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Theoretical Underpinnings of Trust Investment Law: Juxtaposing Nigerian Law with Current Trends in Other Common Law Jurisdictions

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THEORETICAL UNDERPINNINGS OF TRUST INVESTMENT LAW: JUXTAPOSING NIGERIAN LAW WITH CURRENT TRENDS IN OTHER COMMON LAW JURISDICTIONS

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ABSTRACT

Over the centuries, common law jurists and scholars have propounded theories and principles which underpin the conduct of the investment duty of trustees. This article offers a comparative analysis of the theoretical underpinnings of trust investment law as applicable in Nigeria vis-à-vis the current trends in other jurisdictions. It concludes that the Nigerian law is hopelessly lagging behind and proffers recommendations for reform.

INTRODUCTION

Almost every express trust – whether a private or public trust – requires a trustee to make an investment, even if only to lodge trust funds in an interest-bearing bank account. Right from the earliest times, the duty to invest has always been an intrinsic feature of trusteeship, thus ordinarily requiring no express direction to the trustee. So important is the investment duty that it has an inextricable correlation with most of the other

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duties and powers of a trustee. This is especially true of those trusts whose primary purpose is to confer financial benefits on the beneficiaries. Indeed, the life of virtually all such trusts lies in the prudent discharge of this duty. Dereliction or imprudent execution of the duty has tolled the death knell of many a trust, with disastrous consequences to the beneficiaries and often to the trustees themselves. Usually, the question is not whether a trustee is permitted to make an investment with trust funds, but whether he is permitted to make a particular type of investment. Prudence, however, has always been the watchword for trustee investment practice.

The theoretical underpinnings of trust investment laws over the centuries can be reduced to two doctrines – the "authorized list" principle and "prudent man" rule. In preference to the straitjacket placed on trustees by those traditional trust doctrines, the "modern portfolio theory," which was developed in the second half of the last century, has influenced the virtual enthronement of libertarianism in trustee investment regulation in most common law jurisdictions. This work presents an overview of the general principles guiding trust investment under the Nigerian law, comparing those with the current positions in other jurisdictions which have advanced beyond the primordial doctrines.[1] The presentation is in three parts. Part 1 lays the conceptual and philosophical foundations; Part 2 examines the basic principles governing the exercise of the trustee's duty of investment; while Part 3 bears the concluding remarks.

I. CONCEPTUAL AND PHILOSOPHICAL FOUNDATIONS

A. Nature, Basis and Extent of Trustee's Duty of Investment

The power of a trustee to invest trust funds goes beyond a mere power. It is, indeed, an imperative duty, which a trustee fails or neglects to discharge at the risk of incurring trust liability. Thus, even in the absence of an express provision in the trust instrument, equity imposes a duty on a

1. Although the Nigerian trust investment law is outmoded, as will be demonstrated presently, it is way ahead of the positions in other common law African countries. Even our closest contemporary, Ghana, whose legal development has been practically moving in tandem with ours, has never enacted any local trust investment statute. Rather, it remains stuck with the old English law in force on July 24, 1874, which was foisted upon Ghana and Nigeria by the Supreme Court Ordinance (No. 4), 1876 of Gold Coast and Lagos Colonies.

trustee (except, perhaps, a bare trustee[2]) to invest the trust fund rather than leave it dormant.[3] As Professor Maitland perceptively observed:

> Almost every settlement throws upon the trustees the duty of investing money. And even if there is no express declaration that money is to be invested still it is a general rule that if trustees have money in their hands and are not bound at once to apply it in some other way, *e.g.* in paying it over to the beneficiaries, they ought to invest it and so make it profitable; if they retain it uninvested for a longer time than is reasonable then this will be a breach of trust.[4]

Perhaps, the *fons et origo* of this doctrine is traceable to the *Holy Bible*.[5] Jesus Christ illustrated God's relationship with man with the story of a wealthy man who, upon journeying to a distant land, appointed his servants as trustees of his property. To one he gave five talents,[6] to another two talents, and to the third trustee one talent. The first two trustees traded with their respective trust funds and, when the settlor demanded an account, they turned in double the amounts entrusted to them. The third buried his talent in the ground and, on the day of accounts settlement, he exhumed the same and gave it back to the settlor. His excuse for not investing the trust fund was that he was afraid of his hard and greedy master and so would rather not risk investment with his money. Exasperated, the master retorted: "You wicked and slothful servant! . . . Then you ought to have invested my money with the bankers, and at my coming I should have received what was my own with interest."[7] The two faithful trustees were commended for their prudent stewardship, while the "wicked and slothful" one was not only removed from office but also severely sanctioned.

2. As has been observed, "Because time is essential to sound investment and time is not a feature of a bare trust, a 'bare' trust can, in no meaningful sense, be 'invested'." G. Watt, Trusts and Equity, 401 (Oxford Univ. Press 4th ed. 2010).

3. Stone v. Stone, (1869) 5 Ch.App. 74 (Eng.); New England Trust Co. v. Triggs, 334 Mass. 324, 135 N.E.2d 541 (1956), *aff'd*, 337 Mass. 482 (1958) (U.S.).

4. F.W. Maitland, Equity: A Course of Lectures 99 (A. H. Chaytor & W. J. Whittaker eds., Cambridge Univ. Press 1909).

5. *Matthew* 25:14–30 (Revised Standard); *Luke* 19:11–27 (Revised Standard). By contrast, Professor Yakubu notes that under Islamic law trustees are prohibited from investing trust funds, unless expressly authorized to do so by the trust instrument or the beneficiaries, for Islamic law regards every investment as hazardous. *See* M. Yakubu, *The Standard Duty of Care of Trustees*, *in* The Law of Trusts and their Uses in Nigeria 36 (A. A. Utuama & G. M. Ibru eds., Malthouse Press 2004) 36.

6. Ancient Jewish currency.

7. *Matthew* 25:27; *Luke* 19:23.

Indeed, from the above passage, otherwise known as "Parable of Talents," it would appear that the trust concept has Biblical, rather than English, origins, contrary to the claim of English authorities.[8] Thus, from the passage, at least three fundamental principles of modern trust law relating to the trustee's duty of investment can be distilled. First, it is both an inherent power and a paramount duty of a trustee to invest trust funds, even in the absence of an express direction.[9] Secondly, if he cannot carry out any specified investment or a more productive investment, he should at least deposit the trust funds in an interest-bearing bank account.[10] Thirdly, a breach of trust concerning the investment duty may lead to the removal[11] of a trustee and/or attract penal sanctions[12] upon him. In addition to these sanctions, under the principles of equity, the defaulting trustee may be subjected to a civil liability to pay the interest which the trust fund would have earned,[13] or the difference between the amount returned and the value which a prudent trustee is likely to have turned in (a reliable index being the returns made by the other two trustees).[14]

As a general rule, therefore, a trustee who refrains from investing trust funds in his hands, *ipso facto*, commits a breach of trust. It is no excuse that the trustee decided to err on the side of caution so as to avoid the risk of a loss. A ship in harbor is safe; but that is not what ships are built for. By the same token, money buried in the ground or locked up in a fireproof vault may be secure, but it has no way of multiplying or adding value to life, which is what money is meant for. It may even depreciate in real value over time as a result of inflation, devaluation or other economic vagaries. Moreover, money buried in the ground or stored in the house can be eaten up by termites (if it is paper currency) or stolen; in either case, the trustee will be liable to make good the loss to the beneficiaries.[15] On the contrary, if a trustee, acting as an ordinary prudent man, properly invests trust funds, he will not be held liable for any resulting

8. The earliest trace of the origin of the common law, which was the precursor of equity, was after the Norman Conquest of 1066 A.D., and uses, the forebears of the modern trusts, did not emerge until about the 14th century. *See* F.W. MAITLAND, *supra* note 4, at Lectures I–III.

9. There is no indication in Matthew's account that the trustees were expressly directed to invest the trust funds. By Luke's account, however, they were so directed. *See Luke* 19:13.

10. *Ex p. Belchier* (1754) Amb. 218; 27 E.R. 144; *Ex p. Kingston* (1871) 6 Ch. App. 632.

11. *Matthew* 25:28; *Re Smith* (1971) 18 D.L.R. (3d) 405; *Estate of Cooper*, 913 P. 2d 393 (1996).

12. *Matthew* 25:30; Pension Reform Act, 2014, Pt. XIV; Criminal Code, § 434; Penal Code, § 311 (criminal breach of trust).

13. Pride v. Fooks, (1840) 2 Beav. 430; Wallersteiner v. Moir (No. 2), [1975] Q.B. 373 at 397 (Eng.).

14. Nestle v. National Westminster Bank plc, [1994] 1 All E.R. 118 at 138 (Eng.).

15. Caffrey v. Darby, (1801) 6 Ves. Jr. 488 at 496; Cann v. Cann, (1884) 33 W.R. 40 (Eng.).

loss, for there is inherent in every investment the risk of a possible loss, however prudent the investor might be.[16]

Indeed, the rationale for casting upon a trustee an inflexible duty to invest is not hard to demonstrate. There may be, as is often the case, expenses and liabilities to settle out of the trust estate. Leaving the trust fund idle will entail defraying those outgoings from the capital whereby it would be dissipated over time, leaving little or nothing for the beneficiaries. Furthermore, the nature of the trust property or the different classes of beneficiary may make it imperative for the trustee to invest or sell and re-invest the assets. Where the trust estate or part of it consists of fungibles or other wasting assets, it is the trustee's duty to exercise special care to preserve such assets and, if it becomes impracticable or imprudent to retain them without considerable risks of deterioration or depletion, he must realize them and re-invest the proceeds. If, for example, the trust asset is a poultry-farm and there is an outbreak of avian influenza in the neighborhood, should the trustee leave the chickens with the impending danger of all of them being consumed by the influenza? Of course, he cannot be heard to say "I know that the poultry are dangerously threatened by the ravaging influenza, but I am helpless because there is no express direction for me to sell them." Clearly, that will be tantamount to what one learned commentator termed "a pusillanimous abdication of responsibilities in the modern world."[17] Acting as an ordinary prudent man of business, the trustee ought to sell off the chickens. And, if he does so, he must not bury the proceeds, like the "wicked and slothful" trustee in the Parable of Talents, or store the money under his mattress, like one-time Governor of Kano State who earned an infamous reputation for "keeping Government money in Government House." Unless the trust has come to an end, or he is bound at once to apply it in some other way, he is under a duty to invest the proceeds of the sale.

B. Meaning of Investment

It appears that there is no statutory definition of the term "investment" under both the Nigerian and English laws. However, a judicial definition can be found in the English case of *Re Wragg*,[18] where P. O. Lawrence, J., (as he then was) stated that one of the meanings of investment is "to apply money in the purchase of some property from which interest or

16. Speight v. Gaunt, (1883) 22 Ch.D. 727 at 739–40; Bartlett v. Barclays Bank Trust Co. Ltd, [1980] 1 All E.R. 139 at 150 (Eng.).

17. Lord Nicholls of Birkenhead, *Trustees and Their Broader Community: Where Duty, Morality and Ethics Converge*, 9 *Trust Law International* 71, 73 (1995).

18. [1919] 2 Ch. 58 at 64–65 (Eng.). *See also* Re Somerset, [1894] 1 Ch. 231 at 247 (Eng.).

profit is expected, and which property is purchased in order to be held for the sake of the income which it will yield."[19] Watt defines investment in terms similar in substance to those of P. O. Lawrence, J. with the distinction that he substituted the phrase "direct financial returns" for the word "income" in the judicial definition.[20] In the words of the learned author: "An investment is something that is acquired in the expectation that it will produce profit in the form of direct financial returns."[21] From the above definitions, it can be said that whether or not the acquisition of an asset or a product is an investment depends on the purpose of acquisition. Thus, property which is acquired merely for use and enjoyment is not an investment.[22] For instance, the purchase of a car is an investment for a cab operator, but not for a private owner who uses it merely for pleasure.

Perhaps, the "purpose of acquisition theory" will be better appreciated by contrasting the following two English cases. In *Re Wragg*,[23] the investment clause contained in the trust instrument was held to authorize the purchase of real property for the sake of the income that it would yield. By contrast, in *Re Power's Will Trusts*,[24] it was held that a power to invest in the purchase of freehold property did not authorize the purchase of freehold house with vacant possession for the beneficiaries to occupy. Distinguishing the facts of *Re Wragg*, Jenkins, J., observed that "there is a distinction between purchasing freehold property for the sake of the income which will be obtained from it and purchasing freehold property to occupy it."[25]

Hanbury and Martin stated that "premium bonds and chattels, such as antiques or silver, are not investments for this purpose."[26] This statement, however, seems to take no cognizance of the purpose of acquisition theory.[27] For the acquisition of antiques and silver, it is respectfully submitted, could be an investment in the hands of a curator or an antique

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19. A similar definition was furnished in the American case of *Securities and Exchange Commission v. Wickham DC*, Minn. 12 F. Supp. 245, 247, in the following words: "An investment is the placing of capital or laying out of money in a way intended to source income or profit from its employment."

