

The Trustee's Role

19th May 2023

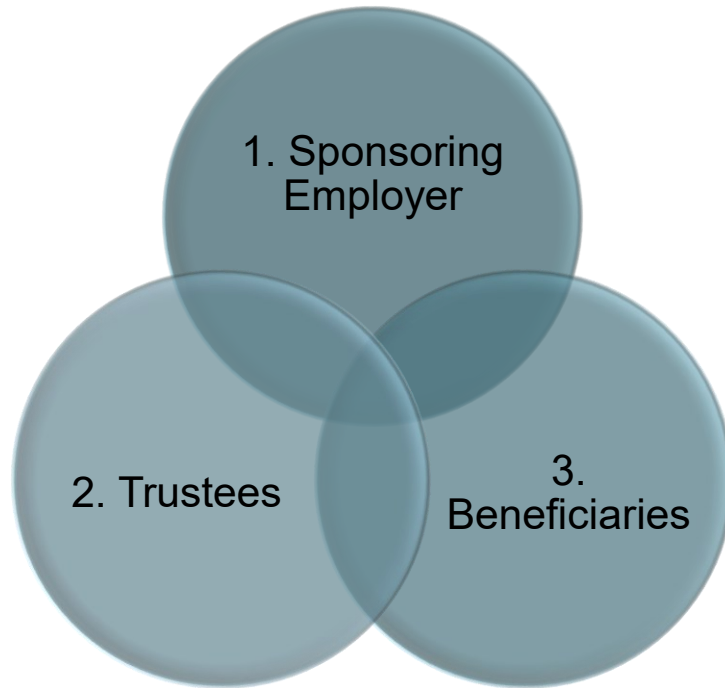
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Agenda:

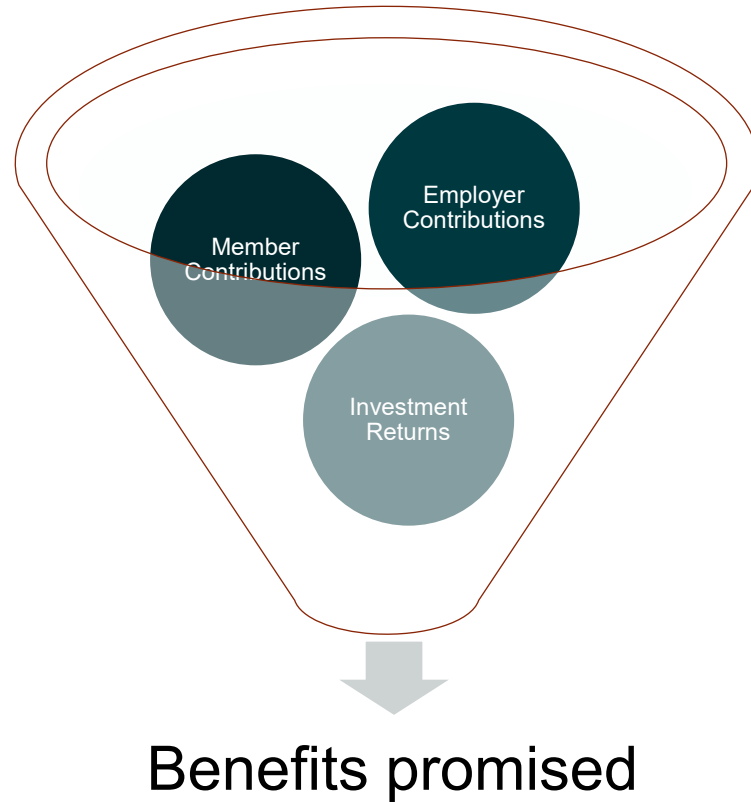
- What is a trust?
- Trust law duties
- Conflicts of interest
- Further legal framework
- Trustee powers and how to exercise them
- Discretionary powers
- A case study – lessons to learn
- Role of professional advisers
- Trustee liability and protection
- Good governance

What is a trust?



A first party transfers property to a second party, for the benefit of a third party.

Pension trust assets



A trust ensures that assets are held separately from the Employer and member benefits are protected.

