



## THE DUTIES OF TRUSTEES IN THE MANAGEMENT OF REAL PROPERTY IN NIGERIA: CAN TRUSTEES IN NIGERIA BE TRUSTED? \*

### Abstract

The role of a trustee in the management of real property subject of trust cannot be over-emphasised. This is particularly so because the legal title in the property is vested in the trustee who is expected to manage the property for the benefit of the beneficiaries of the trust. Thus, the law has imposed certain duties on trustees to ensure that the trust property is managed in accordance with the settlor's instructions. This research deploys the doctrinal research methodology to examine who may be appointed as a trustee and the duties of trustees in the management of real property in Nigeria. The objective therefore, is to determine age of majority for appointment of a trustee and whether the law has made adequate provisions for duties of the trustee in Nigeria such as to ensure that the trustee can be trusted with management of real property. This research argues that the trustee laws regulating appointment of trustee do not clearly provide for the age at which an individual is eligible to be appointed as trustee and there is no adequate statutory provisions for the duties of the trustees in Nigeria. Thus, it is recommended that the trustee laws should be amended to stipulate 18 years as age for appointment of trustee. More so, the laws should be amended to distinctively and comprehensively provide for duties of the trustees and sanctions for breach of the duties.

**Keywords: Beneficiary, Duties, Trust, Trustee, Real Property.**

### 1. Introduction

The office of the trustee is crucial and significant to the realization of the objectives of a trust because the legal interest in the property is vested in the trustee, and he is the one responsible for the management of the property. Equity will not allow a trust to fail for want of trustee, and therefore, will ensure that at least one trustee exists to give effect to the wishes and instructions of the settlor or testator.<sup>1</sup> This is more so that the trustee is in fiduciary position and is bound to administer the trust for the benefit of the beneficiaries.<sup>2</sup> It is therefore essential for the trust to have trustee as fiduciary who will administer the trust and discharge the duties imposed by the trust instrument or the law for the benefit of beneficiaries.<sup>3</sup>

The property is vested in the trustee who holds legal title to the property in accordance with the terms of the trust.<sup>4</sup> However, appointment of a trustee takes various forms, depending on the mode of creation of the trust; whether it is created by settlement or in a Will. The general rule is that a trustee is appointed by the settlor,<sup>5</sup> but subsequent trustees may be appointed by the person nominated in the instrument, the court or existing trustee.<sup>6</sup> Thus, appointment of trustee can be made where there is vacancy in the case of retirement, death, incapacity or unwillingness to act by trustees.

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<sup>1</sup> Gaius Ezejiolor, 'Appointment, Powers, and Duties of Trustees' in A A Utuama, and G.M, Ibru,(eds) *The Law of Trusts and their Uses in Nigeria*, (Malthouse Press Ltd , 2004) 16.

<sup>2</sup> Gani Fewehinmi, *Digest of Supreme Court Cases:1956-1984* (Volume 3,Nigerian Law Publications Ltd, 1986) 788.

<sup>3</sup> Saifu Rahman Chowdhury, 'Whether or not the Law Relating to Modern Trustees' Power and Duties have Achieved a Balance between Managing the Trust Assets and Protecting the Interest of the Beneficiaries: A Critical Analysis'. *Mediterranean Journal of Social Sciences*, (2015)(6)(2) 386.

<sup>4</sup> M.I Jegede, *Law of Trusts, Bankruptcy and Administration of Estate* (MIJ Professional Publishers Ltd, 1999) 197; *Ndukayba v kolomo* (2001) 12 NWLR pt.726, 117.

<sup>5</sup> *Ademola v Sodipo* (1989)5 NWLR pt.121,329, 355, para.A.

<sup>6</sup> Adamu Kyuka Usman, *Law and Practice of Equity and Trust*, (Malthouse Press Ltd, 2014) 195; Section 10(1) of the Trustee Act, 1893.



The appointment of trustees in Nigeria is governed by equity, case law, Trustee Act<sup>7</sup>, Trustee Investments Act<sup>8</sup>, Public Trustee Law<sup>9</sup> and State Trustee Laws<sup>10</sup>. However, there are enormous powers placed on the trustee in order to ensure that he performs the duties of his office efficiently and diligently. These duties are designed to achieve the objective of the trust, and anyone appointed as trustee needs to find out what these duties are to avoid breach of these duties.

The research problem is the uncertainty in the law as regards the age at which an individual is qualified to be appointed as a trustee to manage real property in Nigeria. The Trustee Act<sup>11</sup>, Trustee Laws<sup>12</sup> and Public Trustee Laws<sup>13</sup> are silent on the age at which an individual may be appointed as a trustee. However, the Land Use Act<sup>14</sup> stipulates 21 years while the Child Rights Act<sup>15</sup> provides 18 years as age of majority. The question therefore is, 'who is a child for purpose of appointment of trustee to manage real property?' This question is important because it determines whether an individual can be conferred with the powers and duties as trustees. This issue has created a gap in the jurisprudence of trust law in Nigeria, and has caused confusion in the minds of scholars, judges, and settlers. Thus, the aim of this paper is to analyse the duties of trustees in the management of real property in Nigeria, and the objective is to determine whether the laws are comprehensive and adequate enough to ensure that the trustees can be trusted with management of real property in Nigeria.

## 2. Methods of Appointment of a Trustee

Trust can be created by any means as there is no particular form for creation of trust. However, the declaration of trust of any land, tenements, or hereditaments is required to be by writing signed by the person who is creating the trust.<sup>16</sup> Therefore, the appointment of a trustee in relation to real property must be done by writing signed by the settler.<sup>17</sup> This requirement is more apt in the appointment of corporate trustees who charge fee for the administration of the trust.

