## CHAPTER FIVE

## TRUSTEES

### Trustees in General

Although the point has not arisen in our courts, it is perhaps the law that, like in England, so in Malaysia any person who is able to hold property is a trustee. A corporation can be a trustee. Our Trust Companies Act 1949 recognises this principle, though the purpose of the Act is to deal with trust corporations proper. The Public Trustee is Malaysia, by virtue of the Public Trustee Ordinance 1950 can become a trustee of most kinds of trusts including a charitable trust.[1] However, he cannot accept a business trust, or a trust for creditors or the administration of an insolvent estate.[2] It is interesting to note that in our country there are no charity commissioners and there is no restraint on the Public Trustee administering a charitable trust.

When the Trustee Ordinance was passed in 1949, the legislature in Malaysia adopted almost all of the sections of the English Trustee Act 1925 without modifications. However, section 34 of the English Act which reads:

> " 1) Where, at the commencement of this Act, there are more than four trustees of a settlement of land, or more than four trustees holding land on trust for sale, no new trustees shall (except where as a result of the appointment the number is reduced to four or less) be capable of being appointed until the number is reduced to less than four, and thereafter the number shall not be increased beyond four.
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> 2) In the case of settlements and dispositions on trust for sale of land made or coming into operation after the commencement of this Act -
> a) the number of trustees thereof shall not in any case exceed four, and where more than four persons are named (who are able and willing to act) shall alone be the trustees, and the other persons named shall not be trustees unless appointed on the occurrence of a vacancy;
> b) the number of the trustees shall not be increased beyond four.

1. Public Trustee Ordinance 1950, section 4(1).
2. Ibid, section 4(4).

> 3) This section only applies to settlements and dispositions of land, and the restrictions imposed on the number of trustees do not apply -
> a) in the case of land vested in trustees for charitable, ecclesiastical, or public purposes; or
> b) where the net proceeds of the sale of the land are held for like purposes; or
> c) to the trustees of a term of years absolute limited by a settlement on trusts for raising money, or of a like term created under the statutory remedies relating to annual sums charged on land."

was modified by our law as follows:

> " 1) In the case of settlements and dispositions on trust of property, whether movable or immovable, made or coming into operation after the first day of September, 1929, in the settlements or the ninth day of September, 1932, in the Malay States -
> a) the number of trustees thereof shall not in any case exceed four, and where more than four persons are named as such trustees, the four first named (who are able and willing to act) shall alone be the trustees, and the other persons named shall not be trustees unless appointed on the occurence of a vacancy;
> b) the number of the trustees shall not be increased beyond four;
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> 2) The restrictions hereby imposed on the number of trustees do not apply in the case of property vested in trustees for charitable, religious, or public purposes."[3]

The significance of this modification is that while under our law the number of trustees who can be appointed is limited to four except in the case of charitable, religious and public trusts, in England, on the other hand, there is no limit as to the number of trustees who can be appointed to a trust involving movables, although in the case of a trust involving land, there is a limit of four trustees.

The usual practice is that the first trustee or trustees in a trust are appointed by the settlor or testator. If a trust is without a trustee, and no person is named in the trust instrument as having the power to appoint trustees, the court will step in and appoint a trustee.

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3. Trustee Ordinance 1949, section 36.

Equity would not allow a trust to fail for want of a trustee. In Malaysia, this principle seems to have been overlooked in the decision of the Penang court in A.G. v Thirpooree Soonderee[4]. This case has already been discussed under the subject of charitable trusts.[5]

The appointment of subsequent trustees in our law is governed by section 37 (1) of our Trustee Ordinance 1949, which is in pari materia with section 36 (1) of the English Trustee Act 1925. New trustees may be appointed under this section but this is, of course, subject to the limits imposed by section 36 of our Ordinance. The statutory rules as to retirement and removal of trustees found in our Ordinance are also borrowed in toto from the Trustee Act 1925. There has been no known litigation on these sections but it is submitted that we may safely follow the English principles regarding their interpretation because in practice, our courts follow the guidance of the English counter-parts.

Delegation of trusteeship is dealt with by section 25 of our Ordinance which is in pari materia with section 23 of the English Act. In this context, it may be mentioned that the inconsistency found in section 23 and section 30 of the English Act, as to the liability of a trustee has found its way to our law in section 25 and section 32 of our Ordinance. Again it is not known how our courts will approach the "technically incorrect" decision of Re Vickery[6]. Section 25 of the Trustee Enactment (Cap. 61), which corresponds to section 25 of the present Ordinance, was however judicially considered in Wong Weng Hong v Tsoi Lau Ying.[7]

In this case, the respondent, who was in Hong Kong, granted a power of attorney to one Wan Sow, by which he was empowered "to exercise all privileges, powers and rights vested in me as administratrix of the

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4. Supra.
5. See ante, p. 46
6. [1931] 1 Ch. 572
7. [1941] M.L.J. 141.

estate of Loo Chan San and to carry out all duties thereby imposed on me." Acting under this power of attorney, Wan Sow brought a suit in the name of the respondent to recover the value of rubber coupons alleged to belong to her in her capacity of administratrix.

