LAND AS A TRUSTEE INVESTMENT

Section 4(1)(c) of the Singapore Trustees Act gives trustees the power to invest in land, as does the corresponding provision of the Malaysian Trustee Act. However, the power is subject to restrictions and, although it has existed for over fifty years, there are no reported cases on it. This article reviews the restrictions on the trustees' powers to invest in land in the light of the legislative history of the provision and concludes with a recommendation for reform of the law.

SINGAPORE and Malaysia are unusual amongst Commonwealth countries in that although they both follow the practice of adopting a statutory list of trustee investments, their lists include the purchase of land as an authorised trustee investment. The English Trustee Act 1925, on which the current Singapore and Malaysian Acts are both based, did not authorise the purchase of land by trustees and neither does the current English legislation governing the position, the Trustee Investments Act 1961.

The relevant provision of the Singapore Act is, however, rather curiously worded. Section 4(1) of the Trustees Act,[1] states:

> A trustee may invest any trust funds in his hands, whether at the time in a state of investment or not, in the manner following:
>
> > ... (c) in or upon titles to immovable property in Singapore, such titles being freehold titles or grants in perpetuity or leases (other than mining leases) for a term whereof sixty years at least is unexpired at the time of such investment:
> >
> > Provided that there be erected on the land to which such title relates houses or other buildings the gross rental whereof, together with the land appurtenant thereto, is at the time of such investment not less than seven per cent of the purchase price of such land, in the case of a purchase, or of the value of such land, as ascertained under the provisions of paragraph (a) of subsection (1) of section 12 of this Act,[2] in the case of a mortgage;...

[1] Cap. 40, Singapore Statutes, 1970 (Rev. Ed.). The present Malaysian and Singapore Acts have a common origin. The Malaysian Act follows the same wording as the extract from the Singapore Act quoted hereafter, except that the words "in Malaysia" are inserted in place of the words "in Singapore", the following is inserted after the words "Provided that":—
"(i) the land to which any such title relates shall be situate within the limits of any City, Municipality, Town Council or Town Board area; and
(ii) ..."
and after the word "ascertained" at the end of the proviso the following appears in place of the words at the end of the Singapore provision:—
"under section 12(1)(a), in the case of a charge."

[2] S.12(1) provides for the protection of trustees lending money on the security of property subject to certain requirements as to the amount of the loan and the valuation of the property.

The use of the words "in or upon titles to immovable property" in the opening words to paragraph (c) makes it clear that the power of investment extends not only to lending money on the security of land, but also to the purchase of land itself. The equivalent provision in the English Trustee Act 1925[3] reads: "On real or heritable securities in the United Kingdom, including the security of a charge on freehold land by way of legal mortgage and a charge under section 33 of the Finance Act, 1896;...". This provision has always been understood to permit trustees to lend on the security of land, but not to purchase land.[4]

It is the proviso to paragraph (c) which presents problems. Unfortunately, although this language was first contained in legislation enacted in 1932, there appear to be no reported Singapore or Malaysian cases dealing with the matter. This paper is, therefore, an attempt to plot a course through what have long been uncharted waters.

I. RESIDENTIAL PROPERTY

Clearly the trustees' power to purchase land is limited to land on which buildings have been erected. The fact that investments in agricultural land are not permitted is not surprising in the context of a country like Singapore, where hardly any agricultural land exists.[5] What is more surprising, however, is the requirement that "houses or other buildings" must be erected on the land. The use of the phrase "houses *or other buildings"* suggests that "buildings" must be construed *ejusdem generis* with "houses".[6] If this is correct, it is arguable that only residential property can be a valid trustee investment. This would be a most unfortunate result particularly in light of the recent proposals for relaxation of the Central Provident Fund rules — designed in part to stimulate the property market — under which individuals will be allowed to invest their provident fund savings in commercial property subject to certain limitations.[7] Trustees, who are often professional men, can surely be trusted in investment matters no less than possibly untutored individuals dealing with their life savings. Moreover, unless there are compelling reasons to the contrary, moneys held in trust funds should not be subject to rules which militate against the interests of the economy as a whole.