Any person who has capacity to hold property can be a trustee<sup>18</sup> since the ability to be a trustee is co-existent with the capacity to hold property.<sup>19</sup> Thus, any person of full age and capacity can act as trustee. Where the appointment of a trustee is made by court, it will not appoint beneficiaries of the trust, beneficiary's solicitor or spouse, and persons residing outside Nigeria for more than 12 months.<sup>20</sup> More so, women can also be appointed as trustees because there is no discrimination against women provided they are of full age and mental capacity.<sup>21</sup> However, it has

<sup>7</sup> Trustee Act 1893 is a Statute of General Application which applies in those States that have not enacted laws to regulate the administration of trusts within their jurisdiction.

<sup>8</sup> Cap T22, Vol.15, Laws of the Federation of Nigeria, 2004.

<sup>9</sup> Cap 62, Laws of Lagos State, 1994.

<sup>10</sup> For instance, Trustee Law, Cap 130, Laws of Ogun State, 1978.

<sup>11</sup> Trustee Act of 1893 in force in Nigeria by virtue of the Interpretation Act.

<sup>12</sup> Trustee Law, Cap.130, Laws of Ogun State,1978; Trustee Law,Cap.166,Laws of Oyo State,2000; Trustee Law, Cap.T5, Laws of Ekiti State, 2010; Trustee Law, Cap.125, Laws of the Western Nigeria,1959.

<sup>13</sup> Public Trustee Law,Cap.108,Laws of Western Nigeria,1959;Public Trustee Law, Cap 139,Laws of Oyo State,2000;

Public Trustee Law, Cap.P.18, Laws of Ekiti State, 2010.

<sup>14</sup> Cap L5, Laws of the Federation of Nigeria, 2004.

<sup>15</sup> Section 277 of the Child Rights Act, 2003; Section 3, Child Protection Law, 2018, Kaduna State.

<sup>16</sup> Section 7 of the Statute of Fraud, 1677.

<sup>17</sup> *Mohammed Idirisu v Modupe Obafemi* (2004)11 NWLR pt 884, 396, 408, paras D-F.

<sup>18</sup> Angela Sydenham, *Equity and Trusts in a Nutshell* (Fifth edn Sweet & Maxwell, London, 2000) 75.

<sup>19</sup> J.O Fabunmi, *Equity and Trusts in Nigeria* (University of Ife Press Ltd, Ile-Ife, 1986) 179.

<sup>20</sup> *Re Paire's Trusts* (1885)28 Ch.D 725; Adewale Taiwo and Oluwatoyin Akintola, *Introduction to Equity and Trusts in Nigeria* (Princeton & Associates Publishing Co. Ltd,2016) 264.

<sup>21</sup> Section 38 of the 1999 Constitution of the Federal Republic of Nigeria,1999 as amended



been stated that an infant cannot be appointed as trustee and thus cannot act as a trustee.<sup>22</sup> Thus, in some states comprising the former Western Region<sup>23</sup>, an infant cannot be appointed as a trustee in relation to trust. It is provided that “the appointment of an infant to be a trustee in relation to any settlement shall be void, but without prejudice to the power to appoint a new trustee to fill the vacancy.”<sup>24</sup> This means that an infant cannot be appointed as a trustee because he does not possess full mental capacity to hold legal estate. This position is adopted by Taiwo and Akintola<sup>25</sup> and Jegede<sup>26</sup> who posited that an infant cannot act as a trustee.

However, Fabunmi argued that section 18 of the Property and Conveyancing Law relates only to express trust so that an infant can hold a legal estate in land upon resulting, implied or constructive trust.<sup>27</sup> In this regard, it has been held that an infant can be trustee of a resulting trust.<sup>28</sup> Similarly, Emiri and Giwa argued that any trust created by an infant is voidable because the infant may repudiate it at any time during minority or within a reasonable time on attaining majority.<sup>29</sup> But where the legal estate in land is conveyed to the infant and another person, the property will vest in the other person, and not the infant.<sup>30</sup> Notwithstanding the foregoing, Fabunmi concluded that the position whether an infant can be appointed a trustee in Nigeria is not general because in states other than the states comprising the former Western Region of Nigeria, it is possible for an infant to be appointed as trustee as it was in England before the Trustee Act of 1925.<sup>31</sup>

However, the pertinent question now is who is an ‘infant’ for the purpose of appointment of a trustee to manage a real property? The law is settled that individuals who have not attained the age of 18 are regarded in law as ‘minors’, ‘infants’ or ‘children’.<sup>32</sup> The laws on appointment of trustees in Nigeria do not state the age of majority for an individual to be appointed as trustee. However, the Land Use Act<sup>33</sup> and the Child Rights Act<sup>34</sup> stipulate 21 years and 18 years respectively. More so, the Contractual age of majority in Nigeria is 21 years and this remains the position at common law.<sup>35</sup> Therefore, the question now is what law applies in determination of the age of majority for appointment of trustee? This conflict is pertinent because the Land Use Act still remains an integral part of the Constitution.<sup>36</sup> It can be submitted that the Land Use Act applies since it deals with real property and it prescribes 21 years as the age at which an individual can be granted right of occupancy.

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<sup>22</sup> R. Clements and A. Abass, *Equity and Trusts: Text, Cases and Materials* (Third edn Oxford University Press, 2013) 417.

<sup>23</sup> Oyo, Ogun, Ondo, and former Bendel States.

<sup>24</sup> Section 18 of Property & Conveyancing Law, Cap.100, Laws of Western Nigeria, 1959.

<sup>25</sup> Adewale Taiwo and Oluwatoyin Akintola, *Introduction to Equity and Trusts in Nigeria* (Princeton & Associates Publishing Co. Ltd, 2016) 264.

<sup>26</sup> (n,4) 198.

