

CHAPTER 36

ADMINISTRATIVE POWERS OF TRUSTEES

2. POWER TO EMPLOY AGENTS

Agency under the Trustee Act 2000*Matters capable of delegation*

- 36–19** NOTE 84. IN THE FIRST SENTENCE DELETE a administrative power AND REPLACE BY an administrative power. AT THE END OF THE FIRST SENTENCE INSERT: See the comments on that decision in *Southgate v Sutton* [2011] EWCA Civ 637; [2011] W.T.L.R. 1235, where, however, it was common ground (see *ibid.* at [10]) that the trustees had no inherent power to effect such an appropriation.

Asset management

AFTER § 36–31 INSERT THE FOLLOWING NEW PARAGRAPH:

- 36–31A** It is quite common for the investments of a trust to be held not by the trustees directly but by a holding company of which all the shares are vested in the trustees. If the company appoints a discretionary fund manager, he is the agent of the company and not of the trustees and it seems that the special obligations imposed by section 15 of the 2000 Act will not apply to him.

AFTER § 36–33 INSERT THE FOLLOWING NEW PARAGRAPH AND HEADING:

Liability of agents

- 36–33A** An agent duly appointed may, of course, incur a liability to the trustees if he defaults in the performance of his functions. Although an agent may act gratuitously, his liability will typically be for breach of contract and so will depend on the terms of the contract between him and the trustees; there may also be a parallel liability in tort for negligence. A discretionary asset manager, for example, will owe a duty of reasonable care and skill in

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carrying out his functions unless the duty is modified by the terms of the agreement.^{41a} As to other possible liabilities, even when an agent takes possession of trust assets, he will not be treated as a trustee *de son tort* if properly appointed, since he is lawfully in possession of them.^{41b} Even if the trustee infringes the limits set by the 2000 Act to the appointment of agents, section 24 probably precludes an agent from being so treated.^{41c} But it is possible that an agent may incur a liability as such if he is engaged by a principal who is purporting to be a trustee but has not been properly appointed a trustee and so is himself a trustee *de son tort*.^{41d}

3. POWERS OF APPROPRIATION**Appropriation by trustees under general law**

36–66(5) NOTE 32. AT THE END ADD: But such a power may be conferred by the court under Trustee Act 1925, s.57: *Southgate v Sutton* [2011] EWCA Civ 637; [2011] W.T.L.R. 1235. For s.57, see §§ 45–12 *et seq.*

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^{41a} Both at common law and under the Supply of Goods and Services Act 1982, ss.13, 16.

^{41b} *Cunningham v Cunningham* 2009 J.L.R. 227.

^{41c} See § 36–33.

^{41d} *Cunningham v Cunningham*, above; and see § 42–96.