



Fiduciaries and the power of investment: when is an ethical investment not an investment?

COMMENTARY BY [SEBASTIAN ALLEN](#), 18TH JULY 2022

Introduction

The universe of socially responsible or “ethical” investments has been expanding exponentially in recent years.

It has long been the case that the exercise of the power of investment permitted something more than simply maximising investment returns, with possible financial rewards having to be balanced against an appropriate appetite for financial risk. The concept of “financial risk” has itself developed under modern investment theory to encompass broader ideas of sustainability and Environmental, Social and Governance (“ESG”) considerations which are themselves increasingly regarded as important markers of long-term financial success.¹ Indeed it is the great success story of the ESG movement that these more socially responsible considerations have been translated so effectively into the language of financial metrics and concerns.

What is less well developed is the role that “non-financial” considerations can legitimately play in the investment process and, in particular, to what extent those acting in a fiduciary capacity can take non-financial considerations into account when exercising their investment powers.

This issue was the subject of consideration in the recent decision in the case of *Butler-Sloss v The Charity Commission for England and Wales* [2022] EWHC 974 (Ch).

¹ See the comments in the Law Commission report entitled *Fiduciary Duties of Investment Intermediaries (2014)* (Law Com No 350) at paragraphs 6.24 – 6.32 on socially responsible considerations being financially material considerations.

Whilst that case concerned specifically the extent to which the trustees of a charity could adopt an investment policy that excluded a broad range of possible investments on the grounds that they were considered potentially to conflict with their charitable purpose, the case raises more generally issues as to the extent to which trustees can rely on non-financial considerations in reaching investment decisions.

It is clear from cases even prior to the *Butler-Sloss* case that non-financial considerations can be taken into account by trustees and, to that extent, are not inherently irrelevant considerations when it comes to the exercise of an investment power.

The difficulty for trustees is knowing how far this goes and at what point investment decisions taken by trustees motivated by non-financial considerations could be invalidated. Every effort needs to be made to enable trustees to invest in as socially responsible a manner as possible, but there must conceptually come a point where a focus on non-financial considerations means that a proposed ethical "investment" is not actually an investment at all.

How vulnerable are trustees to challenge in those circumstances and how confident can trustees be of being able to invest in an ethically responsible way?

The relevant background to the *Butler-Sloss* case

The proceedings concerned two charities within the Sainsbury Family Charitable Trusts network, the Ashden Trust and the Mark Leonard Trust, with c. £42m and £22m in assets respectively (the "Charities").

In the case of both Charities:

- a. The trustees had determined to pursue very similar charitable purposes which concerned (i) environmental protection and (ii) relief of poverty.
- b. The terms of the trust deeds contained broadly drafted powers of investments, in addition to the statutory power of investment in s.3 of the Trustee Act 2000.
- c. The existing investment policies already excluded investments that were considered to be contributing to climate change, such as fossil fuel companies, and favoured companies with policies or products designed to limit climate change. This was stated by the trustees to be consistent with their charitable purposes and in the long-term interests of their beneficiaries, whilst also providing

a good financial return given that (i) fossil fuel companies were considered to be overvalued and (ii) unless climate change was limited to a 2°C increase there would be a high cost to the global economy.

The concern of the trustees was that their existing investment policies still contained investments that conflicted with their charitable purposes because they still included companies that contributed to climate change. Instead, the trustees wanted to adopt an investment policy which, so far as possible, identified companies in which the trustees would invest by reference to whether they aligned with the Paris Climate Agreement signed on 22 April 2016 under the United Nations Framework Convention on Climate Change.

In seeking to adopt this new approach:

- a. It was recognised that this necessarily excluded a substantial number of publicly traded companies (potentially as much as half), as well as many commercially available investment funds.
- b. The trustees acknowledged in evidence that they could not precisely ascertain the magnitude of the reduction of the investment universe or how it would increase the risk of financial detriment.
- c. The investment managers were nonetheless set an investment target of "*CPI+4% over a 5 year rolling period (net of all fees)*".
- d. When it came to selecting a portfolio based on the new investment policy, the trustees selected the option with the lowest investment in direct equities and the highest allocation of thematic funds with a green focus, carrying with it the highest overall cost and volatility of all the options presented.

The trustees were seeking the Court's approval to take this new approach in line with the second category of case described in *Public Trustee v Cooper* [2001] WTLR 901. The Charity Commission for England and Wales and the Attorney General were joined as defendants to argue the other side of the application. Both the trustees and the defendants encouraged the Court to give general guidance to trustees of charities as to the approach to take in such situations and the effect of the leading authority in this area – *Harries v Church Commissioners for England* [1992] 1 WLR 1241, known as the *Bishop of Oxford* case.

The legal position prior to the *Butler-Sloss* case

There is nothing in a conventionally drafted power of investment or in the Trustee Act 2000 which deals with non-financial considerations.

Under ss.1 and 5 of the Trustee Act 2000 trustees owe a general duty of care in exercising their investment powers and are required to obtain and consider proper advice about how their investment powers should be exercised. There are high-level statutory prescribed "criteria" which trustees are required to take into account when exercising their power of investment in s.4(3) of the Trustee Act 2000 which concern the suitability and diversification of the investments of the trust. In relation to pension scheme trustees, these provisions are disapplied by s.36 of the Trustee Act 2000, but similar high-level investment considerations are imposed by ss.35-36 of the Pensions Act 1995 and by reg 4