

*These notes refer to the Trustee Act (Northern Ireland)
2001 (c.14) which received Royal Assent on 20 July 2001*

Trustee Act (Northern Ireland) 2001

EXPLANATORY NOTES

COMMENTARY ON CLAUSES

Part II: Investment

Sections 3 to 7 form Part II of the Act. This Part of the Act creates and defines a new default power of investment for trustees. This statutory power of investment is in wide terms and it will apply to trustees who do not have specific or conflicting powers of investment under their trust instrument or statute. It is expected to be of most benefit to older trusts and trusts arising under home-made wills or on intestacy because it is mainly those trustees who have to use the present restricted and bureaucratic regime based on the Trustee Investments Act 1961, now to be replaced.

Section 3: General power of investment

Section 3 gives trustees the general power of investment. This means the power to make any kind of investment that they could make if they were absolute owners of the assets rather than holding them on trust for the benefit of others. It should be noted, however, that this does not include the power to invest in land, apart from loans secured on land, but that power to acquire land as an investment is conferred separately by *section 8*. The general power of investment is subject to the safeguards and limitations set out in *sections 3 to 7* of the Bill. In addition, as protection for beneficiaries, the statutory duty of care applies to trustees making investment decisions, unless the trust instrument provides otherwise.

Section 4: Standard investment criteria

Section 4(1) provides that, in exercising any power of investment, whether arising under *section 3* or otherwise, a trustee must have regard to the standard investment criteria. There are two factors to be taken into account, as defined in *section 4(3)*, namely the suitability of the investments and the need for diversification.

Section 4(2) requires a trustee to review the investments from time to time and consider whether, in the light of the standard investment criteria, they should be varied. This accords with the present position at common law where a trustee is

obliged to keep investments under review: see *Nestle v National Westminster Bank plc* No (2) [1993] 1 WLR 1260.

Section 4(3) defines the standard investment criteria. The definition is modelled on section 6(1) of the Trustee Investments Act 1961 and reflects modern portfolio theory. Firstly, the trustee must consider the suitability to the trust of the kind of investment proposed and also the suitability of the particular investment proposed as an investment of that kind. Secondly, the trustee must consider the need for diversification of investments to the extent that that is appropriate for the trust. Along with the duty of care, attention to the standard investment criteria will be of central importance in protecting beneficiaries.

Section 5: Advice

Section 5 provides another safeguard for beneficiaries. In choosing or reviewing any investments, apart from exceptional cases described below, a trustee must obtain and consider proper advice, bearing in mind the standard investment criteria. For these purposes “proper advice” is defined in *section 5(4)* to mean the advice of a person reasonably believed to be qualified in terms of ability and practical experience in financial or other relevant matters.

Section 5(3) recognises that it would be expensive and wasteful to insist upon trustees seeking advice in even the simplest cases, or in cases where the trustees themselves have the desirable skills and knowledge. Some flexibility is needed. Hence the exception - there is no requirement to seek this kind of advice if the trustee reasonably concludes that in all the circumstances it is unnecessary or inappropriate to do so.

Section 6: Restriction or exclusion of this Part etc.

Section 6 deals with restriction or exclusion of this Part. It should be emphasised that the new general power of investment is a default provision: accordingly, it is to be enjoyed in addition to other powers of investment trustees may have from other sources but subject to any restriction or exclusion imposed by the trust instrument or by any statutory provision.

Section 7: Existing trusts and statutory powers

Section 7 provides for the application of this Part of the Act to trusts in existence at the time these provisions on investment come into force (see *section 45* – on a day to be appointed). *Section 7(1)* provides that these provisions apply to trusts created before or after its commencement. So the date of creation of the trust is not crucial and both old and young trusts can enjoy the new general power of investment. However, there are certain exceptional cases to be noted. By *section 7(2)* the rule laid down in *section 6(b)* that the general power of investment is to be subject to any restriction or exclusion imposed by the trust instrument is not to apply as regards any trust instrument made before 3 August 1961. The significance of that date is that it is when the Trustee Investments Act 1961 came into force. The effect of *section 7(2)* then is to ensure that old

limitations on investment which were originally set aside on that date by the Trustee Investments Act 1961 are not now revived or reactivated to frustrate the general power of investment. On the other hand, it is not proposed to override the intentions of persons setting up trusts after that 1961 cut-off date by imposing a general power of investment against their expressed wishes. For example, a settlor may have been motivated by ethical concerns to limit the range of investments available to the trustees and those wishes, if they date from 3 August 1961 onwards, were respected by the 1961 Act in its day and should continue to be respected.

By [section 7\(3\)](#) the general power of investment is conferred where a trust instrument is drafted in such a way that the trustees have power to invest in accordance with the Trustee Investment Act 1961. It may be that the instrument says directly that the 1961 Act is to apply or maybe it uses a phrase like “such powers of investment as may for the time being be authorised by law”. In either case [section 7\(3\)](#) confers the general power of investment, in effect as an automatic enlargement.

[Section 7\(4\),\(5\)](#) and [\(6\)](#) deal with the situation where bodies have existing powers of investment, derived from Northern Ireland legislation, based on trustee powers although they are not themselves trustees. In a sense this scenario parallels the case of the trustees just mentioned. Typically, a statute might say that a body is to have powers to invest its funds in “trustee investments” or to invest “in any securities in which a trustee is for the time being authorised to invest”. Such bodies are now to have the general power of investment, suitably modified and subject to the requirements of [sections 4](#) and [5](#) in relation to standard investment criteria and advice. Essentially, this is a safety net measure, intended to confer the general power of investment on non-trustee bodies which might well have assumed that their “trustee related” investment powers would change as trustee legislation changed. In addition [section 7\(6\)](#) gives these bodies the power to acquire land as an investment, alongside their general power of investment. Schedule 2 to the Act contains specific amendments of Northern Ireland legislation which has been identified as being of this nature.