

### **Problem scenario**

Trudy has been appointed trustee. The trust deed contains the following clause:

The trustees shall be entitled to all professional charges incurred in the execution of the trust and shall be entitled to delegate all or any of their duties in accordance with the general law.

Trudy has accepted the trust, even though she is a total amateur and rather ignorant of business affairs. She purchases a large quantity of office equipment and stationery to facilitate the smooth running of her tasks but still finds that the job is too complicated. After putting in several months of work in service of the trust she eventually enlists the assistance of a friend who, having run his own betting office for many years, is more at ease with commercial matters. She transfers the trust fund into the friend's bank account with the instruction that he should invest it wisely for the benefit of the trust. In fact the friend 'invests' the money on Lucky Laddie, the favourite to win a greyhound race. Lucky Laddie loses the race and the trust fund is lost.

Is Trudy liable for breach of her trust, and why? If she is liable, will she be required to reinstate the full value of the fund, or can she claim remuneration and or expenses?

### **Guidance**

This question examines the trustees' duty to provide personal service to the trust and the trustees' duty to act gratuitously.

The first issue is whether Trudy has breached the duty to provide personal service, otherwise known as the rule against delegation. The rule was set out by Viscount Radcliffe in the House of Lords in *Pilkington v IRC* [1964] AC 612 in the following terms: 'The law is not that a trustee cannot delegate: it is that trustees cannot delegate unless they have authority to do so'.

In the present case a clause of the trust clearly authorises Trudy to delegate in accordance with the general law. Prior to the Trustee Act 2000 the relevant law was set out in section 23(1) Trustee Act 1925, which permitted the appointment of an agent 'to transact any business or do any act required to be transacted or done in the execution of the trust'. So long as the agent was appointed in good faith, the trustees were not liable for losses caused by the agent. However, section 23(1) permitted trustees to delegate executive functions and ministerial acts, but not fundamental decision-making. Accordingly, Trudy would have been entitled to appoint an agent to invest in accordance with an investment policy chosen by her, but not to appoint an agent to choose the investment policy. Trudy has breached her trust.

Trudy has also breached her trust according to the Trustee Act 2000. Section 11(2) provides that in the case of non-charitable trusts, all functions are delegable apart from the distribution of trust assets (e.g. under a discretionary trust), the choice between income or capital as the source of a payment (such as tax due,) and the appointment of a trustee, agent, nominee or custodian. So far so good for Trudy. However, if, as in the present case, the trustee has purported to delegate an 'asset management function' (e.g. investment), the delegation must be made by an agreement evidenced in writing in which the agent agrees to comply with a 'policy statement' provided by the trustee. The policy statement is intended to guide the agent as to how to exercise delegated asset management functions in the best interests of the trust (s.15(1) Trustee Act 2000). Furthermore, the agent must agree to be bound by any revisions of the policy statement made under section 22 of the Act (s.15(2)(b)(ii)). The policy statement (and presumably any revisions of it) must be in writing or evidenced in writing (s.15(4)). Trudy has provided no policy statement and has therefore breached her trust. The delegation is invalid.

There is, quite apart from any breach of Trudy's statutory investment powers, another reason for concluding that she has breached her trust. The case of *Fry v Tapson* established that it will be a breach of the trustees' general duty of care to appoint an agent to perform acts outside their sphere of expertise. There can be no doubt that Trudy's friend, the bookmaker, has been appointed to perform a task he is not qualified to perform. The duty of care with regard to the appointment of trustees is confirmed by s.23(1)(a) Trustee Act 2000.

Does Trudy's lack of experience and expertise 'let her off the hook'? In *Re Vickery* [1931] 1 Ch 572, the judge held that the trustee (said to be 'a missionary ignorant of business affairs') had not breached his trust because he had been neither conscious of negligence or breach of duty, nor recklessness in the performance of the duty'. That decision was based on a generous interpretation of the words 'wilful default' in s.30(1) of the Trustee Act 1925, which provided that a trustee would not be liable for losses arising from the acts of any co-trustee, agent or other person 'with whom trust money or securities may be deposited', unless the losses were caused through the trustee's 'own wilful default'. Trudy has been described as an amateur and 'rather ignorant of business affairs', and there is no suggestion of dishonesty or bad faith on her part. Probably there has been no 'consciousness of negligence'. However, she was surely reckless, and would have been unable to rely upon the immunity afforded by s.30(1). However that may be, section 30(1) Trustee Act 1925 has now been repealed by the Trustee Act 2000, which must further weaken the already weak authority of *Re Vickery*. According to section 1(1) Trustee Act 2000 the standard of care required of trustees is determined according to whatever is reasonable 'in the circumstances'. Certainly it can be raised if the trustee professes special expertise, but there is also, in theory, the possibility that the standard might be lowered to take into account the inexperience and lack of expertise of a trustee such as Trudy. One suspects, however, that the courts will be very reluctant to lower the standard of care below the standard of care expected of trustees generally.

The question remains whether Trudy can recover remuneration and expenses. The general rule, laid down in *Bray v Ford*, is that a trustee will not be entitled to profit from their trust in the absence of express provision to the contrary. The trust instrument provides that Trudy is entitled to all 'professional charges'. Unfortunately for Trudy remuneration clauses are construed strictly against the trustee. It follows that, because Trudy is a non-professional, she will be unable to claim 'professional' remuneration under the trust instrument. She will be able to apply to the court for an award (under its inherent jurisdiction to ensure the good administration of the trust) for remuneration for her past services to the trust (*Foster v Spencer*) but such an application is likely to fail in view of her poor service. The Trustee Act 2000 introduces a presumption in favour of the

remuneration of professional trustees and trust corporations, but no such presumption is raised in favour of non-professional trustees such as Trudy.

Trudy will, however, be able to deduct reasonable expenses from the monies she must repay to the trust. The purchase of office equipment and stationery will be recoverable if they were expenses reasonably incurred (section 31(1) Trustee Act 2000, replacing s.30(2) Trustee Act 1925).