The main issue, therefore, was whether in fact Tsoi was employing an agent to transact any business or do any act required to be transacted or done in the administration of the estate as section 25 permits; or whether, intending to remain abroad for more than 14 days, she delegates the execution or exercise during her absence of all or any of the trusts, powers and discretion vested in her as trustee, i.e., in conform conformity with section 27.

In the Magistrate's Court, it was held that Wan Sow "is the agent of Tsoi and is entitled to institute the suit and appear in court. Section 25 of the Trustee Enactment gives a trustee (which includes an administratrix) power to employ agents. Section 27 ... need only be invoked when the trustee wishes to delegate the discretion vested in him." On appeal, it was held by Horne J. that the intention of the respondent was to delegate her duties, powers and right as administratrix to Wan Sow; therefore the power should have been registered in the manner prescribed by section 27. Although part of the power might authorise the collection of the rubber coupons, yet the authority for the exercise of this power stems from the instrument itself, and in so far as the instrument has not been registered as required by section 27, it is legally ineffective and cannot be relied upon.

Trustees' Liability for Breach of Trust

Ever since the decision of the Privy Council in Khoo Tek Keong v Ch'ng Joo Tuan Neoh since deceased & Anor,[8] it is clear that the English law applicable to a breach of trust applies in this country. In this case, the testator by means of an investment clause provided for investment by the trustees in the following terms:

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8. [1934] M.L.J. 255.

"11. I empower my trustees to invest all moneys liable to be invested in such investments as they in their absolute discretion think fit with liberty to vary the same from time to time."

The trustees made loans with interest on the security of jewellery, as well as unsecured loans to chetties. Charged with breach of trust the defence was successful with respect to the secured loans but with respect to the unsecured loans the trustees were held to have been in breach of their powers of investment:

"Their Lordships agree with the Appellate Court that these do constitute breaches of trust by the appellant but upon the ground that being loans on no security beyond the liability of the borrower to repay, they are not 'investments' within the meaning of clause 11 of the will: they are accordingly dispositions by the appellant of the trust estate wholly unwarranted by the terms of the trust."[9]

As regards the trustee's plea that this was a proper case for the Court to exercise its discretion under section 60 of the Trustee Ordinance 1949 to excuse the breach of trust if it felt that he "has acted honestly and reasonably" , the trial judge vouched for the honesty of the trustee, but the Privy Council was not satisfied that he acted reasonably. It ruled that the trustee should not be given any relief under the section as he had:

"Never really considered the question whether these dispositions of the trust funds were such as in their nature it was prudent and right for him as a trustee to make."[10]

In Re Haji Ali bin Haji Mohamed Noor decd.[11], the High Court had to consider the liability of two co-executors for the proven breach of trust of a third executors One of them, being the illiterate widow of the testator was found to have acted honestly and reasonably in allowing the executor in breach to carry on. The other, an educated businessman, claimed that he had only proven the will, but the court found that on the evidence, he had done more than that. It also held that he was aware of

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9. [1934] MLJ 255.

10. Ibid. pp. 257 - 258.

11. [1933] MLJ 135.

the fraud and had failed to act to prevent it, and hence he was jointly liable for the devastatit committed by the trustee in breach of trust.

Further it may be noted that our courts have decided that a contract made by a trustee either in excess of their powers or in breach of their trust cannot be specifically enforced, and a person who receives any advantage under such an agreement or contract is bound to restore it or to make compensation for it to the person from whom he received. This was decided in the case of Chung Peng Chee v Cho Yew Fai & Ors.[12]

In this case, an agreement was entered into between the plaintiff and the then surviving trustees of an temple, for the sale of a shop-house belonging to the Temple for which the purchase-price was fixed and has been paid. The plaintiff, in accordance with the agreement was permitted to collect the rent of the shop-house. This continued from January 1945 until December 1950 when as a result of a letter, the tenant paid rent to the trustees as he had previously done prior to the agreement. However, under the trust deed of the temple, the then surviving trustees were unable to sell the property in dispute even with leave of the Court.