<sup>27</sup> (n,19) 301

<sup>28</sup> *Re Shelmerdine* (1864)33 L.J Ch. 474.

<sup>29</sup> Festus Emiri, F and Ayuba O. Giwa, *Equity and Trusts in Nigeria* (Malthouse Press Ltd, Lagos, 2012) 242.

<sup>30</sup> Magarry, R. & Baker, P.V. *Snell's Principles of Equity* (Sweet & Maxwell, London, 1973) 190; Section 7 of the Land Use Act, Cap L5, Laws of the Federation of Nigeria, 2004.

<sup>31</sup> (n, 19) 302.

<sup>32</sup> Section 277 of the Child Rights Act, 2003; Stone, R, *The Modern Law of Contract* (Eighth edn Routledge-Cavendish, 2009) 255.

<sup>33</sup> The age of majority at common law is also 21 years.

<sup>34</sup> Section 277 of the Child Right Act, 2003; Section 2 of the Niger State Child's Right Law, 2021.

<sup>35</sup> (n,25) 264.

<sup>36</sup> Section 318(5), Constitution of the Federal Republic of Nigeria, 1999 (as amended); Gani Fawehinmi, *Digest of the Supreme Court Cases 1956-1984*. Nigerian Law Publications Ltd, 1986) Vol.8, 109-111.



Trust Corporation can be appointed as trustee but it must be empowered to do so by its constitution or statute establishing it.<sup>37</sup> They must comply with the statutory requirements relating to prescribed share capital, and must be incorporated in Nigeria. They are certified to charge fees for their services.<sup>38</sup> Trust Corporation means the public trustee or a corporation either appointed by the court in any particular case to be a trustee, or entitled by law to act as a custodian trustee.<sup>39</sup> A corporation may be a trustee for any purpose and may be a co-trustee with an individual or another corporation. A trust corporation includes any corporate body empowered by the court or by law to conduct trustee business, such as trustee department of a bank.<sup>40</sup> Although they charge fees for their services which may not easily be affordable by the Settlor or beneficiaries, this type of trustee is suitable for management of real property because it guarantees continuity, and the beneficiaries are indemnified against any loss or injury done by the trustee.

A public trustee is a corporation sole with perpetual succession and an official seal.<sup>41</sup> Public trustee can act as a sole trustee or jointly with any other person or body of persons. He may act as an ordinary trustee or custodian trustee and may in appropriate cases be appointed trustee by court.<sup>42</sup> Public trustee may decline to accept any trust but shall not do so on the ground only of the small value of the trust property.<sup>43</sup> The public trustee was established by the Public Trustee Act<sup>44</sup> and Public Trustee law of Western Nigeria which is applicable in states comprising the old Western Nigeria. Originally, the services offered by the public trustee were restricted to colonial civil servants who had died in Nigeria.<sup>45</sup> The Public Trustee Act did not impose the restriction but because the natives could not afford it and there was adequate method of managing the estate of the deceased Nigerians, the natives did not make use of it.<sup>46</sup> In the course of time, it became increasingly desirable for Nigerians to use the services of public trustee.

A judicial trustee is appointed by the court in cases where the due administration of the estate had broken down and it is not desired to put the trust through the expenses of a full administration. On application by the settlor, or a trustee or a beneficiary, the court may appoint any fit and proper person who is nominated in the application or an official of the court (usually the official solicitor) to be a judicial trustee alone or jointly with any other person. A judicial trustee is an officer of the court and subject to its control and supervision. The Judicial trustee is entitled to such remuneration as the court allows him; his accounts are audited every year and cannot appoint a successor under the statutory power because this would undermine the power of the court.<sup>47</sup> However, the Rules of Courts in Nigeria do not expressly provide for the office of the judicial trustee and method for the appointment. It is contended that the appointment of the judicial trustee is pursuant to the Judicial Trustee Act<sup>48</sup> and equitable jurisdiction of the court based on the general equitable maxim that 'equity does not want for a trustee'.<sup>49</sup>

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<sup>37</sup> (n,19) 306.

<sup>38</sup> *ibid.*

<sup>39</sup> Section 2, Property and Conveyancing Law, Chapter 100, Laws of Western Region, 1959.

<sup>40</sup> (n, 25) 265.

<sup>41</sup> Section 1 of the Public Trustee Law of Lagos State, 1960.

<sup>42</sup> *ibid.*

<sup>43</sup> Section 4(3) of the Public Trustee Law of Lagos State, 1960.

<sup>44</sup> Cap.170, Laws of Nigeria (1958) applicable to Lagos State. It is now contained in Vol.6, Cap.162, Laws of Lagos State, 1994.

<sup>45</sup> (n,19) 306.

<sup>46</sup> *ibid.*

<sup>47</sup> Section 1(1) Judicial Trustee Act, 1896; *Re Johnston* (1911) 105 L.T. 701; (n,25) 268; Section 6(6)a of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).

<sup>48</sup> Section 1(1) of the Judicial Trustee Act, 1896.

<sup>49</sup> (n,18) 76.



