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TRUSTEES (AMENDMENT) ACT 1992[1]

THIS Act is of interest not only for the amendments it makes to the Trustees Act[2], but also because it represents one of the first fruits of the new Law Reform Committee of the Singapore Academy of Law. It is clear that the Act is based substantially on the recommendations contained in the working paper[3] on reform of trustee investment law produced by the subcommittee on civil law ("the Working Paper"). This is a very well-researched paper, which in addition to recommendations for reform contains a detailed analysis of not only the Singapore law relating to trustee investments, but also that of other common law jurisdictions, such as England, the United States, Canada, Australia and New Zealand. The Working Paper also contains in its second appendix an interesting study of the economic considerations underlying changes in investment practice in recent years.

The Singapore Trustees Act is derived from the Trustee Ordinance 1949[4] of the Federated Malay States, which was extended to Singapore during the time of union with Malaysia by the Malaysian Trustee Investment Act 1965.[5] Prior to the 1992 amendments sections 4 and 7 contained the list of authorised investments. The list in section 4, which was adapted from the English Trustee Act 1925, was extremely limited. Section 7 was added in 1965 to allow trustees to invest in shares in certain public companies after taking proper advice. This followed the philosophy of the English Trustee Investments Act 1961, while avoiding many of the complications of that legislation. Only minor amendments were made after 1965.[6] It is

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1 No. 23 of 1992. The Act was passed by Parliament on 29 May 1992 and assented to by the President on 8 June 1992. It came into force on 26 June 1992 (G.N. No. 301/92).

2 Cap. 337,1985 Rev. Ed. Except where otherwise stated, all statutory references in this article are to this Act as amended by the Trustees (Amendment) Act 1992. Where necessary, the legislation prior to the 1992 amendments is referred to as "the Trustees Act (1985)",

3 This is the document entitled *Reform of Trustee Investment Law,* Working Paper No. 1, Law Reform Committee, Singapore Academy of Law, December 1990. This paper was circulated amongst interested parties and representations were invited. The final report of the subcommittee has not as yet been published.

4 No. 66 of 1949.

5 No. 36 of 1965. This Act, which also added what became s. 7 of the Trustees Act (1985), repealed the Trustees Ordinance, Laws of the Colony of Singapore, 1955 Ed., Cap. 34.

6 See Acts Nos. 39 of 1970, 10 of 1975, 8 of 1978, 21 of 1982 and 39 of 1989. The first four amendments relax the requirements relating to companies to which trustees may lend

fair to say therefore that prior to the 1992 amendments, the Singapore law of trustee investments was badly out of date. Clearly there have been major changes in investment practice over the last thirty years. These are now reflected in the new amendments to the Trustees Act.

Authorised Investments

The 1992 Act adheres to the concept of a statutory list of authorised investments to which trustees are restricted, unless their trust deed grants them wider powers. The list now appears in the First Schedule to the Trustees Act and greatly extends the range of authorised investments, as compared with its predecessor. The Schedule follows the pattern of the previous list by specifying that "proper advice" must be obtained before trust moneys can be invested in certain types of investment. As would be expected, the cases where an investment can be made without advice are relatively limited. These are listed in Part I of the First Schedule and comprise essentially securities of the Government, or guaranteed by the Government, and fixed income securities issued by any public authority in Singapore. Negotiable certificates of deposit issued by any bank in Singapore and interest bearing deposits in a bank or finance company in Singapore are also included in this list, provided they are in Singapore currency. The inclusion of interest bearing deposits is an innovation of the 1992 Act. Previously, trustees were only allowed to deposit money in a bank for temporary purposes.[7] Nowadays, however, bank deposits are recognised as an investment in their own right and the Act has been changed to reflect this.

A wider range of investments is permitted under Parts II and III of the First Schedule, but here "proper advice" must be obtained before the investment is made. Essentially this repeats a requirement of the previous legislation, but the identity of the person required to give the advice has changed. In most cases now the advice required must be that of an investment adviser licensed under the Securities Industry Act[8] or a bank licensed under the Banking Act[9] or a merchant bank approved under the Monetary Authority of Singapore Act.[10] Where the trustees are proposing to exercise their power to invest in land, they must obtain advice as to the value of the land from

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trust funds. The fifth extends the list of authorised investments to include negotiable certificates of deposit.

7 Trustees Act (1985), s. 15, This section has been retained and now appears as s. 12(1) and (2). Its importance has been reduced, however, given that interest bearing deposits are now an authorised investment.