20. G. WATT, LAW OF TRUSTS 268 (Blackstone Press 3d ed. 2001).

21. *Id.*

22. Re Peczenik's Settlement Trusts, [1964] 2 All E.R. 339 at 341 (Eng.).

23. Re Wragg, [1919] 2 Ch. 58 (Eng.).

24. Re Power's Will Trusts, [1947] 2 All E.R. 282 (Eng.).

25. *Id.* at 283.

26. J. E. MARTIN, MODERN EQUITY 540 (Sweet & Maxwell 17th ed. 2005). For a similar view, see also J. G. RIDDALL, THE LAW OF TRUSTS 350 (Oxford Univ. Press 6th ed. 2002).

27. Nor does it take account of the modern portfolio theory which, as we shall see shortly, emphasizes the evaluation of the investment portfolio holistically rather than on an asset-by-asset basis.

dealer, though not so in the hands of a pastime collector. Whether such an investment, if not otherwise prohibited, is a suitable trust investment depends on the circumstances of the trust including its object and likely duration.[28] For instance, trustees of a museum may invest in famous antiques and curios knowing that a substantial collection of such will enhance patronage of the museum which, in turn, will have a direct impact on its income. In *The Modern Law of Trusts*, authors Parker and Mellows stated the position quite incisively in the following words: "Over the last few years trustees have invested in works of art, antique furniture, silver, silver bullion and oriental carpets. Almost invariably these are unsuitable as investments unless the trustees have considerable freedom of choice as to the time of disposal . . . ."[29] Underhill and Hayton are even more assertive in stating that "the purchase of a valuable painting or a rare stamp or antique desk that the trustees believe to have a good chance of capital appreciation will be an investment."[30]

If anything is clear from the authorities, it is that to qualify as an investment, the asset or product must be acquired with a view to producing direct financial returns to the trust estate. However, it does not seem as yet settled the form which the *direct financial returns* should take, that is, whether in the form of income or capital appreciation or both. This question did not arise in *Re Wragg* where, at any rate, the investment in issue was capable of producing both income and capital growth. It would, accordingly, be naive to assume that by using the word "income" the learned judge meant to exclude capital growth as a legitimate expectation of trust investment. Moreover, as a preface to his definition of the term 'investment', P. O. Lawrence, J., had stated it "to include as one of its meanings"[31] the above-quoted words, thus admitting the possibility of other meanings. Proceeding further in the same judgment, the learned judge also stated that "in ordinary parlance real estate is spoken of as an investment if bought in order to be held for the sake of the income or *profit*[32] accruing from it."[33] Surely, the word "profit" denotes either or both income and capital appreciation upon realization of the investment.

28. Interestingly, an option to acquire or dispose of gold or silver is listed as an investment in the Second Schedule to the Investments and Securities Act (2007).

29. A. J. OAKLEY, THE MODERN LAW OF TRUSTS 678 (Sweet & Maxwell 9th ed. 2008).

30. UNDERHILL & HAYTON, LAW RELATING TO TRUSTS AND TRUSTEES 738 (D. Hayton et al. eds., LexisNexis Butterworths 17th ed. 2007). *See also* G. WATT, TRUSTS AND EQUITY, *supra* note 2, at 413.

31. Re Wragg, [1919] 2 Ch. 58 at 64–65; [1918-19] All E.R. Rep. 233 at 237 (Eng.).

32. Italics supplied for emphasis.

33. Re Wragg, [1919] 2 Ch. 58 at 64–65; [1918-19] All E.R. Rep. 233 at 237 (Eng.).

Nevertheless, the orthodox English rule,[34] which was imported into Nigeria,[35] is that a trust investment must have the prospects of producing income. The rationale for this rule is not difficult to comprehend when it is recalled that historically the law of trusts developed largely in the context of family settlements where there were life tenants (sometimes concurrent or successive ones) and remaindermen, both of whom had competing interests in income and capital. Thus, where there are such competing interests, an investment that produces little or no income, but only capital growth, will unduly favor the remaindermen at the expense of the life tenants. Conversely, an investment that yields a high rate of income because the capital is either wasting away or insecure would be detrimental to the remaindermen. The courts are apt to strike down either investment for not only being inequitable, but also a breach of the trustee's duty to hold the scales evenly between the beneficiaries of income and capital. For this reason, originally, trustee securities consisted of fixed-interest bonds and gilt-edged securities, which have the dual benefits of both the yield of income and maintenance of capital value (at least in nominal terms).

More often than not, investors in the real estate and capital markets earn higher returns in the form of capital appreciation than income. This point is particularly crucial in a period of high inflation (such as the present situation in Nigeria) when the real value of income is substantially depreciated. In the modern investment practice, accordingly, the trend is to have an investment portfolio that would produce an appropriate balance between income and capital appreciation. It is no longer satisfactory, in the light of modern economic realities and investment techniques, to define investment by reference to the prospects of income production simpliciter. The better view, therefore, seems to be as expressed by Megarry, V-C, in *Cowan v. Scargill*,[36] where he stated that the trustees' investment power "must be exercised so as to yield the best return for the beneficiaries, judged in relation to the risks of the investment in question and

34. The English law seems to have been substantially altered, first, as a result of the modern portfolio theory which has since been judicially endorsed there and, secondly, by virtue of the Trustee Act, 2000, which has practically done away with what was hitherto known as the "authorized list" of trustee securities and now permitted trustees to invest as if they were absolute beneficial owners of trust funds.

35. Similarly in the United States, see S. E. Sterk, *Rethinking Trust Law Reform: How Prudent is Modern Prudent Investor Doctrine?*, 95 CORNELL L. REV. 851, 881 (2010).

36. [1985] Ch. 270 at 287. *But see* Harries v. Church Commissioners for England, [1993] 2 All E.R. 300 at 304 (Opinion of Nicholls, V-C.) (regarding income production and capital growth as alternative criteria for judging the success of a trust investment) (Eng.). *See also* Cook v. Medway Housing Society, [1997] S.T.C. 90 at 98 ("[Investment is the] laying out of money in anticipation of a profitable capital or income return.").

the prospects of the yield of income and capital appreciation, both have to be considered in judging the return from the investment." This statement appears to represent the current policy direction in England[37] as well as the philosophical underpinning of the United States Uniform Prudent Investor Act.[38] Indeed, the Law Reform Commission for England and Wales has recommended long-term reforms that would enable trustees to operate "total return" investment (e.g. ., investment that disregards the distinction between income and capital).[39] Likewise, the Nigerian Law Reform Commission, in its draft Trustee Bill,[40] has proposed the following definition: "Investment includes but (sic) not limited to assets from which a profit or income is expected." In the search for an apposite definition, perhaps it bears reward to consider the following proposition: *Investment means any property or product which is acquired in reasonable expectation of direct financial returns in the form of income or capital appreciation or both*.

II. GENERAL PRINCIPLES GUIDING TRUST INVESTMENT

A. Higher Standard of Care Required Than in the Discharge of Other Duties[41]

Traditionally, the general standard of stewardship required of a trustee in managing trust affairs is to exercise all such care and caution as an ordinary prudent man would exercise in managing similar affairs of his own.[42] In the exercise of his investment powers, however, a higher standard of care, skill and prudence is required of a trustee under the rules developed by the courts of equity.

In selecting an investment, the very first thing that a trustee should consider is whether it falls within the classes of investments authorized by the terms of the trust or the general law, for under the extant legislation

37. *See, e.g.*, Law Reform Commission, Law Commission Consultation Paper 175, Capital and Income in Trusts: Classification and Apportionment, para. 1.3 (2004); Trustee Act, 2000, Notes 22 and 23 of the Explanatory Notes (Eng.).

38. Promulgated by the Uniform Law Commission in 1994, drawing upon the Restatement (Third) of the Law of Trusts: Prudent Investor Rule (1992).

39. Law Reform Commission, Law Commission Report 315, Capital and Income in Trusts: Classification and Apportionment, para. 5.104 (2009).

40. Nigerian Law Reform Commission, Report on the Reform of Trustee Investment[s] Act 47–58 (2011).

41. In England, section 1 of the Trustee Act, 2000 has established a well-defined statutory duty of care applicable to trustees when performing their functions under the Act, drawing no distinction between the performance of trustees' investment duty and other duties.

42. Speight v. Gaunt, (1883) 9 App. Cas. 1 at 19 (Eng.); Learoyd v. Whiteley, (1887) 12 App. Cas. 727 at 733 (Eng.); Harvard College v. Amory, 26 Mass. 9 Pick. 446, 461 (1830) (U.S.).

and rules of equity applicable in Nigeria,[43] a trustee does not have the same latitude as an absolute owner investing his own funds.[44] Thus, for example, in this country, unless expressly authorized by the terms of the trust, a trustee must not invest in the securities issued by a private company.[45] But a prudent businessman may, and often would prefer to, invest in the shares of a private blue-chip company that offers both the prospects of a higher return and opportunity of his participating in the control of the business. Where, however, a trustee is authorized to invest in a private company and he happens to acquire a controlling interest in such a company, the ordinary prudent man standard entails that:

> He does not . . . content himself with such information as to the management of the company's affairs as he is entitled to as a shareholder, but ensures that he is represented on the board. He may be prepared to run the business himself as managing director or, at least, to become a non-executive director while having the business managed by someone else. Alternatively, he may find someone who will act as his nominee on the board and report to him from time to time as to the company's affairs.[46]

In the English case of *Re Lucking's Will Trusts*,[47] the trust estate held majority shares in a private company. The sole trustee, who was also one of the beneficiaries of the trust, appointed his trusted friend as managing director of the company, but he failed to supervise adequately the drawings of the managing director. As a result, the company and, by extension, the trust estate lost a substantial amount upon the managing director's bankruptcy. Cross, J., applying the ordinary prudent man test, held that by failing to supervise adequately the managing director, the

43. In England, the law has been altered by section 3 of the Trustee Act, 2000 which authorizes a trustee to make any kind of investment that he could make if he were absolutely entitled to the trust assets. The only type of investment that still requires express authorization by the trust instrument is investment in interests in land other than mortgages, freeholds and leaseholds. Similarly, in the U.S., all categoric restrictions on types of trustee investments have been abolished by the Uniform Prudent Investor Act, section 2(e) (1994), 7B U.L.A. 16 (Supp. 1995).

44. For the statutory list of authorized trustee securities, see the Trustee Investments Act, Cap. T22, Laws of the Federation of Nigeria (LFN) 2004 (Nigeria). *See also* Learoyd v. Whiteley, (1887) 12 App. Cas. 727 at 733 (including statements by Lord Watson on the prudent man rule as controlling the actions of a trustee generally, who added the following rider: "Yet he is not allowed the same discretion in investing the moneys of the trust as if he were a person *sui juris* dealing with his own estate.") (Eng.).

45. Fasel Services Ltd v. Nigerian Ports Authority, [2003] 8 N.W.L.R. (Pt. 821) 73, C.A., *aff'd*, [2009] 9 N.W.L.R. (Pt. 1146) 400, S.C.

46. Re Lucking's Will Trusts, [1967] 3 All E.R. 726 at 733 (Cross, J.) (Eng.).

47. *Id.*

trustee had failed in his duty to the trust estate, for which he was liable to the other beneficiaries for the loss occasioned thereby.

Similarly, in *Bartlett v. Barclays Bank Trust Co. Ltd*,[48] Brightman, J., in holding that the bank had breached its trust by failing to supervise adequately the management of a private company in which the trust had a 99.8% shareholding, echoed the above-quoted prudential guidelines propounded by Cross, J. His lordship, however, cautioned that those guidelines should not be construed as imposing on trustees holding majority shares in a company an inviolable obligation to have one of them or a nominee on the board of the company. What is required is that a trustee majority shareholder must take such steps as the circumstances of each case may dictate to *supervise adequately* the running of the affairs of the company.[49] Even, as the facts of *Re Lucking's Will Trusts* itself illustrate, merely being nominally on the board of the company or obtaining relevant information will be fruitless if not used to protect the interests of the beneficiaries. The trustee investor ought to take active interest in the management of the company for, among ordinary prudent businessmen, it is axiomatic that where your treasure is, there will your heart be also.