The office of custodian trustee is created by the Public Trustee law, and the idea is that the property is vested in a custodian trustee for greater security of the trust property, while the management of the trust remains in the hands of the other trustees who are known as the managing trustees.<sup>50</sup> It is usually provided that the property shall be transferred to the custodian trustee as if he were a sole trustee and the management of the trust property shall remain with the trustees other than the custodian trustees.<sup>51</sup> The custodian trustee is not to be reckoned as a trustee in determining the number of trustees for the purposes of the Trustee Act.<sup>52</sup> An incidental advantage of having a custodian trustee is that when new managing trustees are appointed, there is no need to vest the trust property in the new trustees. The real property subject of trust remains vested in the custodian trustee, and there is no need to replace the custodian trustee since it is a corporate trustee. The Public trustee may also be appointed as custodian trustee. The appointment of the Public Trustee to act as custodian trustee may be made by the court, by the settler, or by the person who has power to appoint new trustees.<sup>53</sup>

However, in customary land law, the appointment of trustee is determined by customary land tenure. Land is of fundamental importance in traditional Nigerian Society, and is communally owned.<sup>54</sup> Thus, the control and management of land is vested in the head as trustee of the community. But the trusteeship position of the head is not the same as the trustee in English law because the legal title in the land is not vested in the head or chief.<sup>55</sup> Nevertheless, Abdulkarim has argued that the head or Chief is a fiduciary and is required to discharge his duties as a trustee.<sup>56</sup> Thus, the position of the head or chief is unique because it derives its authority from his office and not from members of the community, and his appointment is determined by the native law and custom.<sup>57</sup> Thus, in Yoruba native law and custom, the person to manage the family property is normally the oldest male member of the family or the eldest female child if she is strong and influential.<sup>58</sup>

### 3. Duties of a Trustee

The office of a trustee is an onerous one and thus imposes a very heavy burden on the trustee. The trustee hardly has any rights in respect of his office and gains nothing unless the trust instrument or statute expressly provides otherwise. In discharging his duties, the trustee must observe utmost diligence and good faith in order to escape liability for any loss occasioned to the trust.

First and foremost, trustees are fiduciaries and they are required by law to exercise utmost good faith and loyalty in the management of the trust property. Accordingly, they are not allowed to use trust property to their own advantage to the detriment of the trust and the beneficiaries.<sup>59</sup> If the trustees derive any benefit from the trust in breach of their fiduciary duties, they will be liable to account to the beneficiaries for the benefit they derived as constructive trustees. The standard of care required of trustee depends on whether they are paid or unpaid. If the trustee is paid for his services, the degree of diligence and proficiency expected of him is that of a specialist in trust

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<sup>50</sup> PH Pettit, *Equity and Law of Trusts*. (Fifth edn Butterworth & Co (Publishers) Ltd, 1984) 309.

<sup>51</sup> *ibid*; section 6 (1)(a)(b) of the Public Trustee Law of Lagos State.

<sup>52</sup> Trustee Act of 1893; Section 4 (2)(g) Public Trustee Act 1906. See also section 8(2)(g) of the Public Trustee Law, Cap.162, Laws of Lagos State.

<sup>53</sup> Section 8(1)(a)(b)(c) of the Public Trustee Law of Lagos State.

<sup>54</sup> Huebner v. A.I.E. & P.M.Co. Ltd. (2017) 14 NWLR pt.1586, 397.

<sup>55</sup> Amos Agbe Utuama, *Nigerian Law of Real Property* (Second edn Malthouse Press Ltd, 2012) 53.

<sup>56</sup> Ibrahim Abdulkarim, 'Trust Law and the Administration of Real Property in Nigeria' *International Journal of Advanced Legal Studies and Governance*, (2011) (2) (1) 219.

<sup>57</sup> Adefi M.D. Olong, *Land Law in Nigeria* (Second edn Malthouse Press Ltd 2011) 44.

<sup>58</sup> *Folami v Cole* (1990)2 NWLR pt.133, p.445, p.455, paras. C-D.

<sup>59</sup> (n,6) 199.



administrations.<sup>60</sup> If however, the trustee is unpaid, then the degree of care is such as reasonable businessman will exhibit in the conduct of his business.<sup>61</sup>

There is a duty to observe the terms of the trust instrument, and if the trustees deviate, they will be guilty of breach of trust for which they will be personally liable.<sup>62</sup> The court does not make it a habit to authorize deviation from the terms of the trust. However, the trustee may deviate from the terms of the trust if the trust is made subject to such considerations as custom. Thus, in *Balogun v Balogun*<sup>63</sup>, custom was allowed to override the strict rule that trustees should observe the terms of the trust. In this case, a testator devised his properties to trustees and stated that his eldest son should be the head of the family and occupy one of the family houses ‘with the incidents of native law and custom thereto attaching’. The trustees started paying the eldest son in his capacity as head of the family an allowance of ₦20 per month out of the estate.

The plaintiffs as beneficiaries under the trust brought an action to stop the trustees from further payment to the eldest son and to compel them to refund the money already paid on the ground that the payment was not expressly authorized by the Will. The West African Court of Appeal held that although there were no express instructions in the Will authorizing payment to the eldest son, it was the implied intention of the testator that the son was to be reimbursed for expenditure incurred according to native law and custom in his position as head of family. It has been submitted that this case is not an exception to the rule that terms of trust must be obeyed because the custom is already incorporated as term of the trust.<sup>64</sup> Perhaps, an exception where the trustee will not observe the term of the trust instrument is where the entire equitable interest is presently vested in a beneficiary who decides to determine the trust after becoming of full age and capacity after. In such circumstance, the beneficiary can require the trustee to convey the trust property to him and thus terminate the trust despite contrary instructions in the instrument.

However, it has been argued that based on the doctrine of administrative deviation or augmentation by virtue of which the court can authorise the trustee in the absence of express or implied instruction in the trust instrument, the trustee can deviate from the express terms of the trust in extreme circumstances where strict adherence to the terms of the trust would endanger the purposes for which the trust was created.<sup>65</sup> This principle is invoked to permit the trustee to do what he has been expressly prohibited from doing.<sup>66</sup> More so, it can also be canvassed that a trustee is not under obligation to observe instructions in the instruments that are not lawful. Thus, in *Ademola v Sodipo*<sup>67</sup>, the Court held that it is the duty of trustee to carry out all lawful directions as contained in the trust instrument. Consequently, by necessary implication, the trustee is not required to carry out instructions that are not lawful.