II. FLATS

Another problem is whether section 4(1)(c) permits trustees to purchase or lend money on the security of flats as opposed to landed properties. At first sight there appear to be no difficulties as flats

[3] S.1(1)(b). Repealed in UK by the Trustee Investments Act 1961, Schedule 5.
[4] *Cf. Re Mordan* [1905] 1 Ch. 515.
[5] The original intention of the legislature was undoubtedly to limit the trustees' power to purchase land to urban areas as is shown by the language of the Malaysian Act which contains the additional proviso referred to above in note 1. Almost identical wording was contained in the Federated Malay States Trustee Enactment 1932, which is the source of the current Singapore and Malaysian statutes. This wording is obviously unnecessary in Singapore and was omitted when the Act was re-enacted in Singapore in 1967.
[6] The *ejusdem generis* rule can be applied where the *genus* is established by a single word. See Cross, *Statutory Interpretation,* London, 1976, at p. 71. See also Bennion, *Statutory Interpretation,* London, 1984, at pp. 833-5.
[7] See, *e.g., The Straits Times,* 1st April 1986, p. 1.

are usually held under a subsidiary strata certificate of title and thus are "tides to immovable property in Singapore". Before the Land Titles (Strata) Act,[7a] came into force, flats were often held under long leases and these too would be "titles to immovable property in Singapore".[8] The problem is that trustees are only permitted to invest in or upon titles to immovable property in Singapore "[p]rovided that there be erected on the land to which such title relates houses or other buildings...". The proviso requires that the title in question should relate to land, but title to a flat is title to a piece of airspace and not to land in the normal sense of the word. It might therefore appear that the proviso cannot be satisfied in the case of a flat. However, section 3 defines land "unless the context otherwise requires" so as to include "buildings, or parts of buildings, whether the division is horizontal, vertical or made in any other way".[9] Unfortunately, this does seem to be a case where "the context otherwise requires". The definition in section 3 cannot be applied here as it would reduce the proviso to an absurdity by causing it to be read as "Provided that there be erected on the *buildings or parts of buildings* to which such title relates houses or other buildings the gross rental whereof, together with the *buildings or parts of buildings* appurtenant thereto, is not less than seven per cent of the purchase price of such *buildings or parts of buildings,* in the case of a purchase...". It takes a considerable stretch of the imagination to describe a flat as a building erected on another building or part of a building. The statute clearly envisages that the title in question should comprise some structure erected on land (in the normal meaning of the word) and this impression is strengthened by the statement that the rental value of the land appurtenant to the building is to be taken into account. It would seem doubtful therefore if the requirements of the proviso can be satisfied where the title in question relates to a flat.

It must be confessed that if flats cannot be an authorised investment, then the usefulness of this provision enabling land to be a trustee investment is very limited indeed in Singapore. The great majority of Singaporeans live in flats and the number of landed properties is very limited. One is tempted to argue that as the effect of this reading of the words of the statute is virtually to prevent land from being a trustee investment, one should strive to achieve a purposive interpretation of the statute and read the proviso as allowing a flat to be a trustee investment so long as it is rented out at a gross rental of at least seven per cent of its purchase price. The difficulty is, however, that this begs the question of what is the legislative intention. These words have remained virtually unchanged since their original enactment in 1932 and it is by no means unlikely that the legislature then took the view that flats were not as safe an investment

[7a] Cap. 277 Singapore Statutes, 1970 (Rev. Ed.).

[8] Often the flat owners were co-owners of the freehold. In this case there would be two titles to immovable property — title to the leasehold flat and title to the freehold land. Each would have to be considered separately for the purposes of s.4(1)(c).

[9] Section 3 of the Malaysian Act says that land "means immovable property and includes any interest therein and also an undivided share of land". This is the original wording contained in the Trustee Enactment 1932. Again this definition does not apply if the context otherwise requires as would seem to be the case for the reasons given in the text in relation to the Singapore statute.

as landed property. Indeed allowing trustees to purchase land was a radical innovation as compared with the position under the English Trustee Act 1925 on which the local 1932 legislation was ultimately based. It is hardly surprising, therefore, that severe restrictions were imposed on this power of investment in the proviso.