It was held by Wilson J. that the agreement was unenforceable because of section20 (e) of the Specific Relief (Malay States) Ordinance 1950 and the defendants, by virtue of section 66 of the Contracts (Malay States) Ordinance 1950, must therefore repay to the plaintiff the amount which the then surviving trustees received from him. However, it was further held that, as regards the counterclaim by the defendants that the plaintiff was accountable to them for the rents and profits of the shop-house for the period from January 1945 to December 1950, the plaintiff is accountable to the defendants for the rents and profits of the shop-house for the said period.

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12. (1954) MLJ 100.

# CHAPTER SIX

## TRUSTEE INVESTMENT

There are,no less than seven duties of a trustee such as the duty to account and give information, duty to invest trust funds, duty to avoid a conflict between his duties as trustee and his personal interests. In this chapter, however, it is proposed to deal with the duty of investment.

It has to be mentioned at the onset that when a person accepts a trusteeship, he should do four things, and if he fails to do any, he may make himself liable for an action for breach of trust. These things are:

1) acquaint himself with the terms of the trust;
2) inspect the trust instrument and any other trust deeds;
3) procure that all the property subject to the trust is vested in the joint names of himself and his co-trustees, and that all title deeds are placed under their joint control; and
4) in the case of an appointment as a new trustee of an existing trust, to investigate any suspicious circumstances which indicate a prior breach of trust, and to take action to recoup the trust fund if any breach has in fact taken place.

The Law of Trust imposes a duty on a trustee to invest trust fund in his hands. His duty in investing trust fund is to take such care as an ordinary prudent man would take if he were under a duty to make the investment for the benefit of other persons for whom he felt morally bound to provide.[1]

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1. Re Whiteley (1886) 33 Ch. D. 347 at 355 per Lindley L.J.; affirmed sub nom Learoyd v Whiteley (1887) 12 App. Cas. 727.

In investing the trust fund, the trustee must confine himself to the class of investments which are either expressly permitted by the trust instrument itself or if the trust instrument be silent, by the law relating to trust investments.

Under the English law, until the Trustee Investment Act 1961 was passed, the investments authorised by statute were extremely limited. They were largely governed by section 1 of the Trustee Act 1925. Briefly, the statutory trustee list of investments was restricted to the following:-

a) stock issued by the British Government and governments of Commonwealth countries and colonies;

b) stock guaranteed by the British Government;

c) stock and mortgages issued by British local authorities;

d) mortgages of land in Great Britain.

Criticism was levied on the restricted nature of these investments. Virtually all of them carry interest at a fixed rate and are repayable at par. And this took no account of the decline, over the years, in the value of the pound. Firstly, eventual repayment of invested capital at its nominal par value would involve a captial loss in real values. Secondly, the income received by a life-tenant might remain nominally the same but, over the years, it will have become progressively worth in real value less than at the date the trust was established. These two difficulties would become more and more acute as the trust itself became older.

In the light of the above, therefore, it is not surprising that many voices were raised against such a bad state of affairs. The Nathans Committee for example in 1952 advocated reform, and in 1955 a White Paper stated that the government intended to introduce a reform of the law. But it was not until 1961 with the Trustee Investment Act 1961 that the reform was at long last achieved.

The main point about this Act is that it replace the old Statutory List. The new List is set out in the First Schedule to the Act. This is divided into three parts. Parts I and II are concerned with the "narrower-

range investments" and Part III the "wider-range investments."

Narrower-range Investments

These include Defence Bonds, National Savings Certificates and Savings Bank deposits. These are the type of investment which can be made over the counter at a Post Office or Trustee Savings Bank, and advice is not necessary because there is no fluctuation in capital value, whereas expert advice is required for investment in Part II and III securities.

While the investments specified in Part II are similar to those in the old Statutory List, they also include certain securities which did not previously rank as trustee investments i.e.

i) fixed-interest securities registered in the United Kingdom issued by local or public authorities in the Commonwealth or by the World Bank;
ii) debentures of United Kingdom companies which comply with certain prescribed conditions as to paid-up capital and dividend records; and
iii) deposits by way of special investments in a trustee savings banks

Wider-range Investments

These types of investments which are contained in Part III of the First Schedule, include :

i) shares, stock and debentures of certain U.K. companies
ii) shares of certain designated building societies; and
iii) units of authorised unit trusts.

It has also to be noted that a striking feature is the inclusion of equities and other securities of the U.K. companies. But such investments in U.K. companies are hedged round with restrictions such as

i) the companies must be quoted on a recognised stock exchange;
ii) shares and debenture stock must be fully paid up or issued on terms that they are to be fully paid up within nine months from the date of issue; and
iii) the company must have a total issued of paid-up capital of at least £1/- million and also have paid in each of the immediately preceding five years a divident on all its shares.

The Malaysian law relating to trustee investment, however, does not follow that of England. Our law is to be found in the Trustee Ordinance 1949 and the Trustee Investment Act 1965. While the former is largely modelled on the English Trustee Act 1925, it has been amended and extended by the latter.