The trustee has duty to ascertain the properties comprised in the trust, and take possession of them upon accepting his appointment as trustee. To this end, the trustee shall examine all the relevant title documents or Certificate of Occupancy in order to ascertain the contents of the trust, collect the assets or take possession of them.<sup>68</sup> Thus, if there is chose in action such as debt in property i.e. rent, it is the trustee’s duty to reduce it into possession by suing for the debt. If the trustee fails

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<sup>60</sup> (n,1) 19.

<sup>61</sup> (n,6) 200.

<sup>62</sup> (n,25) 277.

<sup>63</sup> (1935) 2 WACA 290.

<sup>64</sup> (n,6) 202.

<sup>65</sup> PG Haskell, *Some Problems with the Uniform Trustees’ Powers Act*. Retrieved from: <<https://core.ac.uk/download/pdf/62555925.pdf>. Accessed on 18/09/2021> at 9:33pm

<sup>66</sup> *ibid.* 182.

<sup>67</sup> (Supra) 355, para. A.

<sup>68</sup> Musa Yakubu, ‘The Standard Duty of Care of Trustees’, in, A A Utuama, and G M Ibru, (eds) *The Law of Trusts and Their Uses in Nigeria*, (Malthouse Press Ltd, 2004).27.



to take legal action such that the debt becomes irrecoverable or statute barred, the trustee will be personally liable unless he can show the well-founded belief that an action would have been fruitless.<sup>69</sup> Furthermore, if the properties include a lease containing an option to purchase the reversion, it is the trustee's duty to exercise the option.<sup>70</sup>

The trustee must not exercise his power to gain advantage to himself as any such gain belongs to the beneficiaries of the trust.<sup>71</sup> The trustee should therefore keep accounts and always be ready to provide them to the beneficiaries at any time. Thus, in *Re Francis*,<sup>72</sup> the trustees were required to account for remuneration which they voted for themselves as directors by virtue of the trust shares, they held. Any payment made to trustee to induce him to act in some ways in connection with the trust business must be held by him as a trust fund. The rationale for this rule is that the trustees have acquired the remuneration by the direct use of their trust powers.

The trustees have duty to inform the beneficiaries about matters affecting the trust. This duty is related to the duty to keep account because the keeping of account enhances access to information. Thus, in order to facilitate the supply of information, a trustee should keep a trust diary or minutes or recorded decisions and events affecting the trust.<sup>73</sup> If a beneficiary asks for information and explanation concerning any dealing with the trust property, this must be provided by the trustee. More so, the beneficiaries are, in the absence of special circumstances, entitled to production and inspection of all trust documents in possession of trustees. These include the deeds and other documents relating to the trust property and the nature and extent of his own beneficial interest.<sup>74</sup> The Beneficiary is also entitled to be given any necessary authority to verify information given and to ascertain that trust property is free from any encumbrances.<sup>75</sup> However, it has been held that trustees exercising a discretionary power are not bound to disclose to the beneficiaries the reasons which form the basis of their decision.<sup>76</sup> This is based on the principle that a trustee's exercise of his powers and discretion cannot be challenged so long as he exercised them in good faith.

However, the rule that trustees exercising power are not bound to give reasons for their decisions to the beneficiaries is questionable. Trustees are under a general duty as fiduciaries to exercise utmost good faith and care in the management of the trust. This duty is owed to beneficiaries for whose benefit they are trustees. If the beneficiaries are not allowed to inspect the documents including minutes of meeting of the trustees to see the reasons of the decision of the trustees, how will the beneficiaries know that the trustees are acting in good faith? It can be submitted that if the trustees have not acted in bad faith, they should have nothing to hide or fear by disclosing the documents that will reveal the motives/reasons for their actions or decisions. After all, the law permits the beneficiary to apply to court to direct the account of the trust to be investigated and audited.<sup>77</sup> In any case, the beneficiaries can determine the trust in whole or in part if they are aggrieved by the manner the trustee administers it. This right can be exercised by the beneficiaries notwithstanding the existence of a discretionary trust if the beneficiaries are *sui juris* and unanimously concur to put the trust to an end.<sup>78</sup>

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<sup>69</sup> *Re Brogden (1888) 38 Ch.D 546.*

<sup>70</sup> (n,1) 20.

<sup>71</sup> (n,19) 326.

<sup>72</sup> (1905) 92 LT 77.

<sup>73</sup> *ibid.*

<sup>74</sup> *ibid.*

<sup>75</sup> *ibid.*

<sup>76</sup> *Re Londonderry's Settlement (1965) Ch. 918, 928.*

<sup>77</sup> Section 20 of the Public Trustee Law of Lagos State, Cap.162, Laws of Lagos State, 1994.

<sup>78</sup> *Aguocha v Aguocha (Supra) 195, paras C-E.*



In the case of charitable trust, the beneficiaries have limited right to request or sue for account and information. Thus, in *Sofolahan v Fowler*<sup>79</sup>, the appellants filed a suit on behalf of their children challenging the manner the school was run as a charitable educational institution. The appellants sought for an order *inter alia* that the respondents file and make accounts for the years 1992, 1993, 1994 and 1995 and a further order that a reputable firm of chartered accountants be appointed to audit annually the accounts of the 2<sup>nd</sup> Respondent (Corona School Trust Council) and any parent/child be entitled to a copy of the audited accounts upon payment of a nominal fee, and the Chairman of the PTA be entitled as of right to a copy of the audited accounts for each financial year. Unfortunately, the matter was struck out on the ground that the 2<sup>nd</sup> respondent is a charitable trust and therefore the appellants cannot seek any of the reliefs. The Supreme Court held that the proper person to sue in respect of charitable trust is the Attorney General. Therefore, the right of persons interested in a charitable trust to obtain account and information in respect of a charitable trust is subject to compliance with the procedure for commencement of such action.