8 Cap. 289, 1985 Rev. Ed.

9 Cap. 19, 1985 Rev. Ed.

10 Cap. 186, 1985 Rev. Ed.

an appraiser licensed under the Auctioneers' Licences Act,[11] who is instructed independently of any owner of the land.

Without entering into the details of the statutory requirements, the investments listed in Parts II and III include units in an authorised unit trust scheme, securities of companies listed on the Stock Exchange of Singapore or for which prices are quoted on the Central Limit Order Book (CLOB) International, bank bills and trade bills, and fixed income securities of foreign governments having a Triple A credit rating or equivalent given by specified credit rating agencies.[12] So far as company securities are concerned, there are further requirements laid down by Part IV. The total issued and paid-up share capital of the company, if incorporated in Singapore, must be not less than $15 million and, if incorporated elsewhere, not less than $30 million. In each of the three financial years immediately preceding the financial year in which the investment is made, the company must have paid a dividend on all its shares. The shareholders' equity[13] of the company must be not less than $30 million and the company must have reported a profit in its profit and loss account in the financial year preceding that in which the investment is made.

A major change introduced by the 1992 Act is a general power to invest in land contained in Part II of the First Schedule. Previously, the Trustees Act did contain a limited power to invest in land, but this was so hedged round with restrictions as to be of little use in practice.[14] Now trustees can invest in or upon titles to land in Singapore, so long as they are freehold titles or grants in perpetuity or leases (other than mining leases) of which the unexpired term at the time of the investment is not less than 30 years.[15] The definition of "land" in the Act has been updated and there is now no doubt that trustees can invest in strata titles.[16]

There is a requirement, however, that the land should be generating at the time of investment a gross rental of at least 7% of its purchase price (where it is bought by the trustees) or at least 7% of its value (in the case of a mortgage).[17] This reproduces a requirement of the previous legislation,[18]

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[11] Cap. 16, 1985 Rev. Ed.

[12] No more than 30% of the trust fund can be invested in securities of foreign governments.

[13] This is defined in s. 3 and means essentially the total assets less the total liabilities of the company.

[14] The present writer discussed the position under the previous law in "Land as a Trustee Investment" (1986) 28 Mal.L.R. 9.

[15] The Working Paper recommended that in the case of leasehold there should be a minimum of 60 years of the lease to run, *supra,* note 3, p. 13.

[16] This was doubtful under the previous legislation. See "Land as a Trustee Investment", *supra,* note 14.

[17] First Schedule, Part IV, para. 2.

[18] Trustees Act (1985), s. 4 (c) proviso.

which has been criticised in the past.[19] It appears to mean that it would be at least a technical breach 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. At that time the land is not rented out and therefore does not satisfy the gross rental requirement. Trustees can, therefore, only buy land which is already tenanted.[20]

A further question is whether there should be any need at all for trustees to have to rent out land they own. It is true that if the land is not rented out, the courts would probably not consider it to be an investment, as this has been held to mean purchasing property that will yield income, or the lending of money on security.[21] However, as the Working Paper points out, the case for allowing trustees to purchase land, whether or not it is producing an income, is borne out by the ever increasing prices of land. The Working Paper recommended the abolition of the minimum rental requirement, while retaining the requirement that the property should be income bearing, pending the working out of a suitable formula for the apportionment of capital gains between the life tenant and remainderman.[22] This is, perhaps, an awkward compromise and it was not adopted by the legislature. It might, however, have been more satisfactory to have allowed trustees to purchase non-income bearing land, given that they have a duty to act fairly as between different classes of beneficiaries.[23] Where they buy such land, they would need therefore to consider purchasing other investments with a high income potential, if it is necessary to do so in order to maintain the balance between the life tenant and the remainderman.[24]

In the case of a mortgage of land, it is hard to see the necessity of the requirement that the land should be rented out. 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 9, 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

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[19] See "Land as a Trustee Investment", *supra* note 14, pp. 12-13.

[20] Cases can be found where the words "at the time of in other statutes have been interpreted to include a reasonable time thereafter. However, it is submitted that such an interpretation is permissible only where a literal interpretation would be absurd or senseless, which is clearly not the case here. See, *e.g., Re Tunnel Mining Co., Pool's Case* (1887) 35 Ch. D. 579 and *V. Sp. Suppiah Chettiar* v. *K. S. Navaradnam* [1972] 2 M.L.J. 60.

[21] See *Re Power* [1947] Ch. 572, *Khoo Tek Keong* v. *Ch'ng Joo Tuan Neoh* [1934] A.C. 529.