Moreover, a trustee investor is under a duty to examine information likely to bear importantly on the value or security of an investment such as audit reports or records of title. Thus, in the American case of *Estate of Collins*,[50] trustees who lent money on a junior mortgage on unimproved real estate, failed to obtain a surveyor's valuation of the property and accepted an unaudited financial report were held liable for the resulting loss. This duty has now been enacted by section 2(d) of the United States Uniform Prudent Investor Act which reads: "A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets."

Furthermore, the risk potential of a particular type of investment may make it an unauthorized trustee investment. Thus, a trustee is traditionally required to spurn any investment in wasting or hazardous assets or in speculative ventures.[51] By contrast, for an ambitious businessman deal-

48. Bartlett v. Barclays Bank Trust Co. Ltd, [1980] 1 All E.R. 139 (Eng.).

49. "Alternatives which spring to mind are the receipt of the copies of the agenda and minutes of board meetings if regularly held, the receipt of monthly management accounts in the case of a trading concern, or quarterly reports." *Id.* at 151. *See, e.g.*, Re Miller's Trust Deed, (1978) 75 L.S. Gaz. 454 (discussing one of the trustees was a member of a firm of accountants which acted as auditors for the company).

50. 72 Cal. App. 3d 663, 139 Cal. Rptr. 644 (1977) (U.S.).

51. Learoyd v. Whiteley, (1887) 12 App. Cas. 727 (Eng.); King v. Talbot, 40 N.Y. 76 (1869) (U.S.).

ing with his own funds, he may adopt as a guiding principle "the higher the risk, the higher the expected return on investment." Indeed, Gary Watt puts it more pithily thus: "If the motto of the private investor is 'speculate to accumulate', the motto of the trustee investor is 'select to protect.'"[52] However, that does not mean that the trustee is bound to avoid all risk and in effect act as an insurer of the trust fund. "The distinction is between a prudent degree of risk, on the one hand, and hazard on the other."[53] Ordinarily, those investments which have low risk quotient are apt to produce lower income to the detriment of income beneficiaries. It is, therefore, advisable for a trustee to take a middle course between the ultra-secure and ultra-hazardous investments because going by either of the two extremes would render him vulnerable to attack by one class of beneficiaries or the other.[54]

To sum up, a classic statement of the equity rule which was made by Lindley, L.J., in *Re Whiteley*[55] is still as relevant in Nigeria today as it was in England in 1886 when it was pronounced. There, the Lord Justice stated thus:

> Care must be taken not to lose sight of the fact that the business of the trustee, and the business which the ordinary prudent man is supposed to be conducting for himself, is the business of investing money for the benefit of persons who are to enjoy it at some future time, and not for the sole benefit of the person entitled to the present income. The duty of a trustee is not to take such care only as a prudent man would take if he had 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 morally bound to provide.[56]

Whilst the ordinary prudent man test is the standard of care required of trustees generally, the standard may be raised in the case of a paid pro-

52. WATT, LAW OF TRUSTS, *supra* note 20, at 283.

53. *Bartlett*, 1 All E.R. 139 at 150 (Brightman, J.) (Eng.).

54. Lord Nicholls of Birkenhead, *supra* note 17, at 76, however, cautions that these equitable principles "are not to be read as inhibiting trustees from maintaining portfolios of investments which contain a prudent and sensible mixture of low-risk and higher risk securities. They are not to be so read, because they were not directed at a portfolio which is a balanced exercise in risk management."

55. (1886) 33 Ch. D. 347 at 355, C.A.; *aff'd sub nom.* Learoyd v. Whiteley, (1887) 12 App. Cas. 727, H.L (Eng.). Arguably, the progenitor of this prudent man test of a trustee's investment strategy was the American, Putman, J., in *Harvard College v. Amory*, 26 Mass. 9 Pick. 446, 461 (1830).

56. *Id.*

fessional trustee. For "a paid trustee is expected to exercise a higher standard of diligence and knowledge than an unpaid trustee, and . . . a bank which advertises itself in the public press as taking charge of administrations is under a special duty."[57] In principle, however, it appears that it is the acclaimed professionalism of a trustee more than his remuneration that provides the basis for raising the standard of care required of him.[58] Clearly, it is the fact that a trustee is a professional who, in the ordinary course of business, is paid for rendering similar services to his clients that justifies his being remunerated for what is ordinarily a gratuitous office under the Anglo-Nigerian law.[59] Thus, in *Bartlett v. Barclays Bank Trust Co. Ltd*, Brightman, J., again, had this to say:

> I am of opinion that a higher duty of care is plainly due from someone like a trust corporation which carries on a specialised business of trust management. A trust corporation holds itself out in its advertising literature as being above ordinary mortals. With a specialist staff of trained trust officers and managers . . . the trust corporation holds itself out, and rightly, as capable of providing an expertise which it would be unrealistic to expect and unjust to demand from the ordinary prudent man or woman who accepts, probably unpaid and sometimes reluctantly from a sense of family duty, the burdens of a trusteeship. . . . so I think that a professional corporate trustee is liable for breach of trust if loss is caused to the trust fund because it neglects to exercise the special care and skill which it professes to have.[60]

57. Re Waterman's W.T., [1952] 2 All E.R. 1054 at 1055 (Harman, J.) (Eng.). *See also* Bray v. Ford, [1896] A.C. 44 at 51; Steel v. Wellcome Custodian Trustees Ltd, [1988] 1 W.L.R. 167; Re Cooper (No. 2) (1978) 90 D.L.R. 3d 715 (Eng.). Compare Jobson v. Palmer, [1893] 1 Ch. 71, where Romer, J., did not consider remuneration in itself as a sufficient ground for raising the standard of care.

58. This underlying principle is now statutorily enacted in section 1 of the English Trustee Act, 2000 which, *ex facie*, takes no account of remuneration. However, according to Part V of the Act, professional trustees are presumed to be entitled to remuneration, unless the trust instrument otherwise provides. See also note 13 of the Explanatory Notes which accompany the Act. In the U.S., a corporate or professional trustee is held accountable under the "special investment skills standard" and protection from liability depends upon the trustee's ability to prove that he has met the elevated Uniform Prudent Investor Act (s. 2(f)) standards. *See* K. Ziesenheim, Guidelines for Advisors on the Uniform Prudent Investor Act, *available at* http://www.thornburginvestments.com (last visited Mar. 19, 2012).

59. Whereas in England and Nigeria, the individual trustee receives no compensation for his work, unless it is otherwise authorized by the trust instrument, the court or the beneficiaries, in the U.S., he is generally entitled to compensation unless he agrees to forgo it.

60. [1980] 1 All E.R. 139 at 152 (Eng.).

It is worth reiterating, all the same, that the engagement into which corporate trustees, as all other trustees, enter is not one of insurance.

Again, it should be stressed that the ordinary prudent man test is an objective one and represents the irreducible minimum standard of care below which the conduct of any trustee must not fall. The subjective characteristics of a trustee, that is, whether he is a professional or an amateur, should be considered only in order to raise, but never to lower, the bar. It is on this premise that the approach adopted by Maugham, J., (though not his ultimate decision) in the English case of *Re Vickery*[61] has been trenchantly criticized.[62] In that case, the learned judge applied a subjective standard to an executor-trustee, who employed a solicitor to wind up the estate, unaware of the fact that the solicitor had twice been suspended from practice. True to form, the solicitor absconded with the trust funds. The judge held that the trustee had not breached his duty of care, taking into consideration the fact that he was "a missionary ignorant of business affairs."

Consistent with such reasoning, one learned writer has recommended a subjective standard of care for unpaid amateur trustees.[63] This approach, it is submitted, goes against the grain of legislative[64] and academic thinking not only in England, but also in other jurisdictions such as the United States and Australia. As Professor Scott[65] once said of the American law, "The standard fixed for the conduct of trustees is an external or objective standard. He must at his peril exercise the care and skill and caution that a prudent man would exercise under the circumstances." Remarkably, the current standard of care set out in section 1 of the English Trustee Act, 2000 and in section 2(a) of the United States Uniform Prudent Investor Act still prescribes an objective test. In the case of the former, a trustee must exercise *such care and skill as is reasonable in the circumstances*, while the latter requires a trustee, in satisfying the standards of a

61. [1931] 1 Ch. 572. *Cf.* Wohlleben v. Canada Permanent Trust Co. (1976) 70 D.L.R. 3d 257 at 275; Evans v. Westcombe, [1999] 2 All E.R. 777 at 787–88 (noting that, in relieving a trustee of trust liability, she "was a lay person unaccustomed to problems of this nature who was at all times willing to abide by the advice of solicitors.") (Eng.).

62. See WATT, LAW OF TRUSTS, *supra* note 20, at 224–25 and other authorities cited therein. Millett, L.J. (as he then was), however, disassociates himself from the criticisms in *Armitage v. Nurse*, [1998] Ch. 241 at 252.

63. D. R. Paling, *The Trustee's Duty of Skill and Care*, 37 CONV. 48–59 (1973).

64. *See, e.g.*, Trustee Act, 2000, § 1, sch. 1, para. 1 (Eng.); UNIF. PRUDENT INVESTOR ACT, § 2(a) (1994) (U.S.); RESTATEMENT (THIRD) OF THE LAW OF TRUSTS: PRUDENT INVESTOR RULE § 227 (2007) (U.S.); *Trusts Act 1973* s 22(1) (Austl.).

65. A. W. SCOTT, ABRIDGMENT OF THE LAW OF TRUSTS 435 (Little, Brown & Co. 1960). See also where the distinguished author stated thus: "If [a trustee] is in a position to do better than the ordinary man, it is not enough to do what the ordinary man would do." *Id.* at 343.

prudent investor, to exercise *reasonable care, skill and caution*. The better view, therefore, seems to be as expressed by Professor Watt who, in analyzing the current English statutory provision, states as follows:

> [T]he new duty of care resolves the uncertainties of the old cases. There can now be no doubt that *Re Vickery* is bad law, that trustees should never be judged according to their own subjective *opinions* as to what constitutes prudent behaviour. Having said that, the statutory 'duty of care', whilst objective, is nevertheless one which is variable according to the subjective *characteristics* of the trustee. Factors which might lead to a stricter standard would include the trustee's experience and expertise (professed or real).[66]

This proposition consorts with the qualifications contained in section 1(a) and (b) of the English Trustee Act, 2000 as well as in section 2(f) of the Uniform Prudent Investor Act to the effect that a trustee who has special skills or expertise, or is appointed a trustee in reliance upon his representation that he has special skills or expertise, has to be judged by a higher standard.[67] Accordingly, since the standard of trustee prudence is relational, it follows that professional trustees are to be judged by the standard of prudent professionals; whereas amateurs will be judged by the standard of prudent amateurs.

In the United States, the same standard of care and prudence as aforesaid is also imposed on pension fund trustees.[68] In Nigeria, it is instructive to note that the statutory duty of care imposed by section 69(b) of the Pension Reform Act, 2014 on pension fund administrators and custodians simply requires them to exercise *reasonable care*. However, being professional corporate trustees who by themselves canvass for their engagement, it is submitted that they are subject to a higher standard of skill and caution than the ordinary prudent man under the equitable jurisprudence.

B. Even-Handedness as Between the Beneficiaries

In most cases, trusts are created for the benefit of present and future beneficiaries. In such cases, there is usually a life tenant who is entitled

66. Watt, Law of Trusts, *supra* note 20, at 225; *see also* Watt, Trusts and Equity, *supra* note 2, at 366–67; Underhill & Hayton, *supra* note 30, at 1124.

67. *See also Trusts Act 1973* s 22(1) (Austl.).

68. *See* Employee Retirement Income Security Act of 1974 § 404(a)(1)(B), 29 U.S.C. § 1104(a) (2008). Note that section 2(f) of the Uniform Prudent Investor Act applies to all fiduciaries.

to the income of the trust property and, upon his death, the capital would pass to the remaindermen. Where there are such different classes of beneficiaries, the trustee is under a paramount duty to act impartially or maintain an even hand as between the life tenant and remaindermen.[69] The duty is by no means restricted to cases where there are successive beneficiaries; it applies equally where the competing interests of the beneficiaries run concurrently.[70] This principle of impartiality, which is an offshoot of the duty of loyalty to the beneficiaries as a whole, is aimed at ensuring that no beneficiary or class of beneficiaries gets an undue advantage or more than their fair share of the trust assets at the expense of the others. However, as one learned commentator wittily observes, "treating beneficiaries impartially is often a practical nightmare for trustees."[71] Be that as it may, it has also been noted that:

> Impartial treatment does not mean equal treatment, but it is problematic to pronounce other broad definitions of impartial treatment. Rather, the requisites of impartiality are fact-based and determined on a case-by-case basis. Consequently, a trustee seldom can be assured in advance that a certain investment policy will in fact be considered impartial if any beneficiary complains.[72]

The duty of impartiality has far-reaching implications on trustee investment, the key aspects of which need to be expounded.

