

TRUSTEE ACT 2000

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

PART VI: Miscellaneous and Supplementary

Section 34: Power to insure

116. **Section 34** creates a new power to insure. Under the present law there is probably a common law power (and sometimes even a duty) to insure trust property, but this is not entirely certain. In addition, there are different statutory powers to insure under the Trustee Act 1925 section 19 and the Trusts of Land and Appointment of Trustees Act 1996 section 6(1). The power under section 19 is limited to three-fourths of the full value of the property and does not apply to bare trustees. The new power will replace these disparate, unsatisfactory and, in places, uncertain provisions with a clear general default statutory power for trustees to insure trust property as if they were absolute owners. The new provision is based upon the provisions which now apply to trustees of land by virtue of section 6(1) of the 1996 Act.
117. **Section 34(1)** does this by inserting a new power to insure into the Trustee Act 1925 in substitution for the existing section 19. Subsection (1) of the new section 19 confers a power upon all trustees to insure any trust property (whether land or personal property) against such risks and in such sums as they see fit. Trustees will be able to pay the insurance premiums out of the income or capital funds of the trust (see new section 19(5)).
118. Trustees will be subject to the new statutory duty of care under section 1 when exercising the power to insure under the new section 19 or any corresponding power conferred by the trust instrument (see Schedule 1, paragraph 4). The duty of care will therefore apply, for example, to the selection of an insurer and to the terms on which insurance cover is taken out.
119. The new power to insure will apply to all trustees including bare trustees irrespective of when the trust was created (section 34(3)) but will only be a default power (as is the case in relation to the existing section 19 of the Trustee Act 1925 by virtue of Trustee Act 1925 section 69(2)).
120. The exercise of the power by bare trustees (defined for these purposes in new section 19(3)) will however be subject to the qualification in the new section 19(2). This provides that bare trustees must comply with any direction from the sole beneficiary or all the beneficiaries (as the case may be) that any trust property is not to be insured or is only to be insured on certain conditions. The rationale for this qualification is that where the beneficiaries are together absolutely entitled to the trust property, they have power under the general law of trusts to bring the trust to an end (*Saunders v Vautier* (1841) 4 Beav 115; 49 ER 282). To the extent that any such directions are given, the trustees may not delegate their power to insure. This is so that the beneficiaries can ensure compliance with the directions they have given (see new section 19(4)). The concept of a “delegable function” referred to in new section 19(4) is defined in section 11(2) of the Act.

*These notes refer to the Trustee Act 2000 (c.29)
which received Royal Assent on 23 November 2000*

121. [Section 34\(2\)](#) makes a minor consequential drafting amendment to section 20(1) of the Trustee Act 1925. Section 20(1) provides that insurance monies received by trustees against loss or damage of trust property are capital monies.