Trustee duties – evenhandedness / impartiality

- Re Mulligan: trustees have a duty to take reasonable care and act with due diligence, which is furthered by Trustee Act in case of people who have a special skill
- Re Speights: trustees have to conduct trust business in the same way the ordinary prudent business will conduct his own business
- Re Whiteley: trustees have a higher standard of care, have to be careful and diligent in carrying out business for others who they felt morally obliged to provide
- Investment decisions made on basis of trust deed.
- Difficulty arises when different classes of beneficiaries arise, with some entitled to income from the trust as life beneficiaries where trust property can be used for their benefit during their lifetime until their death where the property is later distributed either in fixed shares or discretionary distribution to other beneficiaries.

Impartiality

- Even-handedness or lack of bias in decisions that have an effect on different beneficiaries' entitlements
- *Re Mulligan (dec'd)* [1998] 1 NZLR 481
- Widow was the income beneficiary
- Nieces and nephews were the residual (capital) beneficiary
- In exercising discretion, the Trustees were entitled to take account of the relationship between the testator and the widow
- But the investment (fixed interest investments) dramatically favoured the widow over the residual beneficiaries
- Trustees went too far in favouring one beneficiary over others

<table>
<tr><td>Facts
• Man died and gave wife a life interest in trust subject to a farm which was sold. The proceeds from trust were invested in fixed interest securities by the trustees, which did not grow in value.
• Residuary beneficiaries after widow dies receives remaining trust property which was a share of 100,000
• In 1965 when the farm was sold, they could have bought 14 average residential properties in Christchurch with 100,000. In 1990s they could not buy 1 house. Inflation adjusted figure would have been 1.368 million
• Residuary beneficiaries: even if it was appropriate for trustees to have initially distributed income to the widow through fixed interest securities, the onset of inflation at 10% per annum and increased house prices meant the trustee would have realised that the capital of the trust fund was same as before.</td></tr>
<tr><td>Issues:
• Claim against trustees were 1) not even-handed between beneficiaries, making decisions favour one set of beneficiaries i.e. widow interested in income over residual beneficiaries interested in capital growth. 2) Trustees also did not prudently invest trust property.
• Claimed for difference between no increase in capital and what trustees ought to have done if they prudently managed investments when inflation increased.</td></tr>
<tr><td>Result:
• Court: at a certain point trustees would have invested trust property in investments where capital value increases.</td></tr>
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- COI arises where widow herself as trustee and beneficiary who was required to act even-handedly in relation to other beneficiary. Breach of duty to be even-handed
- Trustee: trustee unanimity mean they could not be liable as widow would only invest in fixed interest securities.
- Court: However, trustee company identified the problem and should have done more by pressing the issue and explaining the breach of trust obligations to the widow in the undiversified investments.
- If it fails, trustees can seek directions from the court under s 76 of the Trustees Act if unsure whether there has been a breach of trust. Clear breach of trust.
- Trustees: not doing anything different from investment practices and prudent management of trust assets at the time hence no breach of trust
- Rejected by the court as corporate trustees could not claim there was no breach of trust because it was clear they knew the problem
- Court can absolve trustee liability for breach of trust under s 73 Trustee Act – if they acted honestly or reasonably. No suggestions of dishonesty which would have precluded use of section. Question of whether trustees acted reasonably despite breach of trust
- Court: company did not act reasonably as trustees recognised problem but did not take adequate steps to address it.

Measure of damages – loss from breach

- Trustees have to pay 170,000 for breach of trustee obligations
- Residuary beneficiaries need to come up with counterfactual as to the amount there would have been if there had not been a breach of trust obligations
- Investment in shares as a % of trust property out of fixed interest securities. Court has to determine year that it would be appropriate for a non-breaching trustee to have moved some of the property into an investment and the amount. Tracks index of shares and discount if had not purchased shares

- Re Mulligan was a fixed trust and know what people are receiving, even-handedness comes in with investment
- Even-handedness does not apply to discretionary trusts where trustee can exercise discretion to remove beneficiaries or give out property
- Theoretically applies in terms of investment unless there is a specific permission to not be even-handed in investment.