III. LAND AS SECURITY

A curious fact is that although Singapore trustees have the power to purchase land within the terms of paragraph (c), which is denied to their counterparts in most other Commonwealth countries in the absence of an express investment clause in the trust instrument, the trustees' power to lend money on the security of land is more limited in Singapore because the proviso applies here too. The proviso requires that the houses or buildings erected on the land in question should be rented out at a gross rental of no less than seven per cent of the value of the land in the case of a mortgage. The requirement that the land must be rented out in the case of purchase is unremarkable as otherwise the land may not be an investment.[10] In the case of a mortgage it is hard to see the necessity of the requirement. In this case, the land itself is not the investment. It is only security for the investment and if the land is sufficient security as determined under the provisions of section 12, what difference does it make what rent, if any, is currently being charged on the land? Indeed in the past, trustees in England have frequently lent money to finance house purchases by individuals. This practice seems to be impermissible in Singapore.

Again one is tempted to avoid this limitation on the trustees' power of investment by adopting a more liberal interpretation of the proviso, reading it as requiring only that the land should have a gross rental *value* of not less than seven per cent of its purchase price or its value. On this reading the land would not actually have to be tenanted at the time of the investment so long as it was capable of being rented out and producing the required income. This approach, however, does some violence to the language of the statute which refers to the "gross rental" of the land at the time of the investment and not to the "gross rental value". The word "rental" when used as a noun is defined in the Concise Oxford Dictionary as "income from rents; amount paid or received as rent; act of renting". Another difficulty is the fact that any interpretation given to the word "rental" must also apply where the trustees purchase land and not only when they lend on the security of land. If "rental" means only "rental value", the proviso would appear to authorise trustees to purchase land without renting it out at all. It is unlikely that the legislature could have intended such a result.[11] It would therefore appear that

[10] *Cf. Re Power* [1947] Ch. 572.

[11] One could perhaps avoid this result and retain the reading of "rental" as "rental value" by arguing that it would not be an investment at all for trustees to purchase land without renting it out. In *Re Power, supra,* it was held that it was not an investment for trustees to purchase a house for a beneficiary to live in. However, modern investment practice places greater emphasis on capital appreciation than at the time that case was decided and it is arguable that *Re Power* would not apply where the trustees bought land and kept it vacant with a view to benefiting from its capital appreciation only. Given the conservative approach to trustee investments adopted in the Singapore Trustees Act, it is unlikely that the legislature could have intended to authorise such an investment.

the proviso requires that the land must be rented out producing the required return "at the time of such investment".

It must be admitted, however, that even this approach creates difficulties of interpretation. The problems when trustees seek to lend money on the security of land have already been discussed. The use of the phrase "at the time of such investment" suggests another difficulty when the trustees purchase land. Clearly the trustees are not necessarily responsible if, having satisfied the gross rental requirement at the time of purchase or mortgage, the land fails to do so later. The requirement only has to be satisfied at the time of the investment.[12] However, the use of the phrase "at the time of such investment" would appear to mean that it would be at least a technical breach of trust for trustees to buy land with vacant possession with a view to renting it out immediately after purchase. The investment is made by the trustees at the moment they complete the purchase and at that time the land is not rented out and therefore does not satisfy the gross rental requirement. The trustees can, therefore, only buy land which is already tenanted.

IV. LEGISLATIVE HISTORY

It may be helpful at this stage to look at the legislative history of the Trustees Act. The current Singapore Trustees Act, was passed in 1967. It is essentially a re-enactment with minor changes of the Trustee Act 1949,[13] of the Federated Malay States (F.M.S.) which was extended to Singapore during the time of union with Malaysia by the Malaysian Trustee Investment Act, 1965.[14] The wording of section 4(1)(c) of the 1949 Act is virtually identical to that contained in the current legislation.[15] The previous Singapore legislation was the Trustees Ordinance,[16] which was virtually identical to the Trustees Ordinance of the Straits Settlements,[16a] which was in force in Singapore before the 1955 Revised Edition of Ordinances came into effect. This Ordinance, enacted in 1929, did not permit trustees to purchase land. Section 4(1)(c) permits investments only "upon freehold or leasehold securities in the Colony, such leasehold securities being held for a term whereof sixty years at least shall be unexpired at the time of such investment".