[22] *Supra,* note 3, at p. 13.

[23] See *Nestlé* v. *National Westminster Bank Pic,* 6 May 1992 (C.A.) (unreported).

[24] It is submitted that this approach is consistent with the modern trend of the courts to review the portfolio as a whole rather than each investment in isolation. See in particular the judgment of Hoffman J. in *Nestlé* v. *National Westminster Bank Plc,* 29 June, 1988 (unreported), affirmed, *supra,* note 23.

to finance house purchases by individuals. This practice seems to be impermissible in Singapore.[25]

Section 12(3) gives trustees the power to purchase a dwelling house for the use of any beneficiary under the trust. This reproduces a provision usually found in well-drafted trust deeds. It is clearly a most useful power for the trustees to have.[26] Curiously, however, the Act does not require trustees to obtain "proper advice" as to the value of the land before exercising their power under section 12(3). Moreover, there is no restriction on the type of title that trustees may purchase under this subsection, so long as it is a "dwelling house situated in Singapore", which includes "a lot on a strata title plan".[27]

Statutory List or Prudent Man

The most important feature of the 1992 Act is its retention of the concept of a statutory list of authorised investments. It should be borne in mind that trustees have an overriding obligation "to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt morally obliged to provide."[28] This obligation to act with prudence applies even where trustees are limited in their investment powers to the items included in the statutory list. The mere fact that an investment appears in the statutory list does not necessarily guarantee that it is a prudent one to make in the circumstances of the trust.

In the great majority of well drafted trust deeds nowadays, trustees are given complete freedom to invest without restriction.[29] This has been the practice for many years, and it means that in the main it is only older trusts which will be concerned with the changes introduced by the 1992 Act. It is true that wide investment clauses were first used because it was felt that the statutory list was unduly restrictive and the situation has improved with the updating of the list in the 1992 Act. Nevertheless, it is highly unlikely that settlors of trust funds and their legal advisers will return now to the practice of placing limits on the trustees' investment powers. Modern inflationary conditions have shown that what might appear to be a

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25 The Working Paper recommends retention of the gross rental requirement in the case of mortgage (at p. 12). This seems inconsistent with the recommendation to abolish this requirement in the case of purchase (see text, supra, note 22).

26 Were it not for s. 12(3) or an express power in the trust deed, trustees would not be permitted to buy a dwelling house for a beneficiary to live in, as this is not an investment. See *Re Power, supra,* note 21.

27 S. 12(4).

28 *Re Whiteley* (1886) 33 Ch.D. 347, 355. See also *Learoyd* v. *Whiteley* (1887) 12 App. Cas. 727, 733 and *Cowan* v. *Scargill* [1985] Ch. 270.

29 Such clauses are accepted nowadays by the courts, which do not attempt to place limits on them. See *Re Harari's Settlement Trusts* [1949] 1 All E.R. 430.

satisfactory investment when the trust deed is drafted may subsequently be revealed as grossly inadequate. Historically, trusts subject to limitations on their powers of investment have fared very badly when compared to those free to invest more widely.[30]

In most of the United States of America this process has been taken to its logical conclusion. Statutory lists have been repealed and trustees may invest freely subject to the "prudent man" rule. This approach has been adopted now in some Commonwealth jurisdictions.[31] The Working Paper gave serious consideration to the possibility of repealing the statutory list and replacing it with the "prudent man" rule, but ultimately recommended retention of the statutory list, albeit in a much improved form. The Working Paper noted that speculative investments would not be permitted under the "prudent man" rule and felt that this would mean that the courts would ultimately lay down their own list of approved investments. This seems an unduly pessimistic conclusion. The "prudent man" rule already operates in Singapore and England through the use of wide investment clauses and the courts have shown no inclination to impose limits on these clauses.[32]

The Working Paper gave as a further reason for the rejection of the "prudent man" rule the fact that "[t]he financial market is relatively young and the public at large generally lack the 'know how' to operate under the prudent man rule."[33] Again, this seems an unduly cautious conclusion. As already stated, the "prudent man" rule already operates to a very large extent in Singapore. It does not appear that any evidence was brought to suggest that the wide investment clauses currently in use cause any difficulties in practice. Certainly there are no reported local or English cases, which would suggest that these clauses cause problems, which could be avoided by adhering to a statutory list of approved investments.