The general rule is that all trustees must act unanimously in order to have a binding effect. For any action of the trustees to be effective, they must act unanimously unless there is a contrary provision in the trust instrument or the court directs otherwise.<sup>80</sup> If the trustees decide to exercise a power therein, decision must be unanimous; there is no possibility of a majority decision being valid. Mr. Jessel, Master of Rolls, said in *Luke v Smooth Kensington Hotel*,<sup>81</sup> 'there is no law that I am acquainted with which enables the majority of trustees to bind the minority' because the action which binds all the trustees is the action of them all'. Consequently, it is only a receipt by all the trustees that will give a good discharge to a purchaser. For example, all the trustees must collectively receive the money unless the trust provides to the contrary. The reason for this is that the trustees must not allow the trust money to get into the hands of one of their number.<sup>82</sup> They must ensure that the money or fund is under the control of them all. If the trustees permit the funds to be under the control of one of their number, that will amount to a breach of trust on their part.<sup>83</sup>

Therefore, under a trust for sale, if the trustees desire to postpone sale of the land, the decision must be unanimous. If the trustees are in disagreement, the power to postpone cannot be exercised, and the duty to sell must be complied with as soon as possible.<sup>84</sup> However, there is an exception to the rule that trustees must act unanimously. The duty to act unanimously does not extend to the discharge of duties; duties have to be carried out and the fact that not all the trustees are agreeable is irrelevant.<sup>85</sup>

The trustee has duty to invest the property so as to make it productive.<sup>86</sup> Of the non-distributive functions, the power and duty of trustees in relation to investment are undoubtedly the most important.<sup>87</sup> Although the Act gives the trustee discretion with regard to investment in shares,<sup>88</sup> it is an imperative duty which a trustee fails or neglects to discharge at the risk of incurring trust liability.<sup>89</sup> Thus, even in the absence of an express provision in the trust instrument, statute or case

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<sup>79</sup> (2002)14 NWLR pt 664; (2002)3 SCNJ 95.

<sup>80</sup> *Cowan v Scargill* (1984) 2 All E.R. 750.

<sup>81</sup> (1879) 11 Ch. 121.

<sup>82</sup> Key, J in *Re Flower* (1884)27 Ch.D 592

<sup>83</sup> R. Edwards and N. Stockwell, *Trusts and Equity* (Fifth edn Pearson Education Limited, 2002)367.

<sup>84</sup> *ibid.*

<sup>85</sup> *ibid.*

<sup>86</sup> (n,6) 203.

<sup>87</sup> Robert Pearce, and John Stevens, *The Law of Trusts and Equitable Obligations* (Fourth edn Oxford University Press Ltd, 2006) 605.

<sup>88</sup> Section 3(1) of the Trustee Investments Act, Cap.T22, LFN, 2004.

<sup>89</sup> L.O.C Chukwu, 'Theoretical Underpinning of Trust Investment Law: Juxtaposing Nigerian Law with Current Trends in other Common Law Jurisdictions' *Annual Survey of International & Comparative Law*,



law, equity imposes a duty on a trustee to invest the trust fund rather than leave it dormant.<sup>90</sup> Equity generally requires from a trustee the same diligence as he shows in his own private affairs while dealing with others. In the case of investment of trust property, he is not allowed the same discretion. The trustees have a duty to exercise such care and skill in relation to investments as is reasonable in the circumstances. A higher standard of care is expected from trustees acting in a professional capacity and where the trustee claims to have special knowledge or experience.<sup>91</sup> In *Re whitely*<sup>92</sup>, Lindley L.J. stated: “the duty of a trustee is not to take such care only as a prudent man would take if he has only himself to consider. The duty rather is to take such care as an ordinary prudent man would take if he were minded to make an investment for the benefit of other people for whom he felt normally to provide”.<sup>93</sup> Therefore, the standard of care in the discharge of duty to invest is objective, and not subjective.

Trustees must select those investments which are authorized either by the express terms of the trust or by law. In this respect, the Trustee Investments Act<sup>94</sup> stipulates that trustees invest in the following: Federal Government securities, State government securities, Securities of companies or corporation incorporated directly by an Act or law and specified in the schedule to the Act, Debentures and fully paid shares of any company incorporated and registered under the Companies and Allied Matters Act, not being a private company. Thus, private limited liability companies are excluded from the list of allowable investments as the investments are limited to companies whose shares are quoted on the stock exchange.<sup>95</sup> However, the shares are registered in the name of the trustee who is the legal owner of the shares while the beneficial owners are the beneficiaries.<sup>96</sup>

The Trustee Investment Act contains provisions, which are designed to ensure that investment is not made in any registered company but only in healthy and viable ones. The power conferred on the trustees by the Act shall not be exercisable unless at the time it is proposed to exercise it, the nominal value of the fully paid-up shares issued by the company is not less than One million Naira, the price of the debenture or shares of the class in question is quoted on the Nigerian Stock Exchange, and in the case of investment in shares of company, dividends have been paid on all shares when the dividends became due.<sup>97</sup> It has thus been submitted that investment of trust property is usually in securities,<sup>98</sup> thereby making it difficult for trustees to invest in real estate.

However, Usman posited that the kind of investments Public Trustee can make is spelt out by the Public Trustee Law, and these include government securities, debentures and fully paid up shares of any company incorporated and registered under the Companies and Allied Matter Act.<sup>99</sup> The position of the learned author is not supported by any provisions of the Public Trustee Law because the type of investment Public Trustee can invest in are contained in the Trustee Investment Act which is a matter within the Exclusive Legislative List of the constitution.<sup>100</sup> More so, Administration of Estate Law empowers the trustees of settlement who have not parted with their land to invest in

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(2017) (22) (1)74.

