



Fiduciary duty vs social conscience?

A changing climate for
trustees and investments



Nations Unies

Conférence sur les Changements Climatiques 2015

COP21/CMP11

Paris, France





Save & increase forest area
to capture greenhouse
gases from the atmosphere

Hold average increase in
global temperature to 2°C

Make finance
consistent and aligned
with Agreement goals

Limit temperature
increase to 1.5°C

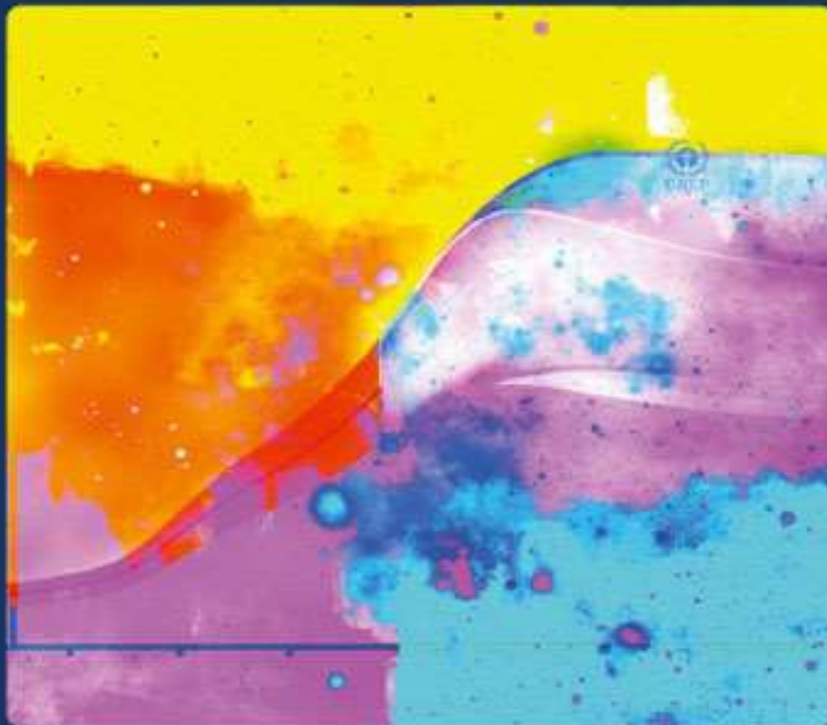


Increase ability to adapt to
climate change





Then, in October 2018...



ipcc
INTERGOVERNMENTAL PANEL ON climate change



Global Warming of 1.5 °C

An IPCC special report on the impacts of global warming of 1.5 °C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty.

Westminster acts...





Matters have continued to heat up through 2021

- The Economics of Biodiversity: The Dasgupta Review (February 2021)
- Latest IPCC report – AR6 Climate Change 2021
- UN Climate Change Conference (COP26) in the UK from 31 Oct to 12 Nov 2021
- Gibraltar: Climate Change Act 2019
- Gov of Gibraltar position on climate change:
<https://www.gibraltar.gov.gi/environment/climate-change>

**How does
this concern
trustees?**





Trustees' powers of investment

- Trustees have a duty to make trust fund productive for beneficiaries
- Trustee Act 2000 – very wide general power of investment
- Any exclusion or restriction in trust instrument?
- Pension schemes – similar considerations



Express powers of investment

- Express powers are strictly interpreted (*Re Maryon-Wilson's Estate* [1912] 1 Ch 55) but not to be restricted unduly (*Re Harari's Settlement Trusts* [1949] WN 79)
- Such investments as the trustees think fit:
 - Used to be interpreted restrictively
 - Now will normally cover anything which can properly be called an investment, even if it does not add that the trustees are to have the powers of a beneficial owner (which puts it beyond doubt).



Meaning of “invest”

- One traditional meaning of “invest”: “to apply money in the purchase of some property from which interest or profit is expected and which property is purchased in order to be held for the sake of the income which it will yield” (*Re Wragg* [1919] 2 Ch 58 at 65).
- Three issues:
 1. Property acquired for occupation or use (*Re Power’s Will Trusts* [1947] Ch 572).
 2. Property acquired for trading (*Orr v Wendt* [2005] WASC 199).
 3. Non-income producing property.



The investment power is fiduciary

- A power to choose investments is a fiduciary power
- Must (obviously) confer no benefit on its holder
- Must be exercised with a single eye to the benefit of the beneficiaries (*Lord Vestey's Executors v IRC* [1949] 1 All ER 1108 at 1115, HL; *Re David Feldman Charitable Foundation* (1987) 58 OR (2d) 626).



Duties of care in relation to exercising investment powers

Generally same degree of diligence/care in office of a person of ordinary prudence in managing his/her own affairs (subject to particular characteristics of the officeholder that merit a higher standard).