1. Choice of Investment

Where the trustee has the discretion to select investments, he must exercise such discretion in a manner that is fair to all the beneficiaries. He must, accordingly, select such an investment or (in line with the current global best practice) investment portfolio as would produce reasonable income for the life tenant as well as maintain the value of the capital for

69. Re Tempest, (1866) L.R. 1 Ch. App. 485 at 487; Nestle v. National Westminster Bank Plc, [1994] 1 All E.R. 118; Edge v. Pensions Ombudsman, [2000] Ch. 602. In the U.S., the trustee's duty of impartiality in the investment and management of trust assets has been codified by section 6 of the Uniform Prudent Investor Act. In England, the Law Reform Commission Report 315 (May 7, 2009) on *Capital and Income of Trusts: Classification and Apportionment*, has proposed that there should be imposed on trustees a new flexible statutory duty to balance the interests of income and capital beneficiaries.

70. Lloyds Bank Plc v. Duker, [1987] 3 All E.R. 193; X v. A, [2000] 1 All E.R. 490 (Eng.).

71. S. A. Medlin, *Limitations on the Trustee's Power to Adjust*, 42 REAL PROP., PROB. & TR. J. 717, 728 (2008).

72. *Id.* at 723. See also Nestle v. National Westminster Bank Plc, [1988], unreported but transcribed in [1996] 10 (4) T.L.I. 112 at 115 (Eng.).

the benefit of the remainderman.[73] As Cotton, L.J., stated in *Re Whiteley*,[74] "Trustees are bound to preserve the money for those entitled to the *corpus* in remainder, and they are bound to invest it in such a way as will produce a reasonable income for those enjoying the income for the present." Thus, for example, in the English case of *Raby v. Ridehalgh*,[75] it was held that a trustee, in exercising his investment powers, ought not to unduly favor the life tenant, even though the investment yielded a high return. And, in the American case of *Estate of Cooper*,[76] a trustee was removed for excessively favoring income production over capital appreciation. Conversely, in the Canadian case of *Re Smith*,[77] a trustee was held to be under a duty to re-invest where authorized shares were producing low dividends because of the company's policy to pursue capital growth. Such an investment was unfair to the income beneficiary, but favorable to the contingent beneficiary. The trustee was removed from office for a breach of his duty to hold the scales evenly between the beneficiaries.

An excellent illustration of how far the courts can go in enforcing this duty of impartiality is afforded by the New Zealand case of *Re Mulligan (deceased)*.[78] In that case, the testator died in 1949, leaving his widow a substantial legacy and a life interest in a farm. The widow and a trust corporation were appointed trustees of the estate. The trustees sold the farm in 1965 and invested the proceeds in fixed-interest securities until the widow died in 1990. The trust corporation had, between 1965 and 1990, tried to persuade the co-trustee/life tenant to invest in equities so as to counter inflation, but she understandably demurred. Of course, the investment favored her at the expense of the contingent beneficiaries. Upon the estate capital being substantially depreciated in value, the trust corporation was held to be in breach of trust because it had become cognizant of the depreciatory effect of inflation on the capital and yet pandered to the wishes of the life tenant.

Under the current global economic climate, the position of trustees vis-à-vis the choice of investments is an unenviable one. Professor Pettit captures the quagmire in the following words:

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73. Nestle v. National Westminster Bank Plc, [1994] 1 All E.R. 118 (Eng.).
74. (1886) 33 Ch.D. 347 at 350 (Eng.).
75. (1855) 7 De. G.M. & G. 104; 44 E.R. 41 (Eng.).
76. 913 P.2d 393 (1996) (U.S.).
77. (1971) 16 D.L.R. 3d 130; on appeal (1971) 18 D.L.R. 3d 405 (Can.).
78. [1998] 1 N.Z.L.R. 481 (N.Z.).

> In the present investment situation, the position of trustees is not easy. The sort of investment that will produce a high rate of interest that will suit the life tenant is likely to be fixed-interest investment, the real value of which may well be eroded by inflation by the time that the remaindermen come into possession, while equities that it is hoped will show a capital appreciation and thus safeguard the position of remaindermen may not produce a high enough rate of interest to satisfy the tenant for life.[79]

Indeed, the dilemma of Nigerian investors is further accentuated by the notorious fact that interest rates are currently at an abysmal trough while, at the same time, there has been a cataclysmic crash in the stock market. As at the time of writing, most equity investments in Nigeria could afford neither capital appreciation nor appreciable dividends, if any dividend at all. Thus, the investment climate is so fraught that any trustee who assumes the uneasy task of making trust investments at the moment may be tempted to say Jesus' last prayer at Gethsemane before he was given up to his murderers: "Lord, if it be possible, let this cup pass from me."[80] And if he has successive beneficial interests to contend with, his predicament is no less than that of a toad in the river; anyhow it opens its mouth to cry, water must percolate into its alimentary canal![81]

It may be added that where the settlor or testator has, whether expressly or by necessary implication, evinced an intention to allow the trustee to favour the life tenant (maybe his spouse or parent) over the remaindermen or vice versa, the trustee will not be held to be in breach of the duty of impartiality if he takes that into consideration in choosing investments.[82] Thus, in the American case of *In re J. B. Uihlein Trust*,[83] the trust investment portfolio consisted of 70% fixed-income securities and 30% equities. The court found as a fact that the settlor intended to allow the trustee to favor the life beneficiaries over the remainder beneficiaries and, accordingly, refused an application to review the investments.

79. P. H. PETTIT, Equity and the Law of Trusts 423 (Oxford Univ. Press 11th ed. 2009). The case of *Re Mulligan (dec'd)*, *id.*, amply illustrates this view.

80. *Matthew* 26:39 (Revised Standard).

81. In the U.S., such predicament has been removed for trustees by the Uniform Principal and Income Act, section 104 of which permits a trustee to "adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor."

82. Nestle v. National Westminster Bank Plc, 10 (4) T.L.I. at 115 (Hoffmann, J.); *see also* McPhail v. Doulton, [1971] A.C. 424 at 451 (Eng.).

83. 417 N.W. 2d 908 (1987); 420 N.W. 2d 57 (1988) (U.S.).

However, a more recent American case which, as has been noted,[84] "leaves trustees in a quandary as to exactly when the rule of impartial treatment of different classes of trust beneficiaries would be applicable" is *SunTrust Bank v. Merritt*.[85] In that case, a corporate co-trustee was alleged to have breached its fiduciary duties (particularly the duty of impartiality) by favoring the income beneficiary over the remaindermen. The income beneficiary, who was also a co-trustee, had persuaded the trust corporation to pursue a policy of investing in low-risk, tax-free, fixed-income securities. The court held that there was no breach of duty, curiously construing the provision in the trust instrument that required the trustees to distribute the "entire net income" to the life beneficiary as favoring him and dispensing with the normal duty of impartiality.

Sure enough, this decision invites strictures. The direction to distribute the "entire net income" to the life tenant, which is a prosaic phraseology commonly found in trust instruments creating successive interests, cannot be seriously said to manifest a clear intention to favor the income beneficiary at the expense of the remaindermen. On the contrary, the trust instrument contained a highly restrictive principal-invasion provision, which was a pointer to the fact that the settlor was equally concerned about the quantum of benefits that would go to the remainder beneficiaries. Thus, construing that phrase fairly and straightforwardly, as an investment clause ought to be construed, it simply means that the trustees were required to make such investments as were capable of producing fair income consistent with their normal duties of prudence and impartiality, and then hand over whatever is the net income realized from such investments to the income beneficiary. Indeed, the material facts of this case appear to be on all fours with those of *Re Mulligan*,[86] yet, as witnessed above, the New Zealand High Court found a breach of trust arising from a breach of the duty of impartiality on the part of the defendant co-trustee. Clearly, the decision in *Re Mulligan* is to be preferred.

2. Duty to Convert: Rule in *Howe v. Earl of Dartmouth*

The rule in *Howe v. Earl of Dartmouth*[87] is that, although no direction is expressly or impliedly contained in the will, where there is a residuary bequest of personal estate in a will for the benefit of persons in succes-

84. M. Radford, *Wills, Trusts, Guardianships, and Fiduciary Administration*, 57 MERCER L. REV. 403, 410 (2005).

85. 612 S.E.2d 818 (Ga. App. Ct. 2005) (U.S.).

86. Re Mulligan, [1998] 1 N.Z.L.R. 481 (N.Z.).

87. Howe v. Earl of Dartmouth, (1802) 7 Ves. 137; 32 E.R. 56; Hinves v. Hinves, (1884) 3 Hare 609 at 611 (Eng).

sion, in the absence of a contrary intention, express or implied, there is a duty upon the trustees to realize all such parts of the estate as are of a wasting or hazardous character or of a reversionary nature, or are unauthorized by the general law or by the will, and invest or re-invest the proceeds in some authorized and permanent investment. The rule is aimed at maintaining a fair balance between the competing interests of the life tenant and remainderman. Thus, if no conversion is done, income accruing from wasting assets, such as a copyright, mine, ship, livestock or the like, might be exhausted by the life tenant to the detriment of the remainderman. Conversely, if reversionary interests (i.e., proprietary interests that will only come into possession after the death of the life tenant) and other non-income-producing property are left in their present state, the life tenant may get nothing before he dies.

It has, however, been observed that the traditional reasoning behind the rule is no longer appropriate to contemporary economic conditions.[88] Whilst this view is partially justified in the light of the current global economic distortions, such as spiraling inflation, stock market crash and the latest phenomenon popularly referred to as 'economic meltdown', it seems that the rule is still of contemporary relevance in addressing the fundamental concerns that necessitated its formulation.[89] The argument in support of that view is predicated upon a comparative analysis of the current safety of, and returns from, equity investments vis-à-vis fixed-interest (especially gilt-edged) investments.[90] Standing alone, this argument seems quite compelling. However, it ignores the core issue, which is the probability of either the life tenant exhausting the beneficial interests in wasting assets or the reversionary interests not falling into possession until the life tenant is dead. In either case, the intention of the testator to benefit both beneficiaries would have been defeated. Clearly, it cannot be gainsaid that either beneficiary would be better off getting (metaphorically speaking) 'half bread', in the worst-case scenario, rather than getting nothing at all, which result is guaranteed by the application of the rule in *Howe v. Earl of Dartmouth*.

88. PETTIT, *supra* note 79, at 429.
89. For the philosophical underpinnings of the rule, see A.K.P. KLUDZE, Modern Principles of Equity 318 (Foris Publications 1988).
90. PETTIT, *supra* note 79, at 429.

3. Duty to Apportion[91]

a. *Rule in Re Earl of Chesterfield's Trusts*

As a corollary of the duty to convert, a trustee has a further duty to apportion the proceeds of the sale or conversion as between income and capital so that the former can be given to the life tenant while the latter will be re-invested in the interest of the remainderman. For the trustee to do an equitable apportionment, the rule in *Howe v. Earl of Dartmouth* is complemented by the rule in *Re Earl of Chesterfield's Trusts*.[92] The formula prescribed by this latter rule is to ascertain the sum which, if invested at the date of the testator's death at four per cent *per annum* compound interest, with yearly rests, and deducting income tax, would, with the accumulation of interest, have produced, at the date of receipt, the amount actually received; the sum so ascertained should be treated as capital and the residue should be treated as income. Having done the apportionment, the trustee has to pass on the net income that accrued from the date of the testator's death to the life tenant, unless a contrary intention appears from the will, either expressly or by implication.

b. *Other rules of apportionment of trust investment accruals and liabilities*

Where trust funds are invested in the shares of a company and the company declares dividends or makes special distributions to its shareholders, the courts of equity have laid down rules and legal scholars have equally developed theories as to the mode of apportionment of the accruals to the trust estate between income and capital. Such distributions include bonus payments (whether in cash or in specie) out of the company's accumulated profits; distribution of shares payable from the reserve fund or share premium account; distribution of shares upon a demerger; and distribution of terminal benefits to shareholders upon winding-up. So, too, have the courts fashioned rules for the apportionment of the liabilities of the trust estate, including investment costs and charges. For want of space, it is considered unnecessary, for present pur-

91. For statutory duty to apportion, see the English Apportionment Act, 1870, s. 2; Apportionment Law, Cap. 7, Laws of Western Nigeria, 1959, s. 3; Apportionment Law, Cap. A9, Laws of Lagos State, 2003, s. 3. In the U.S., the common law rules of apportionment have been largely superseded by the Uniform Principal and Income Act, the provisions of which apply in the absence of a contrary intention expressed by the settlor.