The trustee's role

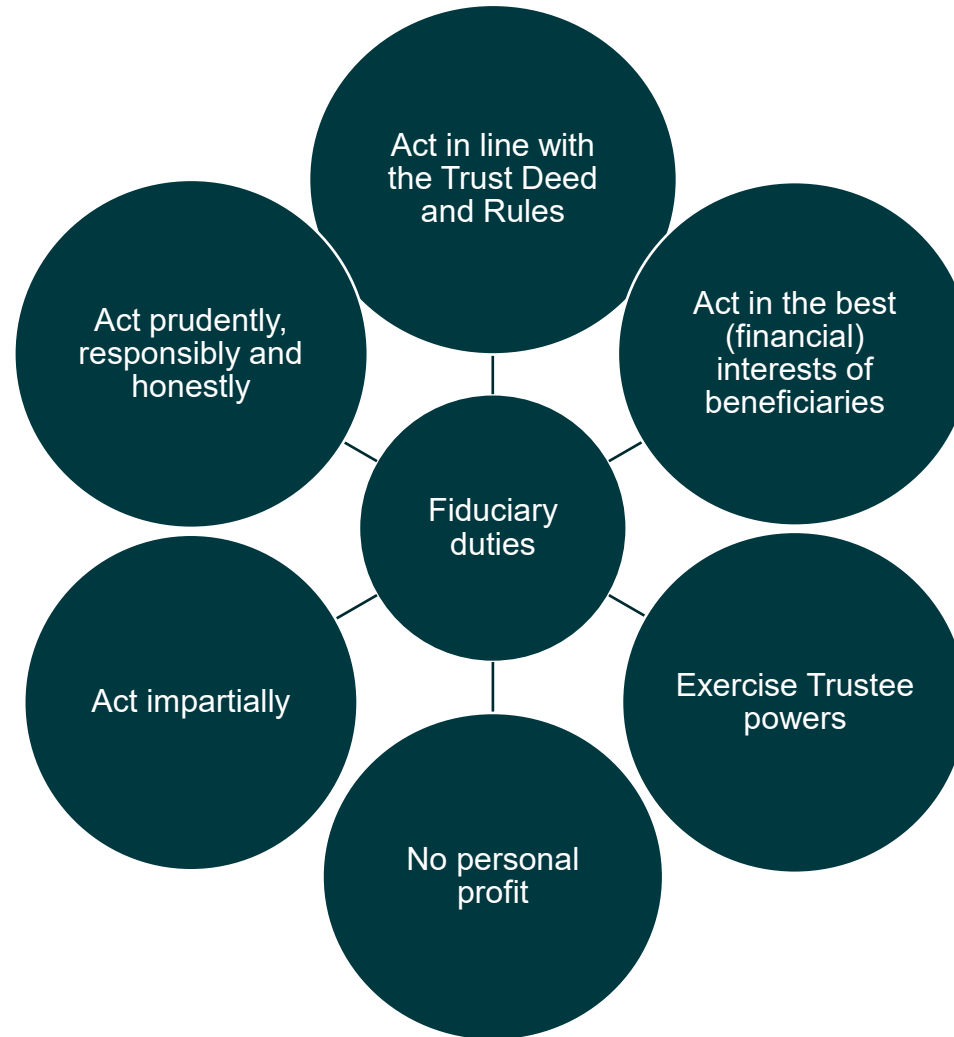
*"a trustee is a **person or company acting separately from the employer**, who holds assets in the trust for the beneficiaries of the scheme. Trustees are responsible for ensuring that the **pension scheme is run properly and that members benefits are secure**"*

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*"the trustee has a **legal obligation** to carry out the **duties conferred upon him by trust**. The relationship between the trustee and the beneficiaries is a '**fiduciary**' relationship, such that the trustee **must always place the interests of the beneficiaries above his own**"*

ICAEW

Trust law duties – things you *must* do



Acting impartially

Consider the interests of all classes of beneficiary

Treat members of the same class in the same way

This does not necessarily mean you should treat all classes in the same way

Strike a balance to give appropriate weight to the interests of each class

Do not promote the interests of one group of beneficiaries over another

Acting prudently, responsibly and honestly



Act prudently –
*the way a
prudent person
would in their
own affairs*



Act responsibly
and honestly –
duty of care



Manage conflicts
of interests



Take account of
the *relevant* facts



Consider if
professional
advice is required

Conflicts of interest



“A secondary interest that may unduly influence judgement or actions / inactions”
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Further legal framework

Employment law	Data Protection	Winding up	Disputes
State Pension and contracting out	Scheme funding	HMRC and tax	Pension Protection fund
Cyber security	Disclosure	Divorce	Environmental, Social and Governance (ESG)
Financial services law	Equality	Investment principles	Employer covenant

Pensions law
Regulations
Case Law
Guidance
Codes of Practice
Custom and Practice

Trustees' powers under Trust Deed and Rules

Decide investment
strategy and invest
Scheme assets

Amend Trust Deed and
Rules of the Scheme

Power to delegate

Power to augment
benefits

Apply discretionary
powers

Deal with surplus
assets / wind up the
Scheme

Trustees can delegate duties but remain ultimately responsible

Exercising trustee powers

Exercisable by majority?

