

background law

The general rule for private trusts is that, unless the trust instrument otherwise directs, trustees must act unanimously, except for charitable and pension trusts. The Pensions Act 1995, s32 (Decisions by majority) is as follows.

Decisions of the trustees of a trust scheme may, unless the scheme provides otherwise, be taken by agreement of a majority of the trustees.

The effect of the incapacity of a trustee is, under the general rule, that the other trustees, even if a majority, cannot make a decision.

The Trustee Act 1925 s36 provides a remedy, but only in broad general terms.

(1) Where a trustee, ... is dead, or ..., or desires to be discharged from ... the trusts ..., or is incapable of acting therein, ... then, ..., (a) the person nominated for .. appointing new trustees by the instrument, if any, creating the trust; or (b) if there is no such person, or ..., then the surviving ... trustee ... may, by writing, appoint one or more other persons ... to be a trustee or trustees in the place of the trustee so ... being incapable, ..., as aforesaid.

Incapacity is not defined. The heading of s38 of the TA 1925, "Evidence as to a vacancy in a trust", promises but does not give a definition. All that the section does is to provide that

A statement, contained in any instrument ... by which a new trustee is appointed for any purpose connected with land, to the effect that a trustee has remained out of the United Kingdom for more than twelve months or refuses or is unfit to act, or is incapable of acting, or that he is not entitled to a beneficial interest in the trust property in possession, shall, in favour of a purchaser of a legal estate, be conclusive evidence of the matter stated.

In practice incapacity can normally be established if the trustee lacks capacity within the meaning of the Mental Capacity Act s2, which provides as follows.

a person lacks capacity in relation to a matter if at the material time he is unable to make a decision in relation to the matter because of an impairment of, or a disturbance of, the mind or brain"

In practice, despite TPR's efforts to promote good governance, some schemes operate casually and fail to be aware of a trustee's incapacity and its legal effect until a formal decision is needed. Normally however the ability to act by majorities means that incapacity of a trustee should not present significant legal problems.

small schemes

The inability of the majority to act is particularly acute if (a) a pension scheme is a "small scheme" in order not to be restricted in its ability to hold employer related investment, and (b) one (or more) of its trustees loses mental capacity.

Section 40(1) of the Pensions Act 1995 is as follows.

(1) The trustees or managers of an occupational pension scheme must secure that the scheme complies with any prescribed restrictions with respect to the proportion of its resources that may at any time be invested in, or in any description of, employer-related investments.

Employer related investments, as defined in s40(2), include land which is occupied or used by the employer or any person who is connected with, or an associate of, the employer, other property used for any business carried on by the employer or any such person, loans

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to the employer or any such person. Any trustee who fails to take reasonable steps to secure compliance may be required by the Pensions Regulator (TPR) to pay a penalty not exceeding £5,000 if an individual or £50,000 if corporate. In addition any person who agreed to make the investment is guilty of an offence and liable to an unlimited fine and, in extreme cases, imprisonment.

By reg 12(2) of the Occupational Pension Schemes (Investment) Regulations 2005, SI 2005/3378, the proportion is not more than 5% of the current market value of the resources of the scheme at any time and none in any employer related loan. Reg 12(1) however provides that reg 12 does not apply to small schemes. A "small scheme" is defined in reg 1 as (abbreviated)

a scheme with fewer than 12 members, where—

(a) all the members are trustees of the scheme and either—

(i) the provisions of the scheme provide that all decisions which fall to be made by the trustees are made by the unanimous agreement of the trustees who are members of the scheme, or

(ii) the scheme has a trustee who is independent in relation to the scheme for the purposes of s23 of the Pensions Act 1995 Act (power to appoint independent trustees), and is registered in the register maintained by the Authority ... ; or

(b) (*corresponding provisions for the directors of a company which is the sole trustee of the scheme*).

In passing, but not necessarily relevant to a trustee's mental capacity, the requirement for unanimity does not preclude weighted voting.

A small scheme is the kind of scheme, which, before 6 April, 2006 was known as a small self-administered pension scheme ("SSAS") and is still commonly referred to as an SSAS.

Contrary to the assertion that TPR made in at least one instance, that the unanimity requirement applies to only the active members, the Pension Act 1995 s124 states,

"Member" in relation to an occupational pension scheme, means any active, deferred, pensioner or pension credit member

The problem, put simply, is that the Trustee Act 1925, the Pensions Act 1995 jointly with the Occupational Pension Schemes (Investment) Regulations 2005 and the Mental Capacity Act 2005 are incompatible with each other and with the circumstances of a small scheme, one or more of whose trustee lacks capacity.

solution

If it is not possible or desirable to transfer the trustee's benefits out of the scheme and the appointment of an independent trustee is too expensive, the unanimity rule can be satisfied by the trustee lacking capacity appointing an attorney under the Trustee Act 1925 s25 (inserted by the Trustee Delegation Act 1999 s5) to exercise his or her functions as a trustee. The s25 power, which must be renewed annually, may be executed by:

- the trustee, if, although lacking the capacity to act as a trustee, he or she has sufficient capacity to execute it, or, if not,
- if the trustee has executed an enduring power of attorney under the Mental Capacity Act 2005 s5, that attorney; or, if none
- the trustee's deputy appointed by the Court of Protection under the Mental Capacity Act 2005, s16.

The last resorts are for the other trustees to apply to the court for direction (expensive) or chance it by doing nothing, ie acting by a majority and hoping that no one will notice (risky).

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