92. (1883) 24 Ch. D. 643.

poses, to embark upon a detailed discussion of these rules and theories which can be found in the standard works on trusts.[93]

C. No commingling of trustee's personal and trust funds in an investment

A trustee must not commingle trust fund with his own money in making an investment, as the admixture of both funds *ipso facto* strikes at the heart of his core obligation to keep the trust property segregated from his personal patrimony. This is an off-shoot of "an inflexible rule of a court of equity that a person in a fiduciary position . . . is not allowed to put himself in a position where his interest and duty conflict."[94] Should such a conflict arise, his duty must prevail over his interest. The rationale for the rule is to protect the trustee from the fallibility of human nature. As an American judge once noted, "there are canons of the court of equity which have their foundation, not in the actual commission of fraud, but in that hallowed orison, 'lead us not into temptation.' "[95] So also, in making an investment, a trustee must not, in general, combine trust funds with the funds of another trust or of a third party.

If a trustee mixes trust funds with his own money in an investment which results in a loss, the trustee, having committed a breach of trust, is liable to make good the loss to the beneficiary.[96] On the other hand, if such an investment is profitable, he becomes a constructive trustee of a proportionate share of the profits attributable to the trust funds so invested. According to Professor Kludze,[97] "If a trustee employs trust funds in his own trade or business, he becomes a constructive trustee of any profit accruing therefrom, *subject to all just allowances for his own time, energy and skill, and for the assets he has contributed*."[98] He cites as an authority for his proposition the English case of *Re Jarvis*.[99] The learned Professor's formulation, however, does not seem to sit well with established principles. For that reason, it is considered necessary to probe into the details of the case cited so as to assess its precedential value as an authority for such a proposition.

93. *See, e.g.*, Pettit, *supra* note 79, at 430–40; M. I. Jegede, Law of Trusts, Bankruptcy and Administration of Estate 245–50 (MIJ Publishers 1999).

94. Bray v. Ford, [1896] A.C. 44 at 51 (Lord Herschell); *see also* Regal (Hastings) Ltd v. Gulliver, [1942] 1 All E.R. 378.

95. Wormley v. Wormley, 21 U.S. 421, 424 (1823) (Johnson, J.).

96. Thompson v. Finch, (1856) 22 Beav. 316 (Eng.).

97. Kludze, *supra* note 89, at 337.

98. Italics added to highlight the objectionable part of the proposition.

99. [1958] 1 W.L.R. 815, *reprinted in* [1958] 2 All E.R. 336 (Eng.).

In *Re Jarvis*, a testator appointed his daughters, the plaintiff and the defendant, to be his executrices and trustees and gave them his business without conferring power on them to carry on the business. Meanwhile, the defendant had been running a similar business in a nearby shop for many years. Upon the testator's death, his business was found to be insolvent, the debts exceeding the assets by some £350. When the lease of the business premises expired, the landlords sued the trustees and obtained judgment for possession and arrears of rent. The defendant personally paid the business debts and the rent arrears. Thereupon, she took a new lease from the landlords and re-opened the shop which had been closed down for four years since the premises were damaged by a bomb a year before the testator's death. She ran it as a joint business with her original shop. As the resuscitated business flourished, her younger sister and co-trustee (who had remained aloof all the while) brought an action claiming that the defendant was accountable as a constructive trustee of the new lease and for any profits made by her in carrying on the business. The defendant conceded that she was a constructive trustee of the lease for herself and the plaintiff equally. The court entered judgment to that effect and ordered an inquiry as to what rent, if any, ought to be paid by the defendant in respect of her beneficial occupation of the business premises.

As regards the business carried on in the premises, it was held that the defendant was accountable for those benefits which came to her because of her position as a trustee of the testator's estate. After holding that that leg of the plaintiff's claim was defeated by laches, the court still went ahead to consider the proper method of assessing the accountability. The defendant's counsel submitted that only those assets of the estate or benefits which had been proved to have flowed to the defendant by reason of her position as a trustee ought to be taken into account. On the other hand, the plaintiff's counsel submitted that that would be an impossible inquiry and that the defendant should be made *accountable for the whole business and its profits*, making allowances for the time, energy and skill that she had expended, the assets she had brought in, the testator's debts she had paid, *etc*. In accepting the submission of the plaintiff's counsel in preference to that of the defendant's counsel, Upjohn, J., had this to say:

> I do not think that it is possible to lay down any general rule in relation to businesses beyond the general principle already stated, that a trustee may not make a profit out of his trust. To take an example: suppose that the defendant, by virtue of her position as trustee, had been able to influence (as possibly she

> did) increased supply to the shop at No. 230, Trafalgar Road [her own shop], without re-opening No. 7, Woolwich Road [the testator's shop], she would clearly be accountable, though surely she should be accountable rather on the basis submitted by counsel for the defendant than on that submitted by counsel for the plaintiff. Each case must depend on its own facts, and the form of inquiry which ought to be directed must vary according to the circumstances. *In this case where the defendant reincarnated the testator's own business on the same premises as formerly and obtained supplies, so far as she was able, from the suppliers of the former business*,[100] I think that the proposition propounded by counsel for the plaintiff is correct . . . .[101]

From the facts of the case and the decision reached, firstly, it is clear that the learned judge did not purport to lay down any general principle; the case was decided on its peculiar facts. Here, the trustee's conduct was in no way morally reprehensible. In fact, the trust property for which she was held accountable had practically ceased to exist by the time she assumed the office of a trustee. She only managed to recreate it using her own resources, time, energy and skill, which she was neither obliged nor empowered to do under the terms of the trust. Had she not done so, there would have been no trust assets, but rather trust liabilities to contend with. Secondly, it is obvious that the learned judge, standing, as it were, by the strict canons of equity, regarded her as running the "reincarnated" business of the testator for and on behalf of the trust estate. Hence, she was accountable to the trust estate for the entire business proceeds, but it was only fair that she be compensated for what she brought into the business, i.e., her time, energy, skill and resources. As the court reasoned, the decision would have been different had she been running her own business in her premises and in so doing converted trust property, e.g., the testator's business goodwill. In that case, the trust estate would have been entitled to recover the value of the converted trust property plus a proportionate share of the profits, and there would have been no question of making any allowances for the trustee beyond her own fair share of the business profits. It is to be noticed that this was a more advantageous option for the defendant, as evident in her counsel's submission which was structured upon the exploded notion that the business was hers.[102]

100. Italics supplied for emphasis.

101. Re Jarvis, [1958] 2 All E.R. 336 at 340–41 (Eng.)

102. In *Phipps v. Boardman*, [1965] 1 All E.R. 849 at 865, upon analogous facts, Russell, L.J., lamented thus: "I would like to say that the defendants have my sympathy, in that having laboured and taken risks they are disappointed of their profit by principles of equity whose rigidity is necessary if cases deserving of no sympathy are not to escape."

Clearly, the principle that emerges from the decision in *Re Jarvis* is that a distinction should be drawn between a trustee carrying on the business of the trust and in so doing mixing his own property, on the one hand, and carrying on the trustee's own business and in so doing mixing trust property, on the other. It seems that the principle which Professor Kludze seeks to extract from that case applies rather to the former situation and does not, contrary to the learned author's proposition, apply to the latter. Thus, in the former case, the trustee has to account to the trust estate for the whole business and its profits, subject to all just allowances for her inputs. Even for such a case, however, it is submitted that, since the office of a trustee is ordinarily a gratuitous one under the Anglo-Nigerian law, the court should not make allowances for the trustee's time, energy and skill as a matter of course.[103] It could do so only where the trustee is otherwise entitled to remuneration or the court considers such a course equitable having regard to the onerous nature of the business and the fact that the trustee acted in good faith,[104] as in the case under analysis.

As for the latter instance, where the trustee carries on his own business and in so doing mixes trust funds with his own, the beneficiary is entitled to recover the trust funds plus a prorated share of any profits made by the trustee, without any question of making allowances for the trustee's time, energy and skill, which he would have expended anyway even if he had not commingled the trust funds. In any case, whether the venture is profitable or not, the beneficiary may choose to demand the return of the trust funds with interest.[105] So, the beneficiary has a lien on the property acquired with the mixed funds for his claims against the trustee or his successor in title.

A celebrated case in which the applicable principles were elucidated by the English House of Lords was *Foskett v. McKeown*.[106] In that case, a trustee used his own money to pay the first three premiums on a life assurance policy and trust funds to pay the fourth and fifth premiums. Upon his death, it was held by a majority of the House of Lords that the trust beneficiaries were entitled to a 40% share in the proceeds of the policy. Lord Millett stated the principles as follows:

103. Williams v. Barton, [1927] 2 Ch. 9 at 11; Foster v. Spencer, [1996] 2 All E.R. 672 at 678 (Eng.).

104. Phipps v. Boardman, [1965] 1 All E.R. 849 (Eng.); Re Duke of Norfolk's Settlement Trusts, [1978] 3 All E.R. 907 (Eng.).

105. Heathcote v. Hulme, (1819) 1 Jac. & W. 122; Wallersteiner v. Moir (No. 2), [1975] Q.B. 373 at 397 (Eng.).

106. [2001] 1 A.C. 102 (Eng.).

> Where a trustee wrongfully uses trust money to provide part of the cost of acquiring an asset, the beneficiary is entitled at his option either to claim *a proportionate share of the asset*[107] or to enforce a lien upon it to secure his personal claim against the trustee for the amount of the misapplied money. It does not matter whether the trustee mixed the trust money with his own in a single fund before using it to acquire the asset, or made separate payments (whether simultaneously or sequentially) out of the differently owned funds to acquire a single asset . . . . As against the wrongdoer and his successors, the beneficiary is entitled to locate his contribution in any part of the mixture and to subordinate their claims to share in the mixture until his own contribution has been satisfied. This has the effect of giving the beneficiary a lien for his contribution if the mixture is deficient.[108]

This case falls under the second category above, that is, where the trustee commingled trust funds in what was clearly his own personal investment. Consistent with principle, the Law Lords simply held that the beneficiary was entitled to claim "a proportionate share of the asset" (i.e., 40% of the insurance proceeds), without adding any rider whatsoever to that declaration of the beneficiary's right. That appears to be the correct position under the Anglo-Nigerian as well as the American laws. Indeed, long before now, Professor Scott – that oracle of the American law of trusts – had stated the principle in the following terms: "Where a trustee uses trust funds in his own business, he is chargeable with principal and interest or with a pro rata share of the profits of the business, at the option of the beneficiaries."[109]

D. Investment Decisions Not to Be Guided by Non-Financial Considerations

As a general rule, a trustee must not fetter his investment discretion for reasons extraneous to the trust purposes, such as reasons of social, political, ideological or moral nature. His paramount duty is to exercise his powers in the best interests of the present and future beneficiaries. Accordingly, where the purpose of the trust is to provide financial benefits for the beneficiaries, as is the case in most private trusts, the prospects of direct financial returns must preponderate over any other consideration in

107. Italics supplied for emphasis.
108. Foskett v. McKeown, [2001] 1 A.C. 102 at 131.
109. Scott, *supra* note 65, at 332.

taking investment decisions. These principles have been settled, at least, since the decision in the English case of *Cowan v. Scargill*,[110] if not beyond. Thus, it is respectfully submitted that Banire's proposition that it is proper that "trustees take into account considerations that are not completely financial, such as political or ethical benefits from the investments"[111] does not represent the actual state of the Anglo-Nigerian law. Indeed, the two English authorities cited in support of the learned writer's proposition clearly demonstrate that what he propounded as a general rule is rather an exception – a very constricted and rare exception – to the rule. Interestingly, in neither of those two cases was the course that he suggested approved by the court rather, as will be seen presently, the *rationes decidendi* of both cases starkly contradict his proposition.