- Check whether the decision can be taken by a majority of the Trustees or requires unanimity.

What is the scope of the power?

- Check the scope of the power and where the balance of power lies.
- e.g. Do you need to consult the Employer or get Employer agreement? Is there a notice period?

How is the power exercised?

- Is a deed required? A written resolution? Can the power be exercised orally and recorded in the minutes?

Discretionary powers

Recipient of a dependant's pension – who qualifies?

Recipient of lump sum benefits

Early / late retirement consent

Discretionary pension increases

Ill health benefits

Exercising discretionary powers

When exercising discretionary power, trustees should:

- Check **Trust Deed and Rules** and follow any **procedures**
- Ask for and consider all **relevant** information (Expression of Wish form, Will, medical reports, etc)
- Disregard irrelevant factors
- Make a **reasonable** decision
- Take **advice** if in doubt
- **Communicate** outcome to member
- **Record** decision

Case study – Discretionary benefit

- **Pensions Ombudsman case regarding death benefits PO-22369**
- *Member, his friend Mr Allen, and Mrs Allen all Trustees of scheme. Member also employed by Mr Allen.*
- *Expression of wish form dated 2015 nominated member's sister and Mr Allen, in equal shares.*
- *Expression of wish form dated 2017 asked for £25,000 to be paid to member's estate, with remainder to member's sister.*
- *Member diagnosed with terminal cancer and died in November 2017.*
- *Death benefit of around £299,000 due.*
- *Trustees to determine to whom benefit is paid and in what shares.*

Pensions Ombudsman Decision

1. Trustee conflicts not managed

“Neither Mr Allen nor Mrs Allen accept that a conflict of interest exists, when clearly there is a conflict between their personal and/or business interests” and their fiduciary duty as trustees.

No process in place to identify and manage conflicts of interest and Trustees had breached duty of care.

The Trustees “favoured their own interests over those of other potential beneficiaries” and had breached their duty to act in the best financial interests of the beneficiaries.

2. Irrelevant factors taken into account

Trustees took into account “the two-year tax deadline, ...and the liquid funds at that time”. The Ombudsman held these were irrelevant factors when deciding who the “Eligible Recipients” were.

When making decision, Trustees focussed on lack of medical records, and “gave little weight or consideration to the other evidence that was available to them”.

The decision reflected “neither the 2015 Nomination, which they considered to have been made validly...nor the 2017 Nomination”.

3. Decision improperly made

No Trustee meetings held or record of decision.

No process to ensure all relevant factors considered.

No acknowledgement of conflicts.

Pensions Ombudsman Decision

Pension Ombudsman determined:

- Member did have capacity when he signed 2017 expression of wish. The balance of benefits were granted to sister.
- £3,000 awarded to sister for “severe and serious distress and inconvenience caused”. Any tax liability due to delays also borne by the Trustees.
- Trustees knowingly and deliberately acted in bad faith and in breach of fiduciary duties. They were therefore unable to rely on exoneration or indemnity provisions.

Role of professional advisers

- Administrators
- Scheme Actuary
- Auditor
- Investment consultant
- Fund managers
- Legal adviser
- Trustee Secretary
- Employer covenant advisers

Aim for a good working relationship of mutual trust, open and honest dialogue, and clear advice

Trustee liability and protection

If something goes wrong, are the trustees protected?

Breach of Trust

- Act when not authorised to do so
- Fail to do something you should have done
- Fail to act with due care

Trustee liability is

- Personal
- Joint and several

Protections

- Exoneration clause – unless act dishonestly
- Indemnity from Employer / Scheme assets
- Trustee indemnity insurance

*“As a trustee, it’s **your responsibility to make sure your scheme is well run**. You should spend time and resources getting your scheme governance right. This will help you to **minimise risk and maximise opportunities** for your scheme and your members. Investing in good governance is likely to save you in the long run, **delivering good value for members and sponsoring employers, and improving member outcomes**”*

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Good governance

- Trustee Meetings
- Administration
- Risk Management
- Checklists / Scheme calendar
- Risk Register and policies
- Access to documents





Questions?

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