

# TRUSTEE ACT 2000

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## EXPLANATORY NOTES

### COMMENTARY ON SECTIONS

#### Part V: Remuneration

94. These sections relate to professional charging clauses and the reimbursement of expenses incurred by trustees. The provisions of the Act will govern the remuneration of “professional” trustees in two ways: first, by setting down rules of construction for express professional charging clauses in trust instruments; and secondly, by providing for the remuneration of certain trustees when there is no express professional charging clause in the trust instrument. The new provisions will, in general terms, apply to all services provided after Part V comes into force irrespective of the date of creation of the trust (see section 33 below). The creation of an implied professional charging provision is likely to be of the greatest benefit to old trusts, informally created trusts and trusts arising on intestacy whilst the new rules of construction will benefit all professional trustees.
95. The general rule under the present law is that trustees should not be paid for acting as such. This rule is founded on the principles that trustees are not allowed to derive any benefit from trust property and that to allow them to be paid might give rise to conflicts of interest and duty. Despite the general rule, the present law does permit trustees to be remunerated in certain circumstances. The three most significant of these are where the trust instrument so provides; where payment is authorised by statute (for example, Trustee Act 1925 section 42, Judicial Trustee Act 1895 section 1(5); Public Trustee Act 1906 sections 4(3) and 9) and when ordered by the court under its inherent jurisdiction to secure the good administration of trusts. Modern trust instruments will almost invariably contain an express professional charging clause. The absence of such a clause would make it unlikely that a professional trustee would accept office in relation to the trust but would not prevent the trustees delegating administrative functions to the professional as an agent. However, the mere presence of an express charging clause may not itself be sufficient to reward a professional trustee properly. First, such clauses are strictly construed against the professional trustee. Thus, unless the trust instrument provides to the contrary (as modern trust instruments will usually do) the professional trustee with the benefit of a charging clause will only be able to be paid for services which could not have been provided by a lay trustee. Second, remuneration under a professional charging clause is in some cases regarded as a gift or legacy rather than an expense of the administration.

#### ***Section 28: Trustee’s entitlement to payment under trust instrument***

96. **Section 28** introduces the new rules of construction of express professional charging clauses in trust instruments. Section 28(1) provides that the new rules will apply in favour of trust corporations and trustees acting in a professional capacity. Subsection (5) explains that to satisfy the condition that a trustee (other than a trust corporation) must be acting in a professional capacity, there must be a close nexus between the profession or business in the course of which the trustee acts and the services which he or she provides as trustee.

*These notes refer to the Trustee Act 2000 (c.29)  
which received Royal Assent on 23 November 2000*

97. The new rules for the interpretation of professional charging clauses are set out in sections 28(2), and (4). These new rules will apply in relation to trusts whenever created provided that the application of the new rules is not inconsistent with the terms of the trust instrument. Nevertheless, the new rules only apply in relation to services provided on or after the commencement of section 28.
98. [Section 28\(2\)](#) reverses the present common law rule which requires an express charging clause to be strictly construed against the trustee, so that, unless the trust instrument contains contrary provision, a professional trustee, who has the benefit of such a clause, may only be remunerated for services which could not have been provided by a lay trustee. Where section 28(2) applies, the services for which a trust corporation or a trustee acting in a professional capacity may be entitled to payment include services which are capable of being provided by a lay trustee (that is, a person who is not a trust corporation and who does not act in a professional capacity as provided by section 28(6)).
99. [Section 28\(3\)](#) provides for restrictions on the operation of the clause in respect of charitable trustees.
100. [Section 28\(4\)](#) contains the second new rule of construction of express charging clauses. Under the present law, payments under express charging clauses are treated for many purposes as a gift and not as remuneration for services rendered. The new rule reverses this rule of construction for the purposes of section 15 of the Wills Act 1837 (which renders void gifts made in a will to a witness to the will and gifts to the spouse of such a person). The change will enable trustees to be paid for work done in connection with testamentary trusts even where they witness the will under which the trust arises.
101. In addition, by virtue of section 28(4)(b) such payments will in future be treated as remuneration for services for the purposes of determining their priority as against other payments due from the deceased's estate (Administration of Estates Act 1925 section 34(3)). Thus, in relation to the administration of the estate, the trustee's charges will become an expense of the administration. Section 33(2) prevents this provision from having an effect upon priorities in the administration of estates where the death occurred before section 28 comes into force.

