

## Trustees' Liability and Beneficiaries Rights under the Trustee Investment Act: Prospects and Challenges

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### *Abstract*

*The contribution of the Law of Trusts to the growth of global commerce is quite profound. Whenever a Trust is created, the trustee is saddled with enormous responsibility by the relevant statute or the contractual document. The Trustee Investment Act (TIA) was first enacted as an Ordinance in 1918 but the current Act came into force on May 23, 1957. The salutary task embarked upon by the Nigerian Law Reform Commission to reform or review the TIA is, to say the least, Herculean. The popularity enjoyed by the TIA in other legislation cross-referencing it in terms of the power to investment Trust fund is, perhaps, next only to the Constitution of the Federal Republic of Nigeria. This fame is however overwhelmed by the cursory nature of its provision on issues one may consider as core subject of the Act. One of such is the liabilities of a trustee as well as the distinct right of beneficiaries under the Act. This paper will examine the concept of trust as well as the basis for a trustee's liability. We shall also briefly consider the scope of a trustee's liability at common law and under selected Nigerian statutes. We shall attempt to highlight obvious prospects and challenges of the Act. We will conclude with a proposal for urgent reform which may require the presentation of a new Bill in place of the one currently before the National Assembly (NASS).*

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## 1. The concept of Trust:<sup>2</sup>

The modern law of trust owes its origin and development to the early English Chancery Court. According to Professor Keaton<sup>3</sup>, a “trust”:

...is the relationship which arises wherever a person called the trustee is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of who he may be one and who are termed *cestui que trust*) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustee, but to the beneficiaries or other objects of the trust.”<sup>4</sup>

According to a learned writer:<sup>5</sup>

A trust arises when a person has property or rights which he holds or is bound to exercise for or on behalf of another or others or for the accomplishment of some particular purpose or particular purposes, he is said to hold the property or rights in trust for that other or those others or for that purpose or those purposes and he is called a trustee.

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<sup>2</sup> For a detailed discussion of the Origin of the received English Law of Trusts See: M.I. Jegede, *Law of Trusts Bankruptcy and Administration of Estate*, (Lagos: MIJ Professional Publishers, 1999), P.3.

<sup>3</sup> The Law of Trusts, (14<sup>th</sup> edn.), (UK: Barry Rose Law Publishers Ltd, 1993).

<sup>4</sup> See also: Underhill's *Law of Trusts and Trustees*, (14th edition), (London, Lexis Nexis Butterworths, 2010), p. 3, where “Trust” was defined as “An equitable obligation, binding a person (who is called a trustee) to deal with property over which he has control (which is called the trust property), for the benefit of persons (who are called the beneficiaries or *cestui que trust*), of whom he may himself be one, and any one of whom may enforce the obligation”. See also: *Green v Russell* (1959) 2Q.B. 226 at 241; *Re Marshall's Will Trusts* (1945) Ch. 217 per Romer L.J. at 219.

<sup>5</sup> I.E. Ekwo: *Incorporated Trustees Law for Churches and Religious Associations*, (Ibadan: Bright Star Publishers (Nig.) Limited, 2003), pp. 23-24.

Maitland described the concept of trust as “the greatest and the most distinctive achievement performed by Englishmen in the field of jurisprudence... an institute of great elasticity and generality, as elastic, as general as contract.”<sup>6</sup>

The concept of trust vests ownership of trust property in the trustee, which can only be exercised in favour of the beneficiaries. The person in whom the legal title vests is generally instructed by the settlor as to how the property is to be managed in a written document referred to as the trust agreement or deed. In the view of a learned author:<sup>7</sup>

...essentially the concept of trust has been carefully exploited for wealth accumulation and has become relevant to nearly all aspects of legal relationship known to law, for example, Company law, contract, Agency, Partnership, Land law, Associations, etc.

Commenting on the fiduciary obligation of a trustee upon the creation of a trust, it was opined that:<sup>8</sup>

The trustee is bound in equity to be ‘scrupulously honest’, prepared to give adequate time to the administration of the trust and have enough common sense. As far as the trustee himself is concerned, his appointment is not to be considered lightly. Unless there is provision in the trust instrument to the contrary, he will have to devote himself to the administration of the trust entirely without payment or other benefit. He may receive not gratitude from the beneficiaries for his efforts but bitterness, and if he is not very careful and makes a mistake, he may be liable to make good any loss out of his pocket.”

## **2. Legal Basis for Trustee’s Liability**

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<sup>6</sup> Maitland, *Equity* (Cambridge: Cambridge University Press, 1947), p. 43.

