

# Trustee Investment Powers And Their Application To Purpose Trusts

STEP Luncheon February 9th 2005 SuperClub Breezes Cable Beach

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# Disclaimer

- The following information is not meant to be a comprehensive statement on the law as it relates to trusts and investment powers. The information is offered for the purposes of providing a brief working framework for understanding trusts and investment powers as dealt with specifically by the trust law of the Bahamas. Readers/viewers are encouraged to seek legal advice on specific issues of concern.

# Exercising Investment Powers

Invest or  
Not to Invest...?  
That is the Question.



# So Where Do We Go For Guidance?

- Option Number One
- Option Number Two
- Option Number Three



# OPTION NUMBER ONE

May Be Useful but  
only if you find out  
what the law says



# Option Number Two

## The Common Law

- Not The Primary Source For Direction



# Option Number Three

## Trustee Legislation

- The Trustee Act 1998
- “An Act to make better provisions relating to the Law of Trustees and for connected purposes”



# What Is A Trust ?



- A relationship
- Regulated principally by statute
- Usually defined by and administered in accordance with the terms of a written instrument



# The Trust Relationship

- Is one where the settlor and the beneficiary both look to the trustee to take care of their interests...
- With laws imposed upon the relationship to ensure that that interest is properly dealt with.

# Trustee's Powers of Investment Pre 1998 - The Way We Were

A law designed for another era, with a colonial flavor ; the previous law protected the interest of the beneficiary by prescribing investments such as The Eastern Bengal Railway Annuities



# In The Post Colonial Modern Era The Powers Of Investment Are Defined In The Trustee Act 1998 *“The New And Better Way”*

- The Trustee Act 1998
  - Dispenses with the list of authorized investments
  - Provides an unlimited general power of investment



# Trustee Act 1998

## Powers Of Investment – Section 4

4. (1) Trustees shall have the full powers of investment and of changing investments of individual beneficial owners absolutely entitled including (without prejudice to the foregoing)-

- (a) investing through nominees; and
- (b) investing in or upon the security of property of any kind in any part of the world, whether or not yielding any income or involving any liability.

(2) The powers conferred by this section-

- (a) shall be exercisable in the discretion of the trustees; and
- (b) shall be in addition to those conferred by the trust instrument or by law.

# So What Does That Really Mean?

- The trustee has very wide powers of investment as if it were the beneficial owner of the trust asset.
- But Be Careful!

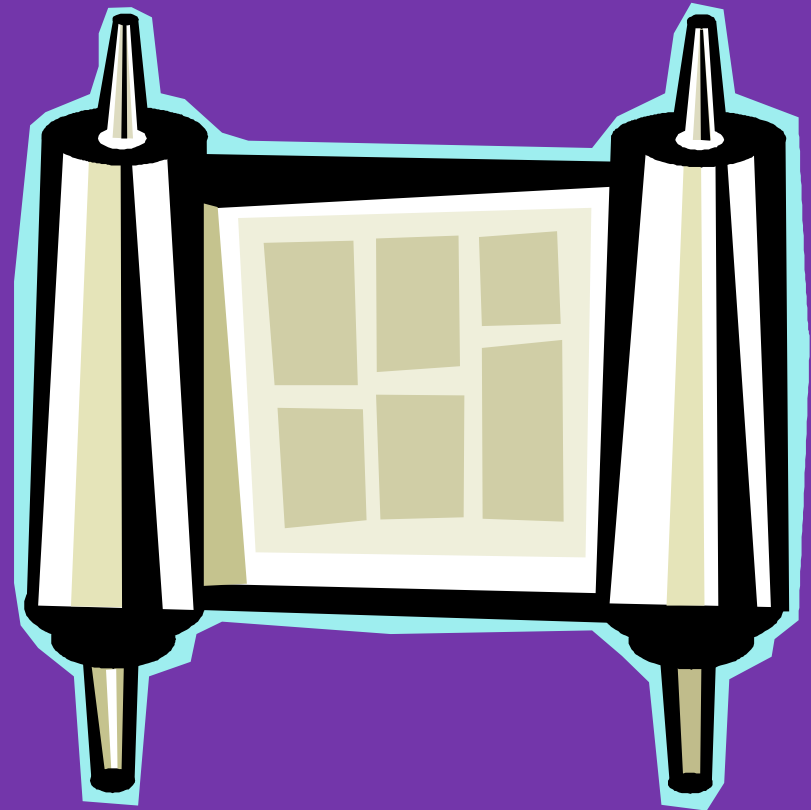


# Investment Powers

## Section 4(4)

S 4 (4) The powers conferred by this section shall be subject to any consent or direction required by the written law or by the trust instrument (whenever commenced or made) with respect to the investment of trust property.

- YOU MUST CHECK OUT THE TRUST DEED



# Investment Powers

## Section 4 Review

- Full powers of investment
- Full powers to change investment
- Full powers to invest as if beneficial owner of the trust fund
- But powers are subject to any consent or direction contained in the trust instrument or the written law

# Degree of Skill

- What degree of skill and expertise ought to be required of a trustee in making and changing investments?





# Section 5 (1)(a) & (4)

- That of a prudent investor!
- Exercising his/her special skills or expertise,
- Having regard to the
  - Purposes
  - Distribution requirements
  - And other circumstances of the trust.



# Statutory Guidelines

## Section 5 (1)

Trustees shall-

- (a) ...
- (b) have regard to the suitability of individual investments, not in isolation, but in the context of the trust property as a whole, with a view to obtaining an overall balance of risk and return reasonably suited to the trust; and
- (c) have regard to the need for diversification of investment so far as the trustees may consider it to be appropriate to the trust.