In *Cowan v. Scargill*, one half of the management committee of the National Coal Board's pension fund trust sued the other half, which comprised Mr. Arthur Scargill and four other officials of the National Union of Mineworkers (NUM). The complaint was that the NUM trustees had refused to concur to the investment of the pension funds in certain overseas industries. The NUM trustees' refusal was based on the fact that the overseas industries were competitors of the British coal mining industry. They argued that their opposition to the proposed investment was in the best interests of the beneficiaries, who were retired British mineworkers. In holding that the NUM trustees were in breach of trust by refusing to invest in the overseas industries, Megarry, V-C, stated as follows:

> In considering what investments to make trustees must put on one side their own personal interests and views. Trustees may have strongly held social or political views. They may be firmly opposed to any investment in South Africa or other countries, or they may object to any form of investment in companies concerned with alcohol, tobacco, armaments or many other things. In the conduct of their own affairs, of course, they are free to abstain from making any such investments. Yet if under a trust investments of this type would be more beneficial to the beneficiaries than other investments, the trustees must not refrain from making the investments by reason of the views that they hold.[112]

110. Cowan v. Scargill, [1984] 2 All E.R. 750; *see also* Buttle v. Saunders, [1950] 2 All E.R. 193 (Eng.).

111. M. Banire, The Nigerian Law of Trusts, 284 (Excel Publications 2002) (citing Cowan v. Scargill, [1984] 2 All E.R. 750); Harris v. Church Commissioners, [1992] 1 W.L.R. 1241, *reprinted in* [1993] 2 All E.R. 300.

112. Cowan v. Scargill, [1984] 2 All E.R. 750 at 761.

Having stated the basic principle, however, the learned judge acknowledged that there are exceptional circumstances in which arrangements which work to the financial disadvantage of the beneficiary may yet be for his benefit. In his words:

> [I]f the only actual or potential beneficiaries of a trust are all adults with very strict views on moral and social matters, condemning all forms of alcohol, tobacco and popular entertainments, as well as armaments, I can well understand that it might not be for the 'benefit' of such beneficiaries to know that they are obtaining rather larger financial returns under the trust by reason of investments in those activities than they would have received if the trustees had invested funds in other investments. The beneficiaries might well consider that it was far better to receive less than to receive more from what they consider to be evil and tainted sources . . . .[113]

Interestingly, what Megarry, V-C, merely cited as a possibility became a live issue a few years later in the Scottish case of *Martin v. City of Edinburgh District Council*,[114] pertaining to the investment of public and charitable funds. There, Lord Murray, applying the principle of *Cowan v. Scargill*,[115] held that the defendant had acted in breach of trust in pursuing an ethical policy of disinvesting from South Africa without considering expressly whether it was in the best interests of the beneficiaries and without obtaining professional advice on the matter.

In both cases, clearly, the provision of financial benefits to the beneficiaries was the purpose of the trusts; hence the trustees' investment decisions were required to be guided exclusively by financial considerations, disregarding ideological considerations. But there are cases, especially concerning charities, where a trust is set up to achieve a purpose other than the provision of direct financial benefits to the beneficiaries. In such cases, the trustees ought not to lose sight of the primary objects of the trusts and invest in a manner incompatible therewith. Classic examples are a trust for the advancement of the Jewish or Islamic religion investing

113. *Id.* at 761–62. In such a situation, the trustees contemplating such ethical investment policy must first present it to the beneficiaries and obtain their consent so that the investment will not be in breach of trust.

114. [1988] S.L.T. 329. Investment in companies that had substantial South African interests was also objected to on ethical grounds in *Harries v. Church Commissioners for England*, [1993] 2 All E.R. 300. Those cases were decided in the heydays of the now defunct apartheid regime in South Africa, which was globally condemned.

115. [1984] 2 All ER 750.

in a pig farm; a cancer research trust investing in a tobacco company and a temperance charity investing in a brewery or distillery. In all of these examples, what is paramount is the advancement of the charitable objects of the trusts rather than any financial benefits to individuals. Accordingly, it is permissible for the trustees to exclude ethically unsound, though financially rewarding, investments that will conflict with the very objects of their charitable trusts.[116]

Nevertheless, apart from the exceptional cases, which are bound to be rare, the same basic principle that trustees' investment decisions must not be dictated by extraneous non-financial considerations applies with equal force to charity trustees.[117] Thus, in the English case of *Harries v. Church Commissioners for England*,[118] the plaintiff, who was the Anglican Bishop of Oxford, and the defendants were trustees of charitable trusts with multifarious purposes geared towards the promotion of the Christian faith through the established Church of England. The plaintiff sought a declaration to the effect that the trustees were under a duty to invest in a manner compatible with Christian morality even if it involved a risk of significant financial detriment. The declaration was refused, Nicholls, V-C, holding that charity trustees were required to invest assets held for the purpose of generating money with a view to securing the maximum financial return compatible with ordinary prudence. They could take ethical considerations into account only insofar as they could do so without jeopardizing the profitability of investments.

Referring to *Cowan v. Scargill*,[119] Nicholls, V-C, whilst drawing the factual distinction that that case had to do with trusts for the provision of financial benefits to the beneficiaries, whereas the case before him was concerned with charitable trusts whose purposes were multifarious, nevertheless, applied the same basic principle as stated in *Cowan v. Scargill*. By expressly finding that the purposes of the trusts in *Harries* case were "multifarious", the court took the case out of the class of charities devoted exclusively to purposes other than the provision of financial benefits to the beneficiaries, in which cases the basic rule might be relaxed. Besides, this was not one of those rare cases recognized by Megarry, V-C, in *Cowan v. Scargill* as an exception where non-financial considerations could influence the trustees' investment policy, i.e., if the actual or potential beneficiaries are *all* adults who share the same strict views on

116. Harries v. Church Commissioners for England, [1993] 2 All E.R. 300 at 304.
117. *Id.*; *see* P. Luxton, *Ethical Investment in Hard Times*, 55 M.L.R. 587–93 (1992). *Contra* R. Nobles, *Charities and Ethical Investment*, 56 CONV. 115–18 (1992).
118. [1993] 2 All E.R. 300 (Eng.).
119. [1984] 2 All E.R. 750 (Eng.).

moral and social matters. In this regard, Nicholls, V-C, observed that "different minds within the Church of England, applying the highest moral standards, will reach different conclusions" as to the merits of a particular investment.[120] Further, the facts of *Harries* case did not fit into the other exception that Nicholls, V-C, himself formulated, which is that where it is shown that potential donors to, or beneficiaries of, the charitable trust fund would be discouraged from making or accepting donations if a particular type of investment is made, the trustees need to weigh the ethical considerations against the potential financial benefits of such an investment.[121] Even, this exception has been faulted on the ground that "If trustees are to be permitted to take such [donor] pressures into account . . . the door is opened to an unacceptable degree of donor control. Uncurbed, this has the potential to reduce charities to the status of investment captives."[122]

The decision in *Harries* case has come under a scathing criticism by a learned commentator[123] who argues that if charity trustees can give money away in pursuit of their charity's purposes, there is no justification for denying them the power, in making their investment policies, to take into account some non-financial considerations that are consistent with those purposes. According to him, "charity would, in most people's opinion, represent one area of social life in which the pursuit of values other than profit or consumer satisfaction must dominate."[124] It is, however, submitted that the learned writer's stricture is misconceived for the reason that the purposes of the trusts in *Harries* case were not entirely free from the provision of financial benefits. They were "multifarious", including the generation of funds for paying the stipends and pensions of the clergy and their families.[125] Viewed from that angle, the learned judge seems justified in holding that the trustees were required to invest

120. Harries v. Church Commissioners for England, [1993] 2 All E.R. 300 at 309. As Lord Nicholls extra-judicially opined, "on moral issues on which there is no consensus, it is no part of the function of a trustee to reject one view and prefer another, whether his own or that of some of the beneficiaries, when to do so would be contrary to the financial interests of the beneficiaries." Lord Nicholls of Birkenhead, *supra* note 17, at 73–74.

121. *Id.* at 304–05. See also where Nicholls, V-C, stated: "There is no evidence before me to suggest that any such circumstance exists here." *Id.* at 308.

122. Luxton, *supra* note 117, at 590.

123. Nobles, *supra* note 117.

124. *Id.* at 115.

125. This point of convergence between the trusts in *Harries* and *Cowan* cases is ably recognized by Luxton, *supra* note 117, at 593. Oddly enough, Nobles fails to see this fact as a justification for Nicholls, V-C's decision even though he has no difficulty in accepting Megarry, V-C's decision in *Cowan* on the basis that "The ordinary business of a pension scheme is to provide financial benefits to individuals and . . . the best way to achieve this is to have the largest possible fund." Nobles, *supra* note 117, at 117.

assets held for the purpose of generating money for, at least, the discharge of that key obligation (which had proved increasingly burdensome) with a view to securing the maximum financial return compatible with ordinary prudence.

It is apparent from the foregoing analysis that English courts have been consistent in insisting that, in the absence of an express authorization by the trust instrument or all the beneficiaries, being *sui juris* and acting in unison, trustees' investment policies must not be dictated by ethical or non-financial considerations especially where the investment objective is or includes the generation of funds for the fulfilment of the financial purposes of the trust. No doubt, this approach is to be followed in Nigeria, although there appears to be yet no reported judicial decision directly in point. As Lord Nicholls of Birkenhead[126] once suggested, "if social conditions today are thought by some to dictate a need for a change in the law, the change ought to be made by the legislature." A few years after the publication of the article containing that suggestion, the English Trustee Act, 2000 was enacted which, however, made no express provision for ethical or social investment. Perhaps to make up for that omission, the Explanatory Notes (note 23) accompanying the Act states that suitability (which is one of the twin standard investment criteria under the Act) "will . . . include any relevant ethical considerations as to the kind of investments which it is appropriate for the trust to make." Although the so-called Explanatory Notes do not form part of the Act, they are at least indicative of the current policy direction, which is that English trustees are now expected to show explicitly that they have considered the relevance or otherwise of ethical considerations in making their investment decisions. That is already a statutory imperative for their pension fund counterparts who are now required to disclose the extent to which social, environmental or ethical considerations are taken into account in the selection, retention and realization of investments.[127]

In the United States, the position used to be that trustees generally were permitted to refrain from investing in companies "whose activities or some of them are contrary to fundamental and generally accepted ethical principles. They may consider such matters as pollution, race discrimination, fair employment and consumer responsibility."[128] However, in this, as in many other respects, the American position has been significantly

126. Lord Nicholls, *supra* note 17, at 74.
127. Occupational Pension Schemes (Investment and Assignment, Forfeiture, Bankruptcy, etc.) Amendment Regulations, 1999, S.I. 1999, No. 1849 (U.K.).
128. A. W. Scott & W. F. Fratcher, Scott on Trusts vol. III, para. 227.17 (Little Brown & Co 4th ed. 1988), *quoted in* Luxton, *supra* note 117m, at 591.

altered by the Uniform Prudent Investor Act. Section 5 of the Act stipulates that "A trustee shall invest and manage the trust assets solely in the interest of the beneficiaries." This means that where the interest of the beneficiaries consists in financial benefits, as is not infrequently the case, no form of ethical or social investment policy is consistent with the duty of loyalty if it entails sacrificing this overriding interest.[129] Indeed, it is remarkable that of all the eight factors that section 2(c) of the Act requires trustees to take into account in their investment decisions, none seems to accommodate ethical or social considerations.

Finally, as on most issues concerning trust administration, in determining the question whether ethical investments should be allowed in any particular case, the express provisions of the trust instrument will always have an overriding effect. Thus, where the trust instrument prohibits or restricts certain types of investment, or authorizes trustees to make specified investments or to take into account non-financial considerations in making their investment decisions, the trustees have no choice but to abide by those directions.[130]

E. Need to Consider Suitability and Diversity of Investments

In England, suitability and diversity of investments have since been stipulated as the "standard investment criteria", which a trustee must have due regard to in exercising any power of investment.[131] Likewise, in the United States, diversification has been statutorily endorsed as one of the fundamental elements of prudent investing,[132] and among the factors that trustee investors have to consider is "the role that each investment or course of action plays within the overall portfolio."[133] In Nigeria, perhaps the closest approach to that is the provision in section 2(3) of the Trustee Investments Act, which imposes a cap on the proportion of the trust funds investible in any of the authorized classes of investment.[134] The essence of such a provision, of course, is to ensure diversification of trust investments. Although there is in Nigeria no equivalent statutory prescription of such standard investment criteria, nevertheless, they flow

129. *Cf.* Lord Nicholls, *supra* note 17, at 74.

130. Harries v. Church Commissioners for England, [1993] 2 All E.R. 300 at 305 (Eng.).

131. Trustee Act, 2000, § 4(1) (re-enacting Trustee Investments Act, 1961, § 6(1)) (Eng.). *See also* Pensions Act, 1995, § 36(1) (U.K.).

132. Unif. Prudent Investor Act § 3 (1994) (U.S); Restatement (Third) of the Law of Trusts: Prudent Investor Rule § 227(b) (2007) (U.S.).