Where large trusts are involved, the trustees are often professional men, who should be able to operate under the "prudent man" rule. Indeed, they already do so in most modern trusts. However, there are many older trusts in Singapore, where the trustees are professionals, but whose investment powers are limited to the statutory list. Here the existence of the list serves

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[30] A more general objection to the statutory list on policy grounds lies in the fact that where large funds are involved, the list causes certain kinds of investments to be favoured, which may have a distorting effect on financial markets. See the Working Paper at p. 7.

[31] The Working Paper gives details of the legal position in many of these jurisdictions at pp. 6-8 and in Appendix 3.

[32] See *supra,* note 29. The Working Paper refers to American criticism that the courts had held certain types of investment to be unacceptable under the "prudent man" rule. The relevance of these cases in Singapore is doubtful in view of the approach of the English courts to wide investment clauses. In any event it should not be beyond the wit of the parliamentary draftsman to devise a statutory formulation of the "prudent man" rule, which would prevent the courts from developing their own list of approved investments.

[33] *Supra,* note 3, p. 8.

to encourage complacency on the part of trustees, who are being paid for their work. They are secure in the knowledge that, so long as they do not invest outside the list, the chances of their being successfully sued by the beneficiaries for a breach of trust are extremely remote, however disappointing the results of the investments they have made.[34] Even where the trustees are not professionals, investment of large trust funds is too complicated nowadays to be undertaken without professional advice, and non-professional trustees should be aware of the necessity to take competent advice as to how they should exercise their investment powers.

A special difficulty occurs, however, in the case of small trusts where the trustees are non-professionals. Investment advice does not come cheaply and the size of the trust may not justify the expense. As the Working Paper states, the statutory list "is a useful guide to the non-professional trustee of small trusts."[35] In practice, however, the courts do not expect the same level of expertise from non-professional trustees of small trusts, as they require from professional trustees.[36] Some guidance, however, is undoubtedly required, and the best way to provide this would be for the Public Trustee to produce a handbook, updated at regular intervals, explaining in non-technical language the duties of a trustee and listing possible safe investments for a small trust. This would be a more flexible and simpler method of dealing with the problem than a statutory list, which governs both small and large trusts and both professional and non-professional trustees.[37]

Perhaps the most serious objection to the concept of the statutory list is its inflexibility. Experience has shown that it is extremely difficult to keep the statutory list up to date.[38] The Working Paper recommended that the list should be capable of amendment as subsidiary legislation by the

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[34] For a good illustration of the difficulties faced by beneficiaries dissatisfied at the results of their trustees' investments, see the *Nestle* case, *supra,* note 23.

[35] *Supra,* note 3, p. 8. See also the report of the English Law Reform Committee on the powers and duties of trustees, Cmnd. 8733, pp. 16-17. This rejected the idea of formulating special rules for small trusts, particularly as it would be difficult "to recommend a statutory definition of a small trust as any financial threshold would quickly become out of date." (at p. 17).

[36] The present law clearly imposes a higher standard on paid trustees. See *Re Waterman's Will Trust* [1952] 2 All E.R. 1054 and *Bartlett* v. *Barclays Bank Trust Co. Ltd.* [1980] Ch. 515.

[37] There are many statutory bodies, whose investments powers are limited to the statutory list in the Trustees Act. (For a list of such bodies, see Table 11 of Appendix 2 of the Working Paper.) It was beyond the terms of reference of the subcommittee (as it is beyond the scope of this article) to consider the investment powers of such bodies. Clearly this would raise different policy questions from those applicable to ordinary trusts. In the past it may have been convenient to link the investment powers of these bodies to the statutory list. If the "prudent man" rule were to be adopted for trusts, it might be necessary to break this link.

[38] For a useful survey of the history of the statutory list in different Commonwealth countries, including England and Singapore, see Appendix 1 of the Working Paper. See also Appendix 3 which gives details of law reform projects carried out in these jurisdictions.

Minister and that a "review committee" to advise the Minister on updating the list should be set up. The "review committee" should comprise representatives from the Monetary Authority of Singapore, financial and business sectors, and lawyers to be appointed by the Minister. They should tender their advice on the state of the legislative list at least once in two years.[39] Unfortunately, only the first part of this recommendation has been implemented by the 1992 Act.[40] It is to be hoped, however, that although there is no statutory obligation to do so, such a review committee will be appointed. The 1992 Act represents a serious and carefully considered attempt to make a statutory list work. However, this can only succeed if the list remains up to date, which will only happen if it is kept under regular review.

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[39] Supra, note 3, p. 8.
[40] S. 4(4).