<sup>90</sup> *ibid* 74-75.

<sup>91</sup> *ibid*, 621.

<sup>92</sup> (1886) 33 Ch.D 347.

<sup>93</sup> (n,68) 36.

<sup>94</sup> Section 2& 3 of the Trustee Investments Act, Cap.T22, Vol.15, LFN, 2004.

<sup>95</sup> D Guobadia, ‘The Creation, Operation and Regulation of Units Trusts’, in, EO Akank, (ed) *Essays on Company Law*. Department of Commercial and Industrial Law, University of Lagos, 1992) 313.

<sup>96</sup> *Kotoye v Saraki* (1994)7 NWLR pt.357, 414, 442-443, paras H-A.

<sup>97</sup> Section 2(2) of the Trustee Investments Act Cap.T22, Vol.15, LFN, 2004. This is similar to section 1 of the Trustee Act of 1893 which section has ceased to operate in Nigeria by virtue of the Trustee Investments Act.

<sup>98</sup> (n,6) 203.

<sup>99</sup> (n,6) 203.

<sup>100</sup> Item 19, Part 1 of the Second Schedule to the Constitution of the Federal Republic of Nigeria,1999 (as amended)



purchasing land.<sup>101</sup> These provisions are inconsistent with the Trustee Investments Act which provides the types of investments trustee can invest in, and thus no Trustee law can provide such types of investments different from what have been provided in the Act.

It can be canvassed that the Trustee Investments Act is unnecessarily restrictive with the result that the trustee will not be able to invest in real property since it is not one of the types of investment permitted by law, and this constitute an obstacle to the Nigerian Trustees desirous of investing in a wide range of portfolios including real estate.<sup>102</sup> However, it has been argued that the Trustee Investment Act grants additional powers of investment to the trustees but the restriction under the Act has affected the extent to which trustees use the additional powers.<sup>103</sup> In any case, the modern trend in the investment power of the trustee is to free him from any restriction on the kind of investment the trustee can make.<sup>104</sup>

The trustee must distribute the trust property whether income or capital to the beneficiaries according to the terms of the trust instrument. Where a trustee pays over to the wrong person, such a trustee has a right to recover the amount of the wrong payment from the recipient.<sup>105</sup> The beneficiary can also trace the amount wrongly paid to another beneficiary.<sup>106</sup> By the equitable doctrine of tracing, an unpaid or underpaid beneficiary may either follow the original asset and enforce his equitable title to it or trace it into the substituted assets in the hand of the trustee or other beneficiaries and enforce a proprietary remedy.<sup>107</sup> However, a trustee who makes an erroneous distribution may be relieved by the court from liability if he acted honestly and reasonably and ought fairly to be excused. However, if trustees are in any doubt concerning the claims of the beneficiaries, they may apply to the court for directions.<sup>108</sup> In such circumstance, the court may make an order<sup>109</sup> authorizing the trustee to distribute the assets of the estate to those beneficiaries who have been ascertained.<sup>110</sup> The purpose of the order is to protect the executors or trustee from liability. However, the order does not prevent any unascertained beneficiary from subsequently coming forward to establish his claim and to proceed against the property itself and not against the executors or trustee personally.<sup>111</sup>

The trustee should not favour one beneficiary at the expense of another. They should act impartially among all the beneficiaries. Where two or more persons are entitled to an interest in the same property, the property should be divided equally, if there is no formula for any other division.<sup>112</sup> In this regard, the trustees must convert wasting property such as households and hazardous investments in order to do justice to all the beneficiaries.<sup>113</sup> An example is that the trustee should act impartial between a life tenant beneficiary, who is entitled to the income out of the trust property and

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<sup>101</sup> Section 2 of the Administration of Estate Law, Cap.1, Laws of Ogun State, 1978.

<sup>102</sup> Chukwu, L.O.C, Theoretical Underpinnings of Trust Investment Law: Juxtaposing Nigerian Law with Current Trends in other Common Law Jurisdictions. *Annual Survey of International and Comparative Law*, (2017) (22) (1) 109-111.

<sup>103</sup> N Ikeyi, 'Is Nigeria's Trustee Investment Act Restrictive or Facilitative?' *Business Law Review*, (2003) (24) (12) 293.

<sup>104</sup> (n,3) 387.

<sup>105</sup> (n,6) 203.

<sup>106</sup> *UBA plc v Wasiu* (2017) NWLR pt.1555, 318.

<sup>107</sup> *UBA plc v Wasiu* (supra) 339, paras C-E.

<sup>108</sup> D.J Bakibinga, *Law of Trusts in Nigeria* (Department of Law, University of Ilorin, 1989)174-175.

<sup>109</sup> It is known as *Benjamin Order* named after the case in which it was first granted.

<sup>110</sup> *Re Benjamin (1902) 1 Ch. 723*.

<sup>111</sup> (n,25) 280.

<sup>112</sup> *ibid*, 62.

<sup>113</sup> (n,19) 322.



the remainder man who is entitled to the capital of the trust.<sup>114</sup>This duty of trustees to maintain equality between beneficiaries underpins the duty to convert.

