

# PWR TECH GUIDE – ROLE & RESPONSIBILITIES OF A TRUSTEE:



## What are the legal responsibilities and duties of a trustee?

You are reading this because you have recently been appointed as a trustee of a will, trust or other legal document and you will be wondering exactly what you are getting yourself into!

Trustees must comply with the various Trustee Acts and will rely on the advice they receive from a variety of additional resources, we will look at these in more detail at the end of this document. For now the focus is on the roles & responsibilities of a Trustee and in this context any reference to “We” in the text refers to the Author, **Portcullis Wealth Retention Ltd.**

## TRUSTEE / S

A trustee owes duties of honesty, integrity, loyalty, and good faith to the beneficiaries of the trust.

They must act exclusively in the best interests of the trust and be actively involved in any decisions.

The general duties of trustees are:

- ✔ **To observe the terms of the trust** - Trustees must learn the terms of the trust and comply strictly with the duties and directions set out in the trust deed.
- ✔ **To act impartially between beneficiaries** - Trustees mustn't allow one beneficiary to suffer at the expense of another. They must balance potentially competing interests for income and capital.
- ✔ **To provide information** - Trustees must keep clear and accurate accounts for the trust and provide beneficiaries with any information or documents relating to the trust that they ask for.
- ✔ **To act unanimously** - Trustees must act unanimously unless the trust deed says otherwise.
- ✔ **To act carefully and distribute assets correctly** – Trustees must provide income for the beneficiaries but still preserve the value of the capital.

## What are the overriding duties of trustees in relation to investments?

“A trustee has a responsibility to guard the assets of others with a higher degree of care than he does his own.”

This quotation helps to illustrate why the work of a trustee is often challenging: a trustee has not only himself to consider but an obligation to provide for and protect others. In that context it is perhaps unsurprising that trustees owe wide ranging duties to beneficiaries. This article considers some of those duties and in particular the duty to invest.

The starting point for determining the specific duties owed by a trustee is the trust instrument. However, duties are also imposed by statute (Trustee Act 2000 (the Act)) and by common law. These include duties to:

- ⊕ Disclose and avoid conflicts of interests
- ⊕ Use due diligence and exercise reasonable care in managing the trust
- ⊕ Act jointly with co-trustees
- ⊕ Not profit from the trust
- ⊕ Account for and give information to the beneficiary as to the state of the trust and trust property.

## The need for trustees to invest the trust fund

Trustees also have a duty to invest. This may be set out in the trust instrument but is also set out in the Act which (at section 3) gives trustees the power to put trust money into any investment in which they would be allowed to invest if they owned the funds themselves. There are, however, some qualifications to this seemingly unlimited power.

The trustee must exercise “such care and skill as is reasonable in the circumstances” - taking into account any special knowledge or experience they may have, or hold themselves out as having. Effectively, this rules out investments which are overly speculative (although see below in relation to assessing the investment risk). It also means that in most cases trustees should seek appropriate professional advice before making an investment decision. However, the fact that a trustee has acted on the advice of a professional will not necessarily excuse a trustee from liability in the event of poor performance. The investment decision remains that of the trustee and should be recorded in writing along with the rationale for the decision.

Otherwise, it is likely to be very difficult for the trustees to recall the thought process behind the decision in the event of a challenge, potentially years later.

Trustees must also ensure that the investments they make are suitably diverse. Individual investments should be considered in the context of the overall investment portfolio.

This reflects “modern portfolio theory” which recognises that, in a broad portfolio, the risk associated with an investment should not be judged in isolation, but against the contribution it makes to the overall risk profile of the portfolio.

The standard of care in choosing investments was considered in the pre-Trustee Act case of *Nestle v National Westminster Bank plc* (1994).

Trustees had managed a trust since 1922 which amounted to £269,203 in 1986. The beneficiaries argued that the trustees had construed their investment powers too restrictively and that if the trust had been properly invested, it would have been worth over £1 million.

The beneficiaries’ arguments were accepted.

However, the court dismissed the claim because the beneficiaries had not proved that the trustees’ investment policy was one which no reasonably competent trustee would have adopted if they had appreciated the true extent of their investment powers.

#### **CONCLUSION:**

On the face of it, the decision in *Nestle* is reassuring for trustees and their insurers, as is the fact that there are few reported cases against trustees arising from alleged breaches of the duty to invest.

However, this perhaps disguises the clear risk of future claims given the significant effect that investment decisions can have on the value of trust assets and that where there is a loss beneficiaries will often look for someone to blame.

It should also be highlighted that the outcome in *Nestle* may well have been different had the case been decided after the Act came into force.

Even at the time the court was critical of the trustees’ failure to carry out regular investment reviews (which are required under the Act).

The obligation to monitor and periodically review investment strategy will always be relevant.