Section 1, Trustee Act 2000: statutory duty of care when exercising either statutory power or any power of investment: *“use such skill and care as is reasonable in the circumstances”*.

Duty can be excluded by the trust instrument.



Exercise of powers of investment

- Usually obliged to seek proper advice (N.B. separate provisions for pension schemes).
- Trustees then have to take account of standard investment criteria – suitability and diversification: see ss. 4(1) and 4(3), Trustee Act 2000.



Duties regarding speculative investments

- Speculative investments may be expressly authorised.
- Even if not – modest holdings in high-risk investments might be appropriate. Depends on size/nature of trust assets as a whole.
- See Lord Nicholls (1995) 9 TLI 71 (cited in *Dominica Social Security Board v Nature Island Investment Co Ltd* [1998] UKPC 19 at [30] and *Trustees of the British Museum v AG* [1984] 1 WLR 418 at 425.



What about ethical considerations?

- *Cowan v Scargill* [1985] Ch 270 per Megarry VC: put aside personal interests and their views about social and political issues
- *Re Wyvern Developments Ltd* [1974] 1 WLR 1097 at 1106 per Templeman J; *Cowan v Scargill* at 288: cannot make moral gestures





What about charities?

Larger registered charities (income > £0.5m) hold total long-term investments worth **c.£144bn**

Only 23.7% of registered charities in E&W indicate that they have a written investment policy





The *Bishop of Oxford* case

Harries v Church Commissioners for England [1992] 1 WLR 1241



- Property held for “*functional purposes*” or “*property held for the purpose of generating money*” (i.e. investments)?
- *Prima facie* interests of charity best served by seeking maximum return consistent with commercial prudence – the more money the better
- Investments should be selected using well-established investment criteria (i.e. advice, diversification, and balancing income vs growth, and risk vs return)



The *Bishop of Oxford* case

What about ethical considerations?

Charity trustees can take into account ethical considerations when:

- A particular investment conflicts with the aims of the charity.
- Holding certain investments would make beneficiaries unwilling to be helped or alienate financial supporters.
- The trust deed expressly permits them to do so (this may also apply to private trustees).



The *Bishop of Oxford* case

What about ethical considerations?

Only if two investments are equally suitable can trustees choose between them on personal grounds e.g. abhorrence of alcohol, tobacco, armaments (see also *Cowan v Scargill*).

Whilst charity trustees need (must?) not act to bring themselves or their charity into disrepute – (i) this does not allow “*moral statements*”, and (ii) trustees should not be “*too tender*”.



So, two exceptions to ‘the more money, the better’:

1. (What we call) ‘**direct conflicts**’ (p. 1246F-G)
 - Avoid even if it would be likely to result in “*significant financial detriment*” (p. 1246G-H)
 - Nicholls VC thought these would be comparatively rare (p. 1246H)
2. (What we call) ‘**indirect conflicts**’ (p. 1247A-B)
 - Appears to be discretionary.

Possibly “*other cases*”, but not specified by the VC.



Picture becomes a bit blurry though...

Nicholls VC, at p.1247H:

Trustees are permitted (but not obliged) to “*accommodate the views of those who consider that on moral grounds a particular investment would be in conflict with the objects of the charity, so long as the trustees are satisfied that course would not involve a risk of significant financial detriment*”.

- **What is a risk of significant financial detriment?**
- **Some sort of balancing exercise involved?**





And gets even blurrier...

England and Wales: *“Charities and investment matters: a guide for trustees (CC14)”*





Ongoing Charity Commission consultation on CC14 in E&W







Other developments in E&W

- Social investment power for charities – new Part 14A of the Charities Act 2011 in 2016.
- Section 172 of the Companies Act 2006 applies to all companies, including charitable companies.
- Section 4(3) of the Trustee Act 2000 applies to all trusts (including charitable trusts): suitability and appropriateness of investments to be considered by reference to the particular circumstances of the trust.
- Section 5 of the Trustee Act 2000: whether investment advice is to be considered proper requires consideration of adviser's experience of "*financial and other matters*" relating to the proposed investment



What about Gibraltar?



**HM Government
of Gibraltar**



Butler-Sloss & ors v Charity Commission & anr

THE ASHDEN TRUST



THE MARK LEONARD TRUST



Butler-Sloss & ors v Charity Commission & anr

- Investment policies which seek, as far as practically possible, to exclude investments that are not aligned with the Paris Agreement
- Those policies risk the charities suffering relative financial detriment => greater risk / lower returns
- Leave granted under section 115(5) of the Charities Act 2011 by Michael Green J: *Butler-Sloss & ors v Charity Commission & anr* [2021] EWHC 1104 (Ch).



watch
this space



Thank you for listening

What questions do you have?

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