Trustee has a duty to convert the trust assets into authorized investments such as sale. The duty may be derived from the terms of the trust (e.g. trust for sale) or from statute.<sup>115</sup> This duty is derived from the doctrine of conversion and re-conversion which has been held to be applicable to real property and rents.<sup>116</sup> The purpose of the rule is to be fair and just to the beneficiaries where one beneficiary is a tenant for life and the other a remainder man.<sup>117</sup> If the property consists of wasting asset such as copy right or a lease, “A” will enjoy all the royalties or rents and profit as the case may be but by the time he dies, the copyright might have expired or the lease determined so that “B” will derive no benefit. Thus, in the absence of any contrary intention shown in the trust instrument, trustees have a duty to sell all wasting assets and invest the proceeds in authorized investment, the wasting assets being converted for the benefit of the remainder man.<sup>118</sup>

Thus, it will appear that the properties that can be converted are residual personality and so the rule does not extend to specific bequests or realty or to property passing on intestacy. Where the rule applies, the conversion must be effected within one year of the testator’s death.<sup>119</sup> However, In England, there is no duty to convert leases exceeding 60 years as they are authorized investments<sup>120</sup> but it is probable that the rule applies to shorter leases of land.<sup>121</sup> There is no similar provision in Nigeria on the duty to convert a lease less than 60 years. It can be contended that since the right of occupancy is limited to a number of years, a trustee right of occupancy will have duty to convert it for the benefit of the beneficiaries if the Right of Occupancy is for a period not exceeding 60 years. However, this rule on the duty to convert does not apply where the settlor/testator has expressly excluded the application of the rule. The essence of the duty to convert is to give effect to the presumed intention of the settlor /testator.

The trustee is not entitled to charge for his services or make a profit from the property and thus he is not allowed to put himself in a position where his interest will conflict with his duty.<sup>122</sup>However, some statutes provide for remuneration for trustees, and the court can also order remuneration where it appoints a judicial trustee.<sup>123</sup> This problem thus is how the trustee can determine the remuneration that he is entitled to in some cases? Perhaps, it can be argued that the trustee can apply to court for direction and determination of his entitlement in the management of the trust. Any incidental profit he makes by virtue of the trusteeship will be held on constructive trust for the beneficiaries.<sup>124</sup>

More so, the trustee is absolutely prohibited from purchasing the trust property because of conflict of interest. This principle was illustrated by *Wright v Morgan*<sup>125</sup>where the trustee had acquired an option to purchase trust property at a valuation to be given by another trustee. It might have been thought that the independent valuation would have ensured a fair sale, but the Privy Council was of the opinion that the disability still existed, and more over, the interest of the trustee

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<sup>114</sup> (n,25) 279.

<sup>115</sup> Richard Edwards and Nigel Stockwell, *Trusts and Equity*, (Fifth edn, Pearson Education Ltd, England, 2002) 370.

<sup>116</sup> *Hart v T.S.K.J (Nig.) Ltd* (1998)12 NWLR pt 578,372, 389, paras C-E.

<sup>117</sup> (n,19) 322.

<sup>118</sup> (n,6) 204.

<sup>119</sup> (n,6) 204.

<sup>120</sup> Section 73(1)(xi) of the Settled Land Act, 1925.

<sup>121</sup> (n,115) 371.

<sup>122</sup> *Bray v Ford (1896) A.C. 44 H.L. at p.51.*

<sup>123</sup> Section 1(5) of Judicial trustee Act 1895.

<sup>124</sup> (n, 25) 278.

<sup>125</sup> (1926) A.C. 788.



as vendor and purchaser still conflicted in respect of selecting the right moment of sale, which might obviously affect the price. This rule applies to property of all kinds whether real or personal, whether in possession or in reversion. Similarly, the trustee must not sell to a person who is in fact a trustee for himself, and all other underhand arrangements to achieve the same result are equally invalid.<sup>126</sup>

#### 4. Conclusion/Recommendations

The Trustees hold and manage the property according to the instructions of the settlor, and for the benefit of the beneficiaries. With regard to real properties, the role of the trustees is more onerous and formidable. Thus, the law has made ample provisions for appointment of trustees and have conferred them with powers and duties to ensure efficient management of trust property. The trustees are normally vested with the landed property by the trust instrument or by order of the court appointing a new or additional trustee in order for the trust to be completely constituted. However, the finding of this research is that trustees in Nigeria cannot be trusted to be able to effectively manage real property due to the following lacuna in the law:

Firstly, the laws have not defined the age at which an individual qualifies to be appointed as a trustee to manage real property. This is a gap in the law which affects the qualification of a trustee as a person of full age and consequently determines the legality of such appointment. Unless the age of majority for trustees appointed to manage real properties is defined, it will be difficult to ascertain who an infant is, and the age at which an individual can be qualified to be appointed as trustee. Secondly, the laws have not made specific and adequate provisions for the duties of the trustees. The duties of the trustees are essentially derived from case law some of which rules are no longer relevant to current socio-economic realities. Without adequate statutory provision for the duties of trustees, trustees in Nigeria cannot be trusted with real property management. Lastly, the Trustee Investment Act is outdated and unnecessarily restrictive of the power of the trustees to invest trust property thereby negatively affecting the rate of investment in the real property sub-sector of the economy.

Thus, in view of the above findings of this research, some recommendations are made accordingly. First, it is recommended that the Trustee Act and Trustee Laws be amended to stipulate 18 years as the age of majority for the appointment of trustees so that the laws on appointment of trustees will be uniform in this regard. The age of 21 years provided in section 7 of the Land Use Act should also be amended to make it 18 years. This will be consistent with the provisions of Child Rights Act, and Child Right Laws of various states. Secondly, the trustee laws should be amended to clearly provide for duties of the trustees and consequences for breach of the duties by trustees. The Trustee Act, a statute of general application, should be repealed, and states should enact their own trustee laws to define the duties of trustees. Lastly, the Trustee Investments Act should be amended to give the trustees more opportunities to invest the trust funds for the good of the beneficiaries. In the meantime, trustees desirous of investing in real estate can invest in Real Estate Investment Trusts which are securitised investments in real estate.

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<sup>126</sup> (n,68) 33.