***Section 29: Remuneration of certain trustees***

102. In general terms section 29 creates an implied professional charging clause applicable to all non-charitable trusts which do not make provision for remuneration of professional trustees. The remuneration of charitable trustees is dealt with in section 30.
103. [Section 29\(1\)](#) confers upon every trust corporation which acts as a trustee the right to receive "reasonable remuneration" (as defined by section 29(3)) from the trust funds (defined in section 39(1)) for any services that it provides to or on behalf of the trust unless the right is negated in the circumstances mentioned below. The right applies even if the trust corporation is a sole trustee, but does not apply if the trust corporation is a trustee of a charitable trust (section 29(1)(b)).
104. [Section 29\(2\)](#) provides, subject to certain conditions and exceptions, for all other trustees of non-charitable trusts to receive reasonable remuneration for any services they provide on behalf of the trust. However, unlike trust corporations under section 28, other trustees do not have an automatic entitlement to such remuneration. The entitlement is not available to sole trustees or to trust corporations and is dependent upon the trustee acting in a professional capacity (see section 28(5)) and upon the agreement in writing of each of the other trustees. In determining whether to give such agreement, trustees will be subject to their paramount duty at common law to act in the best interests of the present and future beneficiaries of the trust.
105. [Section 29 \(3\)](#) defines "reasonable remuneration" in relation to the provision of services by a trustee. It also makes it clear that a trust corporation which is a recognised provider

of banking services may make any reasonable charges for the provision of such services in the course of, or incidental to, the performance of its functions as a trustee. In determining the level of remuneration that is reasonable in the circumstances, regard must be had not only to the nature of the services provided, but also to the nature of the trust and the attributes of the trustee. Remuneration authorised under section 29 will, by definition, be regarded as remuneration for services (and not as a gift) for all purposes, and will be payable out of the income or capital funds of the trust (see the definition of “trust funds” in section 39(1)).

106. **Section 29(4)** provides that remuneration may be paid even if the services provided could have been provided by a lay person (that is, a person who is not a trust corporation and who does not act in a professional capacity - see section 28(5)).
107. **Section 29(5)** specifies that the new power of remuneration will be excluded by any provision about the trustee’s entitlement to remuneration in the trust instrument or in legislation. The right to be remunerated in section 29 is therefore in the nature of a default provision. The phrase “subordinate legislation” is defined in section 6(3).
108. **Section 29(6)** makes clear that appointment as an agent, nominee or custodian does not exclude a trustee from section 29.

### ***Section 30: Remuneration of charitable trustees***

109. **Section 30** makes provision for the remuneration of charitable trustees. As mentioned, section 29 does not permit the remuneration of charity trustees (section 29(1) and (2)). Although the Law Commission concluded that there was a strong case for including charitable trustees within the scope of section 29, it recognised that further consultation was probably necessary before a decision could be taken. If the outcome of such a consultation were to be that charitable trustees should be able to be paid in like manner to trustees generally, it would be inconvenient if primary legislation was necessary. Accordingly, section 30 confers a power upon the Secretary of State to make provision by statutory instrument, subject to an affirmative resolution procedure (section 30(4)), for the remuneration of charitable trustees.
110. The provisions of sections 28 and 29 apply in relation to services provided when those clauses are in force whenever the trust was created (section 33(1)). Remuneration payable under these clauses may be paid out of the income or capital funds of the trust (see the definition of “trust funds” in section 39(1)).
111. Under the present law trustees have power to pay agents and to be reimbursed out of the trust fund for the expenses they incur in carrying out their duties (Trustee Act 1925 sections 23(1) and 30(2)). This power is subject to the general rule that trustees only have power to pay proper costs incident to the execution of the trust (*Holdings and Management Ltd v Property Holding and Investment Trust Plc* [1989] 1 WLR 1313, 1324). Sections 31 and 32 will clarify the law by bringing together the existing statutory power and the common law qualification. Sections 23 and 30 of the Trustee Act 1925 will be repealed by the Act (section 40 and Schedule 3).

### ***Section 31: Trustees’ expenses***

112. **Section 31** makes provision for the reimbursement of trustees’ proper expenses. Section 31(2) makes clear that appointment as an agent, nominee or custodian does not exclude a trustee from section 31.

### ***Section 32: Remuneration and expenses of agents, nominees and custodians***

113. **Section 32** makes provision for the payment of reasonable remuneration and proper expenses to agents, nominees and custodians who are not trustees.

**Section 33: Application**

114. The provisions will not apply until they are in force. When the provisions are in force, they will apply in relation to trusts whenever created. The services to which the provisions will apply are services provided either before or after the commencement of the provisions, but the only expenses to which the provisions will apply are expenses incurred after (not before) the commencement of the provisions. They do not affect the operation of either section 15 of the Wills Act 1837 or section 34(3) of the Administration of Estates Act 1925 in relation to deaths occurring before they come into force (section 33(2)). See the notes to section 28(4) for a description of sections 15 and 34(3).
115. Remuneration and expenses payable under these clauses may be paid out of the income or capital funds of the trust (see the definition of “trust funds” in section 39(1)).