133. Unif. Prudent Investor Act § 2(c)(4) (1994) (U.S.). *See also Trusts Act 1973* s 24(1)(b) (Austl.).

134. Similarly, see the Regulation on Investment of Pension Fund Assets, 2012 made under the Pension Reform Act, 2004, *available at* www.pencom.gov.ng (last visited July 20, 2016).

from the general standard of care required of trustees under the received English principles of equity, which 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 morally bound to provide."[135] Typically, such a prudent man of business will be loath to carry all his eggs in one basket.[136] He is apt to spread out his risks in a diverse range of investments, depending on the size of his investible funds and the needs of his intended beneficiaries.

Indeed, suitability and diversity of investments have a significant correlation with other basic principles guiding the exercise of trustee investment discretions such as the need to produce a fair balance between income flow and capital appreciation; the need for the maintenance or advancement of any infant or contingent beneficiaries and ethical considerations, if the circumstances of the trust so warrant. Proper consideration of the suitability of investments, therefore, entails that the trustee should, in an appropriate case, take into account the competing interests of the life tenant and the remaindermen as well as, perhaps, the personal circumstances of individual beneficiaries.[137] He should also consider the nature and value of the trust assets, the likely life span of the trust, the marketability of the investments and the amount and timing of the distribution requirements. In the case of a charitable trust, it behoves the trustees to consider whether or not a proposed investment is suitable to the trust, having regard to its primary object.[138] For instance, from an ethical viewpoint, the acquisition of shares of a tobacco company is clearly not a suitable investment for a cancer research trust.

As for diversity of investments, whilst it is of crucial importance, it has been observed that "the degree of diversification that is practicable and desirable for a large fund may plainly be impracticable or undesirable (or both) in the case of a small fund."[139] The perceptiveness of this observation becomes apparent when account is taken of the human resources and transaction costs involved in multiple investments. Nevertheless, even

135. Re Whiteley, (1886) 33 Ch. D. 347 at 355 (Lindley, L.J) (Eng.).

136. Contrast with the opinion attributed to one acclaimed industrialist, Andrew Carnegie: "Put your eggs in one basket. And watch the basket. That's the way to make money." WATT, TRUSTS AND EQUITY, *supra* note 2, at 417.

137. Such as the taxation position of the beneficiaries and the relative financial positions of the life tenant and the remainderman. *See* Nestle v. National Westminster Bank Plc, [1994] 1 All E.R. 118 at 137.

138. Harries v. Church Commissioners for England, [1993] 2 All E.R. 300 at 304.

139. Cowan v. Scargill, [1984] 2 All E.R. 750 at 762 (Megarry, V-C) (Eng.). See also the *dictum* of the same judge in *Trustees of British Museum v. A-G*, [1984] 1 All E.R. 337 at 343. *See also* In re Dickinson, Appellant, 152 Mass. 184, 25 N.E. 99 (1890).

for a small fund, diversification can still be cost-effectively achieved by investing in collective investment schemes such as unit trusts or real estate investment trusts, where permissible.

F. Need to Engage the Services of Professionals and Agents[140]

As earlier stated, the trustee's general duty of care requires him to conduct the business of the trust in the same manner in which an ordinary prudent man would conduct his own business. Accordingly, where a prudent businessman would, in the ordinary course of business, engage the services of, or take professional advice from, an expert, the trustee is required to act likewise. The quintessential trustee is expected to be neither a jack of all trades nor a master of all professions. Thus, even in the absence of an express authorization by the trust instrument, a trustee is entitled to engage skilled agents, at the cost of the trust estate, to act for or advise him whenever there is any legal or moral necessity to do so.[141] For instance, whenever investing in real property or faced with litigation, the trustee, unless he is a solicitor-trustee, must of necessity engage a solicitor to offer legal advice, to do conveyancing or to handle the litigation.

Indeed, the ancient wisdom of equity judges has been enacted by statutes. Thus, in England, trustees have been statutorily[142] obligated to obtain and consider proper advice from a person whom they reasonably believe is an expert in financial matters both in the exercise of their investment powers and in the conduct of periodic reviews of their investments. Previous English legislation, including the Trustee Act, 1893[143] (which is still of contemporary relevance in Nigeria), required a trustee lending money on the security of a mortgage to engage a competent estate surveyor to value the property. Furthermore, section 17 of the Trustee Act, 1893 authorized a trustee to appoint bankers and solicitors as

140. *See generally* G. H. Jones, *Delegation by Trustee: A Reappraisal*, 22 M.L.R. 381–95 (1959); J. H. Langbein, *Reversing the Non-Delegation Rule of Trust-Investment Law*, 59 Mo. L. Rev. 105 (1994); Sterk, *supra* note 35, at 897–904.

141. Ex p. Belchier, (1754) 27 E.R. 144; Speight v. Gaunt, (1883) 22 Ch. D. 727. In England, the requirement of "legal or moral necessity" had been discarded with the enactment of the Trustee Act, 1925, s. 23 (1) which, however, has been repealed by the Trustee Act 2000, though the point remains valid. *See* Martin, *supra* note 26, at 583; Jones, *supra* note 140, at 393; Re Vickery, [1931] 1 Ch. 572 at 581.

142. Trustee Act, 2000, § 5 (re-enacting Trustee Investments Act, 1961, § 6(1)) (Eng.). It should be noted that the wording of the statutory provisions is "obtain and consider", which means that trustees are not obliged to *follow* expert advice. *See also Trusts Act 1973* s 24(2) (Austl.).

143. Trustee Act, 1893, § 8 (Eng.).

agents to receive and give valid discharge for any money or property receivable on behalf of the trust estate. And, in Nigeria, a trustee has been statutorily empowered to appoint a person whom he reasonably believes to be competent to value the trust fund, and the valuer's assessment is conclusive as to the value of the trust fund on the date of the valuation.[144]

Acting within his lawful authority, therefore, a trustee will not be liable for any accidental loss or depreciation of the trust fund or property occurring in the hands of an agent to whom it has been properly entrusted in the ordinary course of business.[145] He may, however, be liable if he leaves the trust fund or property in the hands of the agent for an unreasonable period and a loss is thereby occasioned.[146] Besides, a trustee must exercise reasonable care in selecting a skilled agent to act for the trust;[147] he must employ the agent in his proper field of expertise within the scope of his usual business,[148] and adequately supervise the activities of the agent.[149]

Moreover, the rule of received English law which forbids a trustee from delegating his investment discretions unless permitted by the trust instrument[150] is still very much potent in Nigeria, although it has been whittled down in England,[151] and practically abrogated in the United States[152] and Australia.[153] In those jurisdictions, trustees who properly delegate in accordance with the statutory authority are not personally liable for the decisions or actions of the delegate.[154] In Nigeria, a distinction still needs

144. Trustee Investments Act, § 2(4)(c) (Nigeria); Trustee Law Cap. 125, Laws of Western Region of Nigeria 1959, § 14(3) (Nigeria).

145. Speight v. Gaunt, (1883) 22 Ch. D. 727, CA; aff'd, 9 App. Cas. 1, H.L (Eng.).

146. Trustee Act, 1893, § 17(3). *See also* Mathew v. Brise, (1845) 15 L.J. Ch. 39; Rowland v. Witherden, (1851) 3 Mac. & G. 568; 21 L.J. Ch. 480 (Eng.).

147. Re Weall, (1889) 42 Ch. D. 674; Robinson v. Harkin, [1896] 2 Ch. 415 (Eng.).

148. Rowland v. Witherden, (1851) 3 Mac. & G. 568; Fry v. Tapson, (1884) 28 Ch. D. 268 (Eng.).

149. Mathew v. Brise, (1845) 15 L.J. Ch. 39; Re Lucking's Will Trusts, [1967] 3 All E.R. 726 (Eng.).

150. Speight v. Gaunt, (1883) 22 Ch. D. 727 at 756; Anker-Petersen v. Anker-Petersen, (1998) 12 T.L.I. 166 (Eng.). For its application in the U.S., see, for example, *In re Will of Hartzell*, 192 N.E. 2d 697, 706 (Ill. App. Ct. 1963); *Estate of Talbot*, 141 Cal. App. 2d 309, 296 P.2d 848 (1956) (a trustee who yielded the exercise of his investment discretion and judgment to a beneficiary was held to be in breach of trust).

151. Trustee Act, 2000, § 11–15 (Eng.).

152. UNIF. PRUDENT INVESTOR ACT § 9 (1994) (U.S); Employee Retirement Income Security Act of 1974 § 403(a)(2), 29 U.S.C. § 1103(a)(2) (2012) (U.S.).

153. *Trusts Act 1973* s 54 (Austl.).

154. One American commentator, however, argues that by abrogating the duty not to delegate, modern trust law has reduced the incentive for trustees to make careful investment decisions, and this reduced incentive has resulted in uncompensated losses for trust beneficiaries. He, therefore,

to be drawn between "attempting to delegate a trust and obtaining professional help in the exercise of a trust."[155] Inasmuch as a trustee is entitled, or sometimes obliged, to seek proper investment advice, the ultimate decision whether or not to invest or to invest in a particular manner rests with him, subject only to any consent or direction required by the terms of the trust.[156] The trustee cannot abdicate the responsibility to a professional agent and thereby claim absolute immunity from trust liability.[157]

The well-known case of *Learoyd v. Whiteley*[158] nicely illustrates this point. There, trustees invested trust funds on the security of a mortgage of a freehold brickfield. They had duly obtained advice from a competent firm of estate surveyors, which stated that the brickfield was a going concern, with a caveat that it was nearly worked out. Both the English Court of Appeal and House of Lords held the trustees liable for the resulting loss when the brickfield failed, for the report was not such as an ordinary prudent man of business would have relied on in the conduct of his own affairs if he was regardful of the pecuniary interests in the future of those having claims upon him.

G. The Modern Portfolio Theory

It seems convenient, at this juncture, to introduce the "modern portfolio theory"[159] which has undoubtedly gained considerable momentum in the investment world.[160] As Hoffmann, J., (as he then was) at first instance,

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advocates for a return to a regime that entitles a trustee to seek and to pay for investment advice but leaves the trustee as a guarantor for any breaches committed by the investment advisor. *See* Sterk, *supra* note 35, at 855, 904.

155. Maitland, *supra* note 4, at 94.

156. Section 3(2) of the Trustee Investments Act has codified this rule. In the draft Trustee Bill submitted to the Attorney-General of the Federation in 2011, the Nigerian Law Reform Commission has proposed a reversal of the rule forbidding the trustee to delegate investment and management functions.

157. Re Knight's Trusts, (1859) 54 E.R. 18 at 20; Stott v. Milne, (1884) 25 Ch. D. 710 at 714. However, it would be difficult to establish a breach of trust where a trustee had in good faith relied on expert advice, and such reliance may also entitle him to relief from trust liability under the Trustee Act, 1893, s. 8; Judicial Trustees Act, 1896, s. 3 or Trustee Law, s. 45, whichever may be applicable.

158. (1887) 12 App. Cas. 727 (Eng.). See also the American case of *Estate of Talbolt*, 141 Cal. App. 2d 309, 296 P. 2d 848 (1956), where a trustee who yielded the exercise of his investment discretion and judgment to a beneficiary was held to be guilty of a breach of trust.

159. The genesis of the theory is traceable to Harry Markowitz's seminal article, *Portfolio Selection*, 7 J. Fin. 77 (1952).

160. *See generally* B. Longstreth, Modern Investment Management and the Prudent Man Rule (Oxford Univ. Press 1986); E. Ford, *Trustee Investment and Modern Portfolio Theory*, 10 T.L.I. 102 – 104 (1996); Lord Nicholls, *supra* note 17, at 75–76; Sterk, *supra* note 35.

put it in *Nestle v. National Westminster Bank Plc*,[161] "Modern trustees acting within their investment powers are entitled to be judged by the standards of current portfolio theory, which emphasizes the risk level of the entire portfolio rather than the risk attaching to each investment taken in isolation." Surely, modern investment experts favour investment in a balanced multi-sector portfolio as against wholesale investment in any particular sector or line of business, however lucrative it is or may seem at the moment. As has been noted,[162] a balanced portfolio will have three basic characteristics, namely liquidity, stability and growth. Such a portfolio should ideally comprise investments spread across equities, fixed-income stocks and bonds, bank deposits, real estate, and other suitable investments. Further, while investing in equities,[163] there should be a horizontal spread among the major sectors of the market such ass financial services, oil and gas, consumer goods, information and communication technology, and so forth.[164] The pith and substance of the modern portfolio theory, therefore, is that the prudent investor should seek to diversify risk, rather than avoid risk altogether.

