Problem scenario

Theresa died in 2006. By her will, she settled a trust of £20,000 cash on trustees for the benefit of her nephew Bill and her niece Barbara, 'in equal shares upon their attaining the age of 21'. At the date of Theresa's death, Bill was 13 and Barbara was 14. Theresa had also made a gift in her will of £10,000 to another nephew, Barry.

The trustees are Tricia, Tracy, and Barry. Tricia is a solicitor.

In 2009, Tricia urged Tracy and Barry to join her in investing in a private limited company which, she said, promised to be a very profitable investment. She explained to the trustees that although the investment was 'technically unauthorised' (the trust instrument prohibited investment in private companies) it was very secure. In the event, the trustees went ahead with the investment in the company, having first obtained the consent of Bill and Barbara, who had been told that the investment was a 'secure one'.

Shortly after making the investment, the shares rose in value and yielded large dividends to the trust, but later they fell in value and today they are practically worthless.

It is now April 2016 and Bill and Barbara have issued proceedings against the trustees. Advise the trustees as to the possible extent of their liability to the trust and any defences which might be open to them.

Guidance

The remedy which the beneficiaries are most likely to seek against the trustees is an account of assets due to the trust. The liability of the trustees in such a case is, so far as possible, to put the fund in the position it would have been in had the breach of trust not occurred. It will first of all be necessary to consider the basic extent of the trustees' liability to reconstitute the fund, secondly to consider whether they might raise any defences to the beneficiaries' action and finally, to consider whether, if they cannot raise a defence, the court will relieve the trustees of the consequences of their breach.

First, what will be the extent of the trustees liability to account? This breaks down into two important sub-questions. One, what will be the quantum of capital repayment? Two, is interest payable, and if so, how much?

Recently the Court of Appeal held that beneficiaries should be able to recover the lost value of the trust property calculated at the peak value of that property during the period of the continuing breach of trust (*Jaffray* v *Marshall* [1993] 1 WLR 1285). This case has, however, been overruled by the House of Lords in *Target Holdings* v *Redferns* [1995] 3 All ER 785. In that case their lordships held that the quantum of capital repayment in a successful action for compensation should be equivalent to the plaintiff's actual loss assessed at the date of the court hearing with the full benefit of hindsight. The trustees should only be liable to compensate to the extent that they, 'on a common sense view' caused the loss. However, in *Target* their Lordships were dealing with a bare trust in a commercial context. The instant case does not involve a bare trust in a commercial context, it is a traditional trust which has come to an end, the beneficiaries having both now reached the age of 21. Lord Browne Wilkinson stated that 'in the ordinary case where a beneficiary becomes absolutely entitled to the trust fund the court orders, not restitution to the trust estate, but the payment of compensation directly to the beneficiary. The measure of compensation is the same (as for a bare trust in a commercial context), i.e. the difference between what the beneficiary has in fact received and the amount he would have received but for the breach of trust'.

As regards interest on the compensatory award, the crucial question is whether interest will be simple or compound, the former being interest charged on capital alone, the latter being interest charged on capital plus interest. An award of compound interest is usually reserved for cases where the trustee has used misapplied trust funds for their own private purposes (*Wallersteiner* v *Moir* [1975] 1 QB 373). The award of compound interest is designed to ensure that the trustee does not retain any profit from their breach. Accordingly, an award of simple interest is probably appropriate in the present case, as there appears to be no possibility that the trustees could have profitted from their breach. Simple interest will be charged from the date of the misapplication of the trust funds through the unauthorised investment.

Next we turn to consider defences which might be available to the trustees. The trustees will be immune to the beneficiaries' claims if they can show that the claims are time-barred under the Limitation Act 1980 or barred because of undue delay ('laches') in bringing the action. It will also be a defence to a claim to show that the beneficiary bringing the action had instigated, consented to, or acquiesced in, the breach of trust. However, this defence may not be raised against beneficiaries who were not party to such instigation, consent or acquiescence. Claims are generally time-barred under the Limitation Act if they are brought more than six years after the breach of trust occurred. The breach in the present case occurred seven years ago, and so the trustees have a *prima facie* defence (assuming it is now April 2014). However, time does not begin to run against beneficiaries during their infancy. Hence time did not start to run against Bill until 2009 (five years ago) with the result that his claim is not time-barred. Barbara's claim is time-barred but this does not prevent her from profiting from the successful outcome of Bill's claim to have the trust fund reinstated. As Bill's claim is covered by the Limitation Act, 'laches' is not relevant. Nor can his consent to the unauthorised investment be raised as a defence, as he was an infant at the time he gave it.

So far it would appear that the trustees have no answer to Bill's claim. They may, however, be able to claim some degree of relief from the full extent of his claim. In particular, Tracy and Barry might seek to be indemnified by Tricia on the ground that she is a solicitor with a controlling influence over them (*Re Partington* (1887) 57 LT 654). It will not, however, be presumed that Tricia had a controlling influence, the issue will be decided in the light of the experience, expertise and personal fortitude of the other trustees. On the other hand, Tricia and Tracy might look to Barry to meet a large part of their liability. As well as being a trustee, Barry is a beneficiary under the trust and the usual rule in such a case is that the trustee-beneficiary will not be able to claim his beneficial entitlement until he has made good his default. The good news for Barry is, however, that his interest under Theresa's will arises from trusts which are quite distinct from those under which Bill and Barbara are entitled. It follows that the usual rule will not apply in the present case (*Re Towndrow* [1911] 1 Ch 662). At the final hearing of Bill's claim, the judge, if he concludes that the trustees are jointly and severally liable for the breach, will no doubt apportion liability between the trustees according to whatever is 'just and equitable' (Civil Liability (Contributions) Act 1978).

In conclusion, the trustees will be liable to compensate Bill for lost capital, plus simple interest thereon, and the court will apportion the judgment debt against the trustees in whatever proportions appear to be just and equitable. The trustees will not be able to set-off, against the lost value of the shares, the large dividends made thereon, because the profit and loss arose from a single breach of trust (*Bartlett* v *Barclay's Bank Trust Co. (No. 2)* [1980] 1 All ER 139 can be distinguished). Nor will the trustees be relieved of liability under the Trustee Act, s. 61. Relief will only be given under this section if the trustees have acted, *inter alia*, reasonably. Tricia, Tracy and Barry should be advised that they have not acted reasonably, and that their honesty and good intentions will not save them from what could amount to extensive liability to compensate Bill.