Summative assessment exercise - outline answer

The first question is whether the trustees are subject to the law as it was before the Trustee Act 2000, or the law as it is after the Act. Trustee Act 2000 s.7(3)(a) provides the answer. Where, as here, the trust instrument provides that the applicable law should be the general law, the trustees will be permitted to exercise the general power of investment contained in section 3 of the Trustee Act 2000, even if the trust instrument was executed before the Act came into force. (Always assuming the trust was created after 3rd August 1961.)

The general investment power contained in section 3 of the Trustee Act 2000 authorises trustees to make any kind of investment that they could make if they 'were absolutely entitled to the assets of the trust'. However, the trustees do not have an entirely free hand as to the manner in which they invest. According to section 4(1) of the 2000 Act '[i]n exercising any power of investment…a trustee must have regard to the standard investment criteria'. These criteria require that investments should be suitable and diversified. As section 6(1) of the Trustee Investments Act 1961 puts it:

In the exercise of his powers of investment a trustee will have regard—

(a) to the need for diversification of investments of the trust, in so far as is appropriate to the circumstances of the trust;
(b) to the suitability to the trust of investments of the description of investment proposed and of the investment proposed as an investment of that description.

The trustees must also take and consider proper advice unless they have reason to believe that it is not necessary to do so.

Taking each of the investments in turn:

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Freehold premises for Joanne to live in

In *Re Power* Jenkins J pointed out that 'there is a distinction between purchasing freehold property for the income one is going to get from it and purchasing freehold property for the sake of occupying it'. He held that the latter would not be an 'investment' because it would not yield income. In a similar vein Buckley J has stated that 'property which is acquired merely for use and enjoyment is not an investment' (*Re Peczenik's Settlement*). However, the general investment power contained in section 3 of the Trustee Act 2000 overcomes these objections to purchasing a house for Joanne to reside in. Whilst it is not clear that the power authorises investments in assets which merely realise valuable benefits in kind, it does authorise investment in assets which, although they do not produce a financial income, will probably realise capital growth. The trustees will, however, be liable if they paid too much for the house. They should have been guided by the valuation of an experienced and qualified expert with knowledge of the local housing market.

Chelsea porcelain figurines

The issue here is whether Jane is sufficiently expert to justify the trustees in investing in the figurines on her advice. The trustees are not obliged to consult an independent valuer if they reasonably believe that the valuer's advice would be no more expert than the advice of one of the trustees.

Bank account

£240,000 is a lot of money to leave sitting in a bank account. The effect of inflation will be to reduce the real purchasing power of the capital over time, and this might more than off-set any gains made from the interest on the account. However, it is very hard to prove that an over-cautious approach to investment has caused a loss to the fund. In *Nestle* v *National Westminster Bank plc* [1993] 1 WLR 1260, Leggatt LJ stated that a trustee is to be judged 'not so much by success as by absence of proven default' and that 'the importance of preservation of a trust fund will always outweigh success in its

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advancement'. The law has always authorised 'investment' in bank accounts because they produce some (modest) income and some capital value is maintained. However, the Trustee Act 2000 might have an impact here also. The Act introduces a regime in which no particular type of investment is presumed to be good or bad. It no longer makes sense to divide investments into those which are and those which are not 'authorised' under the general law. The reformers' intention was to facilitate investment according to modern portfolio theory, according to which individual investments are not judged in isolation, but in terms of whether or not they are appropriate to the overall portfolio. Whilst it is clear that this means that there is no longer any presumption *against* investment in, for example, private companies, it might also mean that there is no longer any presumption *in favour* of the validity of leaving money in a bank account. Steven and Jane should be advised that to leave such a large amount of the fund in a bank account might be adjudged imprudent, unless they can show that the fund is appropriately diversified. At the very least Steve and Jane should be advised to consider dividing the £240,000 between accounts in at least two unconnected banks. Recent history in Singapore and Japan has demonstrated that not even banks are immune from catastrophic collapse, and trustees should beware.

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