The 1949 F.M.S. Act replaced the earlier F.M.S. Trustee Enactment,[16b] passed in 1932. It was the 1932 Enactment which first introduced the proviso to section 4(1)(c).[17]

12 In any event section 10 provides that a trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be authorised.

13 The Trustee Act 1949 was revised in Malaysia in 1978 (Act 208) and in this form is still in force in Malaysia.

14 No. 36 of 1965.

15 The 1949 Act contains the additional proviso which still appears in virtually identical language in the current Malaysian legislation.

16 Laws of the Colony of Singapore, 1955 Ed., Cap. 34.

16a Cap. 59, Laws of the Straits Settlements.

16b Cap. 61, Laws of the Federated Malay States.

17 The previous legislation, The Trustee Enactment 1920 did not permit trustees to purchase land. The relevant paragraphs of section 3, which deals with investments, are "(c) Upon titles to immovable property in the Federated Malay States by grant in perpetuity or by lease (other than mining lease)

A brief statement of the "objects and reasons" for the enactment was appended to the bill and these are quoted here in full: "The Trustee Enactment, 1920, followed the Straits Settlements Trustee Ordinance, 1914, which in turn was modelled on the English Trustee Act, 1893 (56 and 57 Vict. c.53). That Act was repealed and re-enacted by the Trustee Act, 1925 (15 Geo V c.19), which while making minor amendments of the law introduced a good deal of new material, and this new model has been followed in the Colony in Ordinance 14 of 1929. This Bill is a copy of that Ordinance with only such adaptations as are required by local circumstances".[18]

The objects of the F.M.S. Enactment of 1932 were therefore modest in the extreme — to bring the law in line with the latest developments in England as already introduced into the Straits Settlements. Yet neither the English nor the Straits Settlements model permitted trustees to purchase land. This appears to be one of the "adaptations as are required by local circumstances".

The bill was introduced and passed at a meeting of the Federal Council held on 4th July, 1932. The only speech given on the subject seems to have been that of the Legal Adviser, F.M.S., W.S. Gibson. He can hardly have aroused the enthusiasm of the members for the matter by opening with the words, "Sir, this is a lawyers' Bill which will be extremely dull reading for everybody, including lawyers." The bulk of his speech dealt with what is now section 4(1) (c). He said,

> "There is one point to which I must draw the attention of this Council, and that is the wording of clause 4 (c), "in or upon titles to immovable property...". Under the existing law and under the law as it still stands in England and in the Colony, the words "in or" are left out and the sub-clause starts — "upon titles to immovable property". Those four letters "in or" mark a real distinction. Where an investment can be made "upon" the title, it can only be made by way of charge or mortgage. The language does not authorise purchase as an investment. Where the authorised investment is "in or upon", purchase is included. As the law now stands, then, a trustee can lend on security of any land, agricultural or town land, but he cannot purchase although it may very often be the best way of safeguarding a loan which has gone wrong. The proposal now, in the new clause 4 (c), is that the trustee's power of lending shall be virtually confined to town land. A loan on agricultural land is somewhat speculative even at the best of times, quite apart from the present crisis. But, in addition to being able to lend upon town land, he will also be able to invest in the purchase of town land, either originally or as a chargee who is trying to save an investment that has gone wrong. The purchase of town

for a term whereof one hundred years at least shall be unexpired at the time of such investment;" and "(d) upon freehold or leasehold securities in the Straits Settlements, such leasehold securities being held for a term whereof one hundred years at least shall be unexpired at the time of such investment".

[18] The Bill is published in F.M.S. *Government Gazette of* 4th June, 1932, No. 12, Vol. XXIV, Notification no. 3386, p. 1623.

land may at any time be a good investment and it may be the only way sometimes of safeguarding the position".[19]

It is clear from this excursus into the legislative history of section 4(1)(c) that it was not the intention of the legislature to essay a broad reform of the law of trusts. What was intended was a very limited change in the law designed mainly, so it would seem, to deal with the problem of a trustee who has lent money on the security of land and now finds the debtor unable to pay. Presumably during the depression — the "present crisis" — defaults on loans were by no means uncommon. The possibility of negotiating a purchase of the land with a view to retaining it until land values improved was undoubtedly a useful extension to the trustees' existing ability to exercise a power of sale or to foreclose.