<sup>7</sup> See, A.D. Mustapha: *Registration Law and Practice of Incorporated Trustees*, (Corporate Law Publications, 1990), p.2.

<sup>8</sup> See, D.B. Parker and A.R. Mellows, *The Modern Law of Trust*, (4<sup>th</sup> edn.), (London: Sweet and Maxwell, 1979), P. 223.

The imposition of sanctions against a Trustee presupposes a breach of set duties or powers vested in the Trustee as well as the rights of beneficiaries under a Trust. It has been said that:<sup>9</sup>

The basic right of a beneficiary is to have the trust duly administered in accordance with the provisions of the trust if any and the general law.

Generally, whenever a trustee violates any of his duties owed to a beneficiary, he has committed a breach of trust. Such Trustee will be personally liable for any loss caused by his breach of trust. However a Trustee is liable for his personal acts and not those of other trustees. In other words, in the law of trusts, a Trustee is not vicariously liable for transactions in relation to which he did not take an active part provided such a trustee does not assume the posture of an “innocent bystander” while the other trustees misappropriates trust fund.<sup>10</sup> Liability will also arise where a trustee conceals a breach of trust committed by another trustee or if after discovering the breach, he takes no remedial steps.<sup>11</sup>

The foregoing common law principle is captured by the provisions of section 21 of the Trust Law<sup>12</sup> to the effect that a trustee is chargeable for money and securities actually received by him. The section only makes him answerable and accountable for own acts, receipts, neglects or defaults and not for those of any other trustee or any other person with whom trust money is deposited nor for any other loss or deficiency in securities, unless the same happens through his own wilful default. In this context, an act will be construed as being wilful when the trustee.<sup>13</sup>

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<sup>9</sup> Per Lord Brown – Wilkinson in *Target Holdings v. Redferns (a firm)*, (1995) 3 AER 785.

<sup>10</sup> The trustee will be liable in that circumstance as he will be deemed to have neglected his duty to protect the trust property.

<sup>11</sup> See, *Millers' Trustees v Polson* (1897) 34 Sc. L. R. 798.

<sup>12</sup> Cap 125 Laws of Western Nigeria, 1959 (as modified in the Laws of the states that makes up the old Western Region).

<sup>13</sup> Per Roma J in *Re City Equitable Insurance Co. Ltd* (1925) Ch. 407 at 434.

Knows what he is doing and intends to do what he is doing  
...If it is a breach of duty, he is guilty of wilful default if he  
knows that he is committing and intends to commit a breach  
of his duty or is recklessly careless in the sense of not caring  
whether his act or omission is not a breach of his duty.

### 3. Scope of Trustees Liability

At common law the basic principle is that a trustee is bound to make good the loss occasioned by him to the trust estate.<sup>14</sup> Where a trustee makes an “unauthorised investment”, he is liable to make up the difference between the authorised investment which he ought to have made and the unauthorised investment which he made. A trustee in breach is liable to restore the trust estate to the same position as it would have been if no breach was committed.<sup>15</sup>

Where monetary compensation is to be paid in lieu of restoring assets, the benchmark for the assessment will be the value of the asset as at the date of restoration and not as at the date of deprivation.<sup>16</sup>

A trustee has a duty to follow lawful direction to make an investment. Where a trustee ignores such specific investment directive and invests in something else and a loss occurs, it is no defence that the specie of investment he was directed to make had depreciated in value.

Retention of unauthorised investment will also make a trustee liable. This will arise where a trustee is instructed under a will or other instruments of appointment to dispose of a property expeditiously but he delays unduly in the disposal. The trustee is liable to make up for any loss caused by the prolonged delay.

Apart from indemnifying the trust estate for capital loss caused by the trustee’s breach, the Court has a discretion to order such trustee to pay interest which will be calculated from the date of the misapplication of the trust fund.<sup>17</sup>

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<sup>14</sup> M.I. Jegede, *op. cit.*, note 2 at p.284.

<sup>15</sup> See, *Knott v Cottee*, 51 E.R. 705.

<sup>16</sup> See, The Australian Digest 1966, p.2.

<sup>17</sup> See, *Wallersteiner v Moir* (No. 2) (1975) 1 All E.R. 849.

