee. 22 Finally to note is that in exercising any power of investment, whether under the Trustee Act 2000 or elsewhere, a trustee must have regard to the standard investment criteria, and from time to time review the investments of the trust and consider whether, having regard to such criteria, they should be varied. 23

The standard investment criteria require the trustee to have regard to the suitability of the investment to the trust and the need for diversification of the trust. 24 This is essential when investing as it avoids the risk factor that I mentioned above as investments in various fields of products spread the risk and as a result, reduce the risk. This will indeed be in the best interests of beneficiaries. A result of the 2000 Act with regards to investment, it basically shows a simplification of previous haphazard law, but an increase in power and more risk. To see whether this is in the best interests of beneficiaries is hard to tell.

Providing the trustees stick to the new criteria it would be a safe bet to say most beneficiaries would be secure, especially if the trustees are being remunerated well. The final area that affects the interests of beneficiaries that I would like to focus on is the delegation of power to nominees, agents and custodians. This is another area that is directly affected by the statutory

<https://assignbuster.com/to-what-extent-has-the-balance-shifted-since-the-enactment/>



duty of care, but before moving on to that it is essential to look at the law prior to the 2000 Act.

Firstly it has been said that the burden of carrying out the trust falls upon the trustee, however appointed. 5 In other words, a trustee may not delegate his responsibilities to another unless authorised to do so by either the trust instrument itself, by an equitable rule, or by statute. This absolutism approach to the exercise of a trustee's power and duties might actually seem to cause more harm to the trust fund than the mischief which the non-delegation rule is designed to prevent. In this respect the stricter rules on delegation conflicted with the running and administration of the trust and were not in the best interests of the beneficiary.

However the law as a necessity had to change and develop allowing trustees to delegate power for work that they had no knowledge for would clearly be foolish. In *Speight v Gaunt*<sup>26a</sup> trustee could delegate certain function to agents if this was within the 'moral' or 'legal necessity' of ordinary business usage. This effectively meant that a trustee might delegate certain functions to an agent as would be so delegated by an ordinarily prudent man of business acting on his own behalf. 27 However the common law delegation did not permit the trustees to transfer any of their primary responsibilities.

It is the Trustee Act 1925 s 23 and s 30 that has caused the most complexity in the law with regards to delegation of power. These two acts provide some protection to trustees for excluding liability for breach of trust. For example in s30 a trustee may only be answerable 'for his own acts'. Or in s23 (1) of the 1925 Act liability was excluded where the trustee acted in good faith.

<https://assignbuster.com/to-what-extent-has-the-balance-shifted-since-the-enactment/>

The relationship between these statutory provisions caused a lot of problems in court with interpretation, so it seemed the need for reform was imminent.

Just to note the Trustee Delegation Act 1999 helped also permitted a trustee to individually delegate functions although in limited circumstances. Under s11 of the Trustee Act 2000, a trustee may authorise any person to exercise any or all of their delegable functions. These are all the functions relating to the distribution of the trust assets; any power to decide whether payments should be made out of income or capital; any power to appoint; and any other power made delegable by that trust instrument or another enactment.

Also any person can be an agent for the purpose of exercising the delegable functions. Section 23 of the 2000 Act has also cleared up the fiasco of the s23-30 Act of 1925. It makes it clear that as long as the trustee has fulfilled his obligations with respect to the appointment of the agent and in respect of review of the agent's activities, then there can be no liability for the trustee of the agent then commits an act which is in breach of the terms of the trust.

So it seems again the provisions on delegation of power in the 2000 Act are very welcome as they provide a set of principles that are comprehensive and simplify what was confusing law. In conclusion to what has been discussed above it seems that the 2000 Act has provided a clearer understanding as to what is expected of a trustee, and the power that they have. In relation to power, it does seem that the balance has shifted from less to more, but this does not necessarily mean it will not be in the best interests of a beneficiary.

What has happened is that the whole concept of a 'trust' has changed almost to the extent that one could call it a profession. In this sense providing the trustee is paid and the Trustee Act of 2000 heeded, the administration of a trust should run smoothly. However because the statutory duty of care is so subjective and there will always be some abuse of power, we may find some trustees escaping liability for breaches of a trust that may have been clamped down on long before the 21st century.