The legislature gave a right to purchase to trustees but hedged it round with restrictions. There is nothing in the legislative history to justify a liberal interpretation of the provision which would remove the doubts expressed above as to the trustees' power to buy flats. In the absence of any reported case law interpreting the provision, it would seem unsafe for any trustee to exercise this statutory power unless he is sure that all the conditions of the proviso can be complied with fully and literally.

V. CONCLUSION

The absence of any reported cases on the provision suggests that it has created few problems in practice. However, it may well be that the severe restrictions which apply to the trustees' power to purchase land have had a deterrent effect and have led trustees to favour other forms of investment.

The question remains whether the present restrictions should be retained or whether, after more than fifty years, they can now be lifted and trustees given a free hand to invest in land. Certainly the trend today is towards conferring wider powers of investment on trustees to enable them to take advantage of the constant changes occurring in the world of investment practice. This is evidenced not only by the widely drawn investment clauses found almost universally in modern professionally drafted wills and trust instruments, but also by the trend in many Commonwealth countries to expand the range of permitted trustee investments.[20]

[19] The Minutes of the Federal Council meeting are published in F.M.S. *Government Gazette* of 23rd September 1932, No. 20, Vol. XXIV, Notification No. 6940, p. 2696. A more detailed report of the meeting is published in Proceedings of the Federal Council of the Federated Malay States for the year 1932, at page B 49.

[20] As an example of this trend one may cite the English Trustee Investments Act, 1961. More recent examples are the New Zealand Trustee Amendment Act, 1974 and the Victoria Trustee (Authorised Investments) Act, 1978. In Canada the trend has been towards deletion of the statutory list and its replacement by variants of the American "prudent man" rule (referred to below in text at note 22). See, e.g. Trustee Act, Revised Statutes of New Brunswick, 1973, c. T-15, s. 2: "Unless a trustee is otherwise authorized or directed by an express provision of the law or of the will or other instrument creating the trust or defining his powers and duties, he may invest trust money in any kind of property, real, personal or mixed, but in so doing,

In England the Law Reform Committee recommended in their report on the powers and duties of trustees[21] that trustees should have the power to invest in land. In the context of the present depression in the real property market in Singapore, any increase in the funds available for investment in land is to be welcomed. There is much to be said for the abolition of the present statutory list which at present governs trustee investments and its replacement by a generalised standard of care in making investments to which trustees would have to conform. An example would be the "prudent man" rule, adopted in most United States jurisdictions under which the "only general rule which can be laid down as to investments is that the trustee is under a duty to make such investments as a prudent man would make of his own property having primarily in view the preservation of the estate and the amount and regularity of the income to be derived".[22] It lies beyond the scope of this paper to discuss this question. However, in the meantime, Singapore can relax the current restrictions on the trustees' power to purchase land by the simple expedient of deleting the proviso to section 4(1)(c). This would give the trustees complete freedom to invest in freehold property and in leasehold property[23] where the lease has at least sixty years to run subject to their common law duties of care. Alternatively, the present proviso might be replaced by a new one requiring trustees to seek appropriate professional advice before exercising their power to purchase land. In the absence of a general review of trustee investment powers, this would have the merit of bringing the trustees' power to purchase land into line with their existing power to purchase shares under sections 7 and 8 of the Trustees Act.

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he shall exercise the judgment and care that a man of prudence, discretion and intelligence would exercise as a trustee of the property of others." See also An Act to Amend the Trustee Act 1983, Statutes of Manitoba, 1982-83-84, c. 38, s. 5. The Ontario Law Reform Commission has recommended the adoption of a version of the "prudent man" rule. See Report on the Law of Trusts, 1984, Recommendations 1-4 at pp. 304-5.

[21] 23rd report. Cmnd. 8733, paras. 3.1 to 3.7. The Committee recommended that trustees should have the power to buy freehold and leasehold land (with at least sixty years unexpired) without restriction as an investment subject to taking appropriate professional advice. Where leaseholds having less than sixty years to run were purchased, the trustees would have to set up a sinking fund, serviced out of income, or take other steps to protect the capital value of the fund.

[22] *Scott on Trusts* (3rd ed. 1967), s. 227.

[23] Other than mining leases — In the context of Singapore this exclusion seems redundant and could be safely omitted.

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