**Whether you appoint our sibling Portcullis Wealth Planning Ltd to act as your adviser in this regard is a decision for the Trustees.**

**Portcullis Wealth Retention Ltd believe working with a firm that has the understanding of the trust frame work AND the responsibilities of the officers of that**

**framework, that can provide regulated investment advice (via Portcullis Wealth Planning Ltd)**

**Portcullis will have the burden of responsibility and liability if the advice is negligent, poor or unsuitable. This tends to sharpen the focus and integrity of the advice to the trustees which will need to be suitably robust. As a result we believe we are worthy of careful consideration.**

#### **What happens if trustees don't comply with their duties?**

If a trustee doesn’t comply with their duties and responsibilities, the trust beneficiaries can apply to the Court to have them removed. The Court can also direct the trustees on how to correctly administer the trust.

We can help beneficiaries who haven’t received an expected distribution from a trust.

This could be because the trustees have declined to provide for them or because the trust assets have been poorly invested or used for other purposes.

We can also help you if you’ve been accused of failing in your duty as a trustee.

#### **Can a new trustee/s be appointed?**

The most common reasons for a change in Trustee are the individual steps down due to personal reasons, such as health, retirement, change in circumstances etc. In which case the remaining Trustee / s can appoint a replacement to succeed them. We recommend that there are two trustee’s at all times.

If you don’t know anyone suitable to act as a replacement trustee, you can appoint a professional third party from the list of additional parties listed at the end.

In relation to the trustees, we currently advise this hasn’t needed to happen forcibly, ever. However, if it were required, for reasons yet unknown, then a specialist firm of Solicitor’s should be appointed to resolve the issues. Most likely Monkton & Whitehead through Solidus IEP would be our recommendation, particularly if it’s a Portcullis advised Trust.

In such an event the Court can appoint replacements for any trustees that they remove for neglecting their duties.

#### **What happens if trustees disagree on how they manage a trust?**

For most trusts, the trustees must make decisions unanimously.

This can cause problems if the trustees disagree about what’s best for the trust and its beneficiaries – unless you agree, you might not be able to do anything at all.

In the event of a protracted dispute then we would recommend a suitably qualified legal professional is appointed who can help the trustees resolve disputes and help them get on with managing a trust.

This is usually conducted through something known as Alternative Dispute Resolution (ADR) such as mediation to help the Trustees agree a solution.

### What can beneficiaries do if they disagree with how a trust is being managed?

As explained above, specialist legal advice should be sought so they can help remove negligent trustees from a trust.

But there may also be cases where the beneficiary disagrees with one of the trustees' decisions even if it doesn't strictly contravene their duties or the conditions of the trust.

Our experience to date this hasn't been a problem. In the unlikely event the beneficiary / ies became unhappy with a Trustee / s decision, they would have the ability to seek your removal.

### Can I get help with my duties as a trustee?

Managing a trust can be complicated, with new and unexpected challenges arising every day.

Every trustee can seek professional help with their duties to make sure they're acting in the best interests of the trust and its beneficiaries. You might consult:

- ✔ Portcullis Wealth Planning Ltd
- ✔ Portcullis Wealth Retention Ltd
- ✔ Accountants
- ✔ Solicitors
- ✔ Estate Agents / Property consultants.

#### Portcullis Wealth Planning Ltd

**Role:** Regulated IFA.

**Responsibility:** Provide investment advice to the Trustees, both in terms of portfolio construction and suitable product wrappers for the trust to hold and invest the capital through.

#### Portcullis Wealth Retention Ltd

**Role:** Estate Planners / Licensed Will Writer

**Responsibility:** Provide advice to the Trustees on Trust structure and HMRC tax matters. Portcullis Wealth Retention Ltd can also be appointed as HMRC Tax Agent and deal with HMRC Trust Registration Service (TRS) as well as annual self-assessment tax returns.



#### Solicitors

**Role:** Solicitors, they provide regulated legal advice to Trustees, IFA or Estate Planner as required.

**Responsibility:** Liaise with the IFA or Estate Planner to create the framework an adviser wishes to recommend for a given client scenario. To deal with any legal matters too complex for the Estate Planner to deal with. Provide legal comment on any contentious or potentially litigious matter. Particularly if HMCTS is to be involved.



Accountant

#### Accountants

**Role:** To deal with HMRC self-assessment through to appeals and provide tax advice. Some accountants can also register the trust with the HMRC Trust Registration Service (TRS)

**Responsibilities:** To file any HMRC paperwork if IFA or Estate Planner not acting for the trustees. May provide audit and other tax services to the trustees. Typically for PWR clients we don't need the additional services of an accountant as we are HMRC Self-Assessment Agents and can also use the HMRC TRS service ourselves (*additional fees will apply*)



#### Estate Agent / Property Consultants

**Role:** To manage and oversee a trust owned property.

**Responsibility:** To market a property for sale. To manage a tenancy agreement on behalf of the trustees if required

If you want to contact us, or are interested in receiving more details about any aspect of this guide or indeed advice on any personal financial matters yourself then please contact us:



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