The portfolio investment technique inevitably imports a duty upon trustees to undertake periodic reviews of the investments and to switch investments as may be necessary from time to time.[165] It also compels the engagement of experts, as portfolio investment seems too intricate for the amateur trustee. The attraction of a balanced portfolio investment is that the poor performance of some of the investments will be compensated by the more productive ones and success will be judged by the overall performance. Also, long-term investments that typically yield lower (or even no) income in the meantime will be balanced against short-term income-producing ones so as to satisfy the disparate claims of the beneficiaries in an appropriate case. "It seems clear that well-diversified investment in accordance with the modern portfolio theory best meets the interests of beneficiaries by providing a combination of safety and access

161. Nestle v. National Westminster Bank Plc, [1988], unreported but transcribed in [1996] 10 (4) T.L.I. 112 at 115 (Eng.).; [2000] W.T.L.R. 795 at 802. *See also* J. W. v. Morgan Trust Company of Bahamas Ltd, [2002] 4 I.T.E.L.R. 541.

162. J. Stephens, *Designing an Investment Portfolio for Trustees*, 1 T & T (1994), *cited in* WATT, TRUSTS AND EQUITY, *supra* note 2, at 402.

163. Indeed, equity investment is the fulcrum on which the modern portfolio theory revolves.

164. As the progenitor of the modern portfolio theory himself cautions, "It is necessary to avoid investing in securities with high covariances among themselves. We should diversify across industries because firms in different industries, especially industries with different economic characteristics, have lower covariances than firms within an industry." Markowitz, *Portfolio Selection*, 7 J. FIN. 77 89 (1952).

165. Nestle v. National Westminster Bank Plc, [1994] 1 All E.R. 118 at 133, 140 (Eng.); *see also* Trustee Act, 2000, § 4(2) (Eng.); *Trusts Act 1973* s 22(3) (Austl.); Pension Reform Act No. (4) (2014), §§ 57(f), 78(3)(b)–(d) (Nigeria).

to the greatest possible funds."[166] Indeed, investing in accordance with the modern portfolio theory is said to be the modern paradigm of prudence.[167]

The modern portfolio theory has instigated the reformulation of the traditional approach to trust investing in many jurisdictions.[168] As has been observed,[169] its implementation has brought about a sea change in modern trust law in at least three ways. First, it has eliminated the prohibition on speculative investment. Secondly, it has imposed on trustee investors a duty to diversify. Thirdly, to ensure that persons with an understanding of portfolio theory make investment decisions, modern trust law has abrogated the traditional prohibition on delegating investment responsibilities and has instead sought to encourage such delegation.

Unfortunately, there are a number of obstacles in the way of the Nigerian trustee investor wishing to take advantage of the modern portfolio theory, most notably the fact that the range of investment options open to him remains overly restricted by both the extant statutes and rules of equity. Thus, he is still enmeshed in the murky waters of statutory list of trustee investments coupled with a complicated scheme of apportionment of investments. For instance, unless authorized by the trust instrument, he can neither invest in a private company nor in a start-up but prospective public company that is yet to meet the requirements of Nigerian Stock Exchange listing or three-year dividend payouts, as stipulated in the Trustee Investments Act.[170] Besides, traditional trust law forbids the delegation of his investment discretions unless permitted by the trust instrument. So, too, is his investment discretion still unduly fettered by the obsolete rule that a trust investment has to be income-producing.

For the English trustee, the Trustee Act, 2000 has removed all such obstacles[171] by authorizing him to invest as if he were an absolute benefi-

166. Ford, *supra* note 167, at 103.

167. LONGSTRETH, *supra* note 160, chap. 4. For a contrasting view, see Sterk, *supra* note 35, at 867 *et seq*.

168. *See, e.g.*, Trustee Act, 2000, §§ 3, 4, 5, 11, 15, Explanatory Note 25 (Eng.); UNIF. PRUDENT INVESTOR ACT §§ 2, 3, 9 (1994) (U.S.); RESTATEMENT (THIRD) OF THE LAW OF TRUSTS: PRUDENT INVESTOR RULE § 80 (2007) (U.S.); *Trusts Act 1973* ss 21, 24, 54 (Austl.); *Superannuation Industry (Supervision) Act* 1993 s 52(2)(f) (Austl.); Manitoba Law Reform Commission, *Trustee Investments: The Modern Portfolio Theory*, Rep. No. 101 (June 1999); British Columbia Law Institute, *Total Return Investing by Trustees*, Rep. No. 16 (August 2001).

169. Sterk, *supra* note 35, at 854; *see also* LONGSTRETH, *supra* note 160, at 12.

170. Such as those that emerged in the wake of the recent privatization of public utilities and recapitalization of banks, the shares of which savvy investors rushed to buy.

171. For an excellent exposition of these obstacles and how they have been eliminated by the current English legislation, see WATT, TRUSTS AND EQUITY, *supra* note 2, at 417–18.

cial owner of the trust fund.[172] For the avoidance of doubt, the Explanatory Notes (note 25) which accompany the Act expressly state that the "standard investment criteria" are intended to accord with the modern portfolio theory. And, consistent with that note, the Law Commission for England and Wales has recognized that "The 2000 Act embraces modern portfolio investment theory in which the main concern of the investor is to balance overall growth and overall risk."[173]

Ironically, such *carte blanche* to invest in the same range of securities and in the same manner as a prudent man would do with his own funds had been conceded to trustee investors in the United States[174] and Australia[175] even before the idea was floated in England. In the United States, it is known as the "prudent man rule,"[176] the ancestry of which is traceable to the State of Massachusetts.[177] Moreover, the portfolio investment technique has since been a prominent feature of the American trust investment laws and practices.[178] In keeping with that philosophy, section 2 (c) of the Uniform Prudent Investor Act[179] has set out eight basic factors that should guide trustees in exercising their powers of investment and management of trust assets. The current position in the United States is vividly captured in the following observation of one learned commentator:

172. Trustee Act, 2000, § 3 (Eng.); *see also* Pensions Act, 1995, § 34 (U.K.).

173. *Capital and Income in Trusts: Classification and Apportionment*, 175 LAW COMM. C.P. para. 1.3. (2004).

174. V. Latham, *Trustee Investment and American Practice*, 7 CURRENT LEGAL PROBS. 139–55 (1954); M. A. Shattuck, *The Development of the Prudent Man Rule for Fiduciary Investment in the United States in the Twentieth Century*, 12 OHIO ST. L.J. 491(1951).

175. Section 21 of the Australian Trusts Act, 1973 provides that a trustee may, unless expressly forbidden by the instrument creating the trust – (a) invest trust funds in any form of investment; and (b) at any time vary an investment or realize an investment of trust funds and reinvest an amount resulting from the realization in any form of investment.

176. Whilst repudiating the "legal list" approach, the prudent man rule nevertheless forbade speculative investment. As Putman, J., stated it, a trustee must "observe how men of prudence . . . manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested." Harvard College v. Amory, 26 Mass. (9 Pick.) 446, 461 (1830).

177. Latham, *supra* note 174, at 144–45; SCOTT, *supra* note 65, at 438. See also the leading case of *Harvard College v. Amory*, *id.*, which was the *fons et origo* of the rule; the Model Prudent Man Rule Statute, 1942 which codified the rule (text of which is recited in Shattuck, *supra* note 174, at 508–09). There were, however, deviations in the States that adopted the "legal list" approach spurred by the decision in *King v. Talbot*, 40 N.Y. 76 (1869). *See* LONGSTRETH, *supra* note 160, at 11–12; Sterk, *supra* note 35, at 856.

178. J. H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV., 641 (1996); E. Moses et al., *Modern Portfolio Theory and the Prudent Investor Rule*, 30 ACTEC J. 166 (2004); Sterk, *supra* note 35.

179. For similar statutory guidelines, see section 24 of the Australian Trusts Act, 1973.

> The Uniform Prudent Investor Act and its 'Prudent Investor Rule' fundamentally changed trust investment law with its new emphasis on the portfolio as a whole rather than on individual assets and its rejection of emphasizing strict avoidance of 'risky or speculative' investments. Under the new rules no specific investment is inherently prudent or imprudent. Instead, suitability to the trust account's purposes and beneficiaries' needs is considered the determinant . . . .
>
> The Uniform Prudent Investor Act requires that trustees be familiar with modern portfolio theory and incorporate its principles into their investment strategies and documentation of their actions.[180]

From the foregoing, it can be seen that whereas, in Nigeria, the suitability or risk of a particular trust investment would still be judged in isolation, in more pro-active jurisdictions, such as England, America and Australia, it is now to be judged vis-à-vis the overall investment portfolio. Again, while the Nigerian trustee is still weighed down with the shackles imposed on him by the non-delegation rule of equity,[181] his counterparts in those countries have been freed from such shackles. There is, therefore, an urgent need for a paradigm shift so as to jolt the Nigerian trustee investor to move away from the present position in which he "wears a complacent air, because the virtue of safety will in practice put a premium on inactivity."[182] The time has come for Nigerian trustees to be liberated from conservative investment strategies which no longer represent prudent investing but rather expose them to potential liability for making "hazardous" or "speculative" investments or for delegating trust investment duty. Surely, such a transformation will be in the best interests of trust beneficiaries who have been at the receiving end of the current anachronistic regulatory regime. Fortunately, the modern portfolio theory appears to be the philosophical underpinning of the Pension Reform Act[183] as well as the Regulation on Investment of Pension Fund Assets made by PenCom. This provides the basis for a distinct expectation that any reform of the general trustee investment legislation henceforth will take into account this rather progressive doctrine.

180. K. Ziesenheim, *Guidelines for Advisors on the Uniform Prudent Investor Act*, *available at* www.thornburginvestments.com (last visited Mar. 19, 2012).

181. As encoded in the Latin maxim "*Delegatus non potest delegare*."

182. Nestle v. National Westminster Bank Plc, [1994] 1 All E.R. 118 at 142 (Eng.).

183. *See* Pension Reform Act No. (4) (2014), §§ 78, 86, *re-enacting* Pension Reform Act No. (2) (2004), §§ 66, 73(1) (Nigeria).

III. CONCLUSION

This work has undertaken a comparative review of the general principles of equity and statutory rules guiding the discharge of a trustee's investment duty and the exercise of his investment discretions under the Nigerian law vis-à-vis the laws of other common law countries. As has been demonstrated, investment is virtually a universal obligation of trusteeship. It has also been revealed that the theoretical (as well as statutory) framework for trust investment under the Nigerian law is largely outdated when compared with the current trends in other jurisdictions, notably England, United States of America, and Australia. Crucially, the prospects of mandating Nigerian trustee investors to embrace the modern portfolio theory, which is now the lodestar that guides trustee investors in those jurisdictions, is still bedeviled by a number of obstacles imposed by the obsolete received English law as well as the extant legislation applicable in this country. In other jurisdictions, such obstacles have been eliminated by legislation authorizing a trustee to invest as if he were an absolute owner or a prudent man of business investing his own funds.

In order to align our law and practice with the current global trends, therefore, the trust investment regulation in this country need to be liberalized. The starting point should be to do away with the relics of received pre-1900 English statutes of general application that have since been buried in England but which, regrettably, still rule us from their graves. Equally deserving of trashing are those antediluvian principles of equity noted above which can no longer stand the test of validity under the modern trust investment law. This should be followed with the enactment of a comprehensive Trustee Act dealing with all aspects of trusts in which the modern principles of trust investment discussed herein shall be captured. Nonetheless, considering, among other factors, the relatively low standard of investment skills and high level of corruption[184] in this part of the world, it seems too great a risk to give the Nigerian trustee a *carte blanche* to invest as if he were the absolute beneficial owner of trust assets. As this writer stated elsewhere,[185] the stage of development in this country still calls for some sort of statutory red line to be drawn for trustee investors.

184. Transparency International's *Corruption Perceptions Index* (2015) ranked Nigeria as No. 136 out of 168 countries surveyed. *Corruption Perception Index 2015: Nigeria*, TRANSPARENCY INTERNATIONAL, www.transparency.org/country/#NGA (last visited July 15, 2016). *See also* A-G of Ondo State v. A-G of the Federation, [2002] 9 N.W.L.R. (Pt. 772) 222 (Nigeria).

185. L. O. C. Chukwu, *Half a Century of Trustee Investments Legislation in Nigeria: A Case for Law Reform*, 2 NIALS J. BUS. L. 178, 228 (2013) (suggesting also the modalities of the proposed statutory reform).