# Statutory Guidelines Section 5 (1)

So What Does That Mean?

The Trustee Must Apply The Whole Portfolio  
Theory.

Investments must be considered not in  
isolation but in the context of the trust  
property as a whole.

John Mowbray The Chase Journal 1998

# Statutory Guidelines

## Section 5 (2) - The Checklist

Among circumstances to which trustees shall have regard in choosing investments are such of the following as they may consider to be appropriate to the trust or its beneficiaries-

- (a) the size of the trust property as a whole and the estimated times and amounts of future distributions of income and capital;
- (b) general economic condition;
- (c) the possible effect of inflation and deflation;
- (d) the expected tax consequences of investment decisions and of distributions;
- (e) the expected total return from income and appreciation of capital;
- (f) other resources of beneficiaries;
- (g) needs of liquidity, regularity of income, and preservation or appreciation of capital;
- (h) any special relationship or special value of an asset to the purposes of the trust or to one or more of the beneficiaries; and
- (i) intentions or wishes of the settlor or testator, whether or not expressed in the trust instrument.

# Statutory Guidelines

## Section 5 (3) – Verify The Checklist

3) Trustees shall make reasonable efforts to verify facts relevant to their investment decisions.



# Statutory Guidelines

## Section 5 (5) - Consider Everyone



- (5) If a trust has two or more beneficiaries, the trustees shall act impartially in investing the trust property, having regard to any differing interests of the beneficiaries.

# But Which Way To Go?

6. (1) Before exercising any powers of investment, trustees may obtain and consider proper advice on the question of suitability to the trust of any proposed investment.



# Investment Advice

(3) For purposes of this section, proper advice is the **written advice** of any investment adviser named in the trust instrument or duly appointed pursuant to its terms, or **of any person who is reasonably believed by the trustees to be qualified to give the advice** as a result of that person's ability in and practical experience of financial matters, and notwithstanding that it may be given in the course of that person's employment as an officer or servant of a company or other institution.



# Investment Advice A Good Move

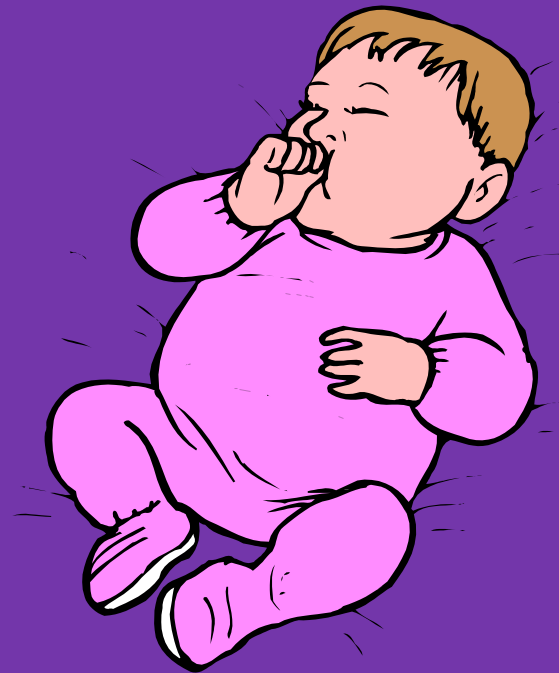


- (4) Trustees shall not be liable for any loss which may result from their having made, changed, retained or disposed of any investment pursuant to proper advice.

# Practical Guide

- Know Your Trust Instrument
- Identify Possible Investments For General Suitability
- Obtain Advice
  - If Advice Is Negative Withdraw Or Proceed With Extreme Caution
  - If Advice Is Positive
    - \*Apply Whole Portfolio Theory
    - \*Review Checklist
    - \*Consider All Beneficiaries
- Record Your Deliberations
- Make Your Decision
- Record Your Decision
- Record Reasons For Your Decisions .... then

# Sleep Like A Baby



# Note 1

## Drafting

- When drafting a trust document it is helpful if the document identifies an investment advisor or provides for the protector or settlor to identify a person whose advice may be sought. It wouldn't hurt also to include a clause which provides for the trustees not to be liable for any loss resulting from following that advice. (Section 6 (3) (4))

# Note 2

## Purpose Trusts Act 2004

Section 10. Save as otherwise provided by this Act, the law relating to authorised purpose trusts is the same in every respect as the law relating to ordinary trusts from time to time and for this purpose the law relating to ordinary trusts includes (without limitation) the Trustee Act.



Navigate Well

# Profile

An attorney whose areas of expertise include trust, corporate, commercial, and conveyancing law, Mr. Michael Allen is a partner in the firm McKinney Bancroft & Hughes.

Following the acquisition of a post graduate degree from the State University of New York at Buffalo, United States and a Bachelor of Laws degree from the University of Buckingham in England, Mr. Allen was admitted to the Bar of England and Wales in 1987 and the Bahamas Bar in 1988. He is also a member of the Honourable Society of The Middle Temple, England.

Mr. Allen advises the Firm's offshore and Bahamian clientele on trust, corporate and commercial structures for general business and wealth management purposes. His practice involves, the creation of financial products connected with wealth management concerns, providing legal support to real estate transactions, and issuing formal opinions on a wide range of multi-jurisdictional structures available for the conduct of business in and through The Bahamas.

He is currently Deputy Chairman of the Bahamas Financial Services Board and has led the firm in writing and presenting for in-house, local and international audiences, such topics as "A guide to doing business in the Bahamas", "The Bahamian Foundation" "Investment Funds" "Trustee Investment Powers" and "International Business Companies".