The violation which will impose personal liability on a trustee may arise from a deliberate or negligent act or omission and sometimes from mere inactivity.<sup>18</sup>

For instance where due to an honest or reasonable mistake of fact or law a trustee wrongly delivers trust property or made unauthorised payments, he is personally liable for any breach of trust resulting from his acts.<sup>19</sup>

Where it is established that the trustee has benefited from his breach, the beneficiary has a choice to either claim the profit made by the trustee or be awarded interest on a higher rate than the normal rate.

However it is trite law that a trustee is no guarantor of the value of the trust property, hence where it diminishes in value due to no fault of his, he is not liable. Likewise, a trustee will not be liable where he lawfully entrusts trust property to an agent who embezzles trust fund despite the trustee's careful supervision.<sup>20</sup>

#### **4. Nature of Trustees' Liability at Common Law**

##### **4.1 Contribution:**

Trustees are usually liable jointly and severally but a beneficiary must join all the trustees in an action relating to the trustees liability.<sup>21</sup> Jegede,<sup>22</sup> rightly in my humble view, opined that in relation to a breach of trust, the express trustees and third parties who actually participated in the breach are liable for the breach and where one of the trustees has borne the cost of repairing the breach of trust, he is entitled to ask the other trustees to proportionally contribute money to reimburse him for the expenses so incurred.

##### **4.2 Indemnity:**

A trustee may be held liable to indemnify his co-trustees for damages incurred as a result of a breach of trust. The trustee seeking to be

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<sup>18</sup> Jegede, *op. cit.*, note 2 at p.283.

<sup>19</sup> See, *Ashby v Blackwell*, 28 ER 813.

<sup>20</sup> See, *Speight v Gaunt*, (1883) LR 9 A. C. 1.

<sup>21</sup> See, *Re Jordan* (1904) 1 Ch. 260.

<sup>22</sup> Jegede, *op. cit.*, note 2 at p.287.

indemnified must prove that he is not blameworthy for the breach of trust.<sup>23</sup>

### **5. Statutory Sanctions against Trustees in Nigeria**

Unlike in the United States of America and some other jurisdictions where we have Uniform Trust Codes embodying the law and practice relating to Trusts including the duties and liabilities of Trustees as well as the rights or remedies of Beneficiaries, there is no such Code or Statute in Nigeria. Rather, we have to glean the law and practice regulating Trustees' conducts in relation to a Trust from a plethora of legislations. The pivot legislation for this discourse – Trustee Investment Act, is to say the least, extremely technical, dry and out of touch with contemporary investment challenges which has increased the liabilities of a Trustee and the need for greater protection for a beneficiary under an Investment Trust. Let us examine the liabilities of a Trustee under some Nigerian legislation.

#### **5.1 Trustee Investment Act:**

Section 2 sets out the scope of the Act. It applies to securities created or issued by or on behalf of:

- Federal Government;
- State Government;
- Statutory Corporations owned by the Federal or State Government; or
- Public Companies duly registered under the Companies and Allied Matters Act.

The Act in section 3 mandates the Trustee to invest Trust Fund within the confines of section 2 above. The implication of this is that except the relevant law or trust deed otherwise provides, a Trustee will be in breach and therefore liable to sanction, if a trust fund is not invested in the specie of securities highlighted in section 2 of the TIA.

#### **5.2 Companies and Allied Matters Act (CAMA):**

The following sanctions against Trustees are discernible under the CAMA:

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<sup>23</sup> See, *Re Partington* (1887) 57 LT 654.

- a. **Restitution:** Although originally an equitable remedy, CAMA has given it the force of Law as a sanction against Trustees in order to preserve Trust income and property in respect of charities whose Trustees are incorporated under Part C of CAMA. This liability of Trustees does not arise unless and until there is a misappropriation or misapplication of the Trust property. For instance where, contrary to the clear provisions of the Act, Trustees accept salaries or other forms of remuneration, such Trustee(s) will be made to refund any amount so received.
- b. **Fine:** This is provided for in the following circumstances
  - i. false information regarding incorporation;
  - ii. breach of qualification for appointment as a Trustee;
  - iii. failure by Trustees to submit Annual Return;
  - iv. fines imposed by the regulation of the body.

The fines imposed by CAMA on Trustees are cumulative in nature with an indefinite duration depending on how long the default continues.<sup>24</sup>

- c. **Imprisonment:** A Trustee is liable to this sanction under the Companies and Allied Matters Act if he knowingly, during incorporation, supplies information which is false to procure the registration of the Trustees of a body under Part C of the Act.