The combined result as regard power of investment of the above-mentioned Ordinance and Act are as follows:

By virtue of section 4 of the 1949 Ordinance, a trustee may invest trust funds in the following:-

a) stocks, public funds or government securities issued by the United Kingdom, the Federation of Malaya or any dominion or colony of the United Kingdom;

b) stock or securities which is or shall be guaranteed by the Parliament.

c) stock issued by local authories in Malaya, Great Britiain or other colonial bodies and guaranteed by the appropriate governments;

d) debentures, debenture stock or shares of local authorities of certain specified water, electricity and railway companies in Malaya, United Kingdom and the colonies,

e) land, mortgages and charges.

Section 4 of the said Ordinance as amended by the TIA 1965[2] however allows for investments in:-

a) securities of the governments of Malaysia or Singapore;

b) fixed interest securities of either federal or state public authorities;

c) loans to an approved company.

In addition, section 3 of the TIA 1965 empowers that investments specified in section 4 of the 1949 Ordinance shall include securities issued by a company prices for which are quoted on the Stock Exchange of Malaysia,[3] although this power of investment does not extend to companies

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2. See Schedule to TIA 1965, section 4.

3. TIA 1965, section 3(2)

whose total issued and paid-up share capital is less than five million dollars and which have not paid a dividend on all the shares for the previous five years.[4]

It is to be noted that section 4(c) of the abovementioned Ordinance provides that a trustee may invest trust find in land (including leased but excluding mining leases whose term is unexpired for 60 years at least) or on loans on titles to lend provided:
a) the land or lease to which the title relate is situated within the limits of a Municipality or Town Board area; and
b) the gross-rental of the land is not less than seven percent of the purchase value of such land.

And by virtue of section 9 (1) of the same Ordinance, a trustee, when lending money on the security of land is required of the following:
a) in making the loan, the trustee was acting upon a report as to the value of the property made by a person whom the trustee has reasonable grounds to believe to be an able practical surveyor or valuer who is independent of the owner of the land;
b) the amount of the loan must not exceed two-thirds of the value of the property stated in the report; and
c) the loan was made under the advice of the surveyor or valuer as expressed in the report i.e. the surveyor or valuer must have advised that the loan is a proper one.

Power of Trustees to invest in Equities

Section 4(e) of the Trustee Ordinance 1949, as amended by the TIA 1965,[5] allows a trustee to make "loans to an approved company." And, by virtue of the amended section 3 of the Ordinance,[6] an "approved company" means a company:

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4. Ibid. Section 3 (3) (a) and section 3 (3) (b).
5. See Schedule to TIA 1965.
6. Ibid.

a) incorporated in Malaysia which has been continuously so incorporated for seven years and with its place of business in Malaysia;
b) having as its sole or primary object the promotion of home ownership by advancing sums of money for the purchase of land or building; and
c) approved by the Minister of Finance by notification in the Gazette for the particular purpose.

As already mentioned, section 3 of the TIA 1965 permits trustees to invest in companies provided
1) the company is quoted on the Stock Exchange of Malaysia;
2) the total issued or paid-up capital of the company is no less than five million dollars; and
3) for the five previous years, the company has paid a dividend on all its shares.

It may lastly be noted in passing that the abovementioned section 3 (1) also allows investments in unit trusts if they are approved for this purpose by the Yang DiPertuan Agong in the Gazette.

Conclusion

A reading of the statutory law of England and Malaysia shows that the law relating to trustee investment is distinctly different for both countries. This is partly due to the differing circumstances or environment of the two countries, and partly due to the fact that the TIA 1965 was not modelled on the English Trustee Investment Act 1961

# CONCLUSION

One finding appears evident, namely, that the courts in Malaysia have adopted the English law of trusts. This is inevitable bearing in mind the provisions of section 3 of the Civil Law Act 1956, and the fact that we never had a law of trusts as such, except for the 'trust' concepts in Islamic law. However, as pointed out earlier, we do have some significant differences to the English law. These differences are restricted to areas of trustee investment and, to an extent, in the sphere of charitable trusts.

From the lack of cases, one can safely deduce that there has not been much judicial activity in the law of trusts in this country. Litigation appears to have focussed its attention to particular areas of trusts only, such as charitable trusts. Possibly this is because few people (through ignorance) create trusts.

However, this does not mean that there are large areas in our law which are uncertain. This is because a lawyer is enable to draw upon the vast resources of the English principles of trust law by virtue of the Civil Law Act 1956.

Wither will our law of trusts go in the future? As we have already accepted the English law of trusts, future development of our trust law will no doubt be greatly influenced by development in England.