Part 3 – trustees' duties and information obligations

Subpart 1 – duties of trustee

Subpart 1 of Part 3 contains the mandatory and default duties of a trustee. This gives effect to R2, R3, R13, R14(2) of the Commission's report. The intention is to improve the clarity and accessibility of a trustee's duties by summarising and restating the current law while leaving room for the interpretation of these duties by the courts.

Mandatory duties

As outlined in cl 14, the mandatory duties must be performed and can't be modified or excluded by the terms of the trust deed. Common law will continue to inform the content and application of those duties (cl 3(3)).

However, while the terms of the trust can't exclude a mandatory duty, the trust deed can influence how the duty to hold or deal with trust property for the benefit of the beneficiaries or permitted purpose is applied (cl 14(2)).

Default duties

The default duties are the key common law trustee duties, which can be modified or excluded, expressly or implicitly, by the terms of a trust.

An exclusion or modification of a default duty must be consistent with the mandatory duties. Clause 15(3) clarifies that excluding one of the specified default duties is not inconsistent with the mandatory duties.

Again, the common law will continue to inform the content and application of the duties (cl 3(3)).

Clause 15(4) adds to what was proposed by the Commission – it requires paid trust advisers to disclose and explain the exclusion or modification of any default duty. A failure to do so won't invalidate the terms of the trust (cl 15(5)), but may give rise to a claim against the adviser in tort or under the advisors' rules of professional conduct.

Standard of care

The Commission's report recommended inserting a standard of care: that when exercising a power of administration, a trustee must exercise such care and skill as is 'reasonable in the circumstances', taking account of any special knowledge or experience that the trustee has (R13). This is already part of the common law and can be excluded by the terms of a trust.

In giving effect to this recommendation, the Bill frames the standard of care as a general default duty of care, which may be excluded by the terms of the trust deed (cl 22).

A separate provision deals with the standard of care that applies to investment and is taken from existing section 13B of the Act (cl 23, giving effect to R14(2)). A trustee must exercise the care and skill that a prudent person of business would exercise in managing the affairs of others.

In both cases, a higher standard of care is likely to arise if a person has special knowledge or experience (cls 22(b) and 23(b)).



5. Do the provisions on duties clearly set out the basic obligations of a trustee?

6. Do you have any comments about how they could be improved?

7. Do you think there should be an additional mandatory duty for the trustee to act personally, in order to clarify how the trustee's ability to give powers to other people operates (see cls 64 and 65)?

8. Should there either be a different standard of care for powers of investment or is it appropriate for the general duty of care to apply in this case? Why?

Subpart 2 – exemption and indemnity clauses

Clauses 33–36 give effect to R4 of the Commission's report and set out rules relating to the extent to which trustees can limit or exclude their liability. Two key features of these provisions are:

- the terms of a trust can't exclude a trustee from being liable, or indemnify a trustee, for a breach arising from dishonesty, wilful misconduct or gross negligence (cls 33 and 34), and
- paid advisors must explain the effect of any exclusion or indemnification (cl 36).



9. Do the exemption and indemnity provisions clearly set out the extent to which trustees can limit their liability?

10. Do you have any comments about the language used, or otherwise about how the provisions could be improved?

11. Should the liability of an advisor under cls 15(4) and 36 be specifically set out in the Bill or be left for development under ordinary tort principles?

Subpart 3 – trustee's obligations to keep and give trust information

Documents to be kept by trustee

Clauses 37–40 set out basic requirements on trustees to keep specified documents, reflecting R5 of the Commission's report. The provisions are drafted in a way that doesn't require the information to be provided in a particular medium, so trustees can retain the information in electronic form if they wish. Clause 37 sets out a list of documents of such significance to all trusts that they must always be kept. Trustees may choose to keep other documents as well.

These provisions can't be excluded or modified by the terms of a trust, although the terms of the trust could require additional information to be kept.

Giving information to beneficiaries

Clauses 41–47 give effect to R6 of the Commission's report. The Commission intended the general principle in *Schmidt v Rosewood Trust* [2003] UKPC 26; [2003] 2 AC 709 be codified and clarified to make trustee's information disclosure obligations clearer. The overall effect is that a trustee must proactively disclose some trust information, so that at least one beneficiary must know about the trust, to enable the trust to be enforced.

Clauses 41–47, therefore, replace existing common law rules, preserving the Court's supervisory role in necessary cases (cl 47).

These provisions can't be overridden by the terms of a trust, but the terms can influence the decision about giving information to beneficiaries (cl 45(2)(c)).



12. Do these provisions clearly set out a trustee's obligation to keep and give trust information?

13. Do you have any suggestions about how the provisions could be improved?