### 5.3 Investment and Securities Act

1. Trustee of a Collective Investment Scheme registered by the Securities and Exchange Commission – will be liable to sanction in the following instances:
  - Fine of ₦50,000.00 daily for default in delivering to SEC within 1 month of ceasing to act as Trustee;<sup>25</sup>

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<sup>24</sup> See I. E. Ekwo, *Incorporated Trustees Law and Practice in Nigeria*, (Durban, South Africa: Lexis Nexis, 2007), pp. 139 to 143.

<sup>25</sup> ISA, s. 163(10).

- Trustees must not be exempted from liability under any CIS agreement, otherwise such agreement will be void;<sup>26</sup>
- SEC may direct a Manager to appoint a new Trustee in place of a serving one;<sup>27</sup>
- Fine of a ₦ 100,000.00 or 1 year imprisonment or both for failure to comply with the directive of SEC on the management of a CIS;<sup>28</sup>
- Indemnity of the manager and the beneficiaries (investors) against any loss or damage suffered in respect of any money or assets in the custody of the Trustee as a result of the Trustee's wilful or negligent act or omission;<sup>29</sup>

2. Investors' Protection Fund Board of Trustees under sections 199 to 204 ISA, 2007.
  - Where IPF falls below the prescribed minimum, Trustees must take steps to remedy the deficiency – section 208 ISA
  - BoT of IPF must invest in accordance with the TIA – S.211.
3. Trustees of Bonds without fiduciary relationship with the issuers – section 245 ISA:
  - Vested with the powers of Trustees under the TIA – S.246 ISA.
  - Despite S.246(c), Trustees bound by the limitations imposed by the proviso to the section.
  - Sinking fund must be invested by the Trustees in accordance with the TIA – S.252 (1).

## **6. Prospects of the Current Investment Trust Law**

It is obvious from the long title of the Trustee Investment Act that it is intended to regulate the investment of trusts and allied fund in Nigeria. In an emerging capitalist economy such as ours, the TIA, despite its patent deficiencies, provides a veritable platform for ploughing back funds pooled together from various sources as contribution into viable

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<sup>26</sup> *Ibid.*, s. 168.

<sup>27</sup> *Ibid.*, s.173 (1) ( c ).

<sup>28</sup> *Ibid.*, s.173(4).

<sup>29</sup> *Ibid.*, s.183.

commercial ventures so as to enlarge the fund, secure it from mismanagement as surplus fund and generate income for beneficiaries of the trust fund.

No doubt, so much has to be done to bring the TIA in line with the dynamics of modern commercial expediencies. The current narrow scope of investment opportunity afforded a trustee by the combined effect of sections 2 and 3 of the Act is unduly restrictive. Limiting a trustee's power to invest trust fund to securities such as sovereign bonds, shares, debentures and stocks only in an era when Real Estate Investment Trust (REIT) is fast becoming a major income earner globally is, to say the least, unacceptable. It is hoped that the current effort at amending the Act will take care of these shortcomings, among others.

### **7. Challenges of the TIA**

1. The TIA is vague on specific sanctions against a Trustee in breach of the Act. The provision on beneficiaries' right in a principal legislation such as the TIA is unclear.
2. The Provisions of the Act is, to say the least, not elaborate on its subject matter to wit, investment of trusts fund by trustees. The Act in its current form is dry, technical and ambiguous.
3. It is out of touch with modern trends in trust investment.

### **8. Proposals for Urgent Reform**

1. The current TIA should be repealed as a review or reform alone cannot address the fundamental overhauling which the Act requires.
2. The South African Investments Act 1997 (which itself is the modified version of the Canadian Trusts Investment Act) should be adopted as a model *mutatis mutandis*.
3. As it is the practice in other jurisdictions, the new TIA should be Trusts Investment Act so as to capture trust fund and trust property.
4. For effective regulation of the activities of trustees, it is suggested that the proposed Act should establish an independent body (Trusts Investment Commission) to give it the desired attention instead of the current passing attention trust related activities currently

receive from the Corporate Affairs Commission and the Securities and Exchange Commission. These Commissions are already overburdened by their primary responsibilities.

5. The proposed TIA should copiously define key terms such as “Trustee”, “Trust investment”.
6. Clear provisions should be made in the new Act for Trustee’s duty of care and skill.

### **9. Conclusion**

Trustees play vital role in the appropriation and administration of trust fund/property. Imposition of sanctions implies a breach of a statutory or contractual obligation by a trustee. The current TIA falls far below contemporary commercial expediency in this dynamic field of law thereby leaving room for inferences and legal manoeuvrings. The momentum for a wholesale overhaul involving all stakeholders is already gathering with this conference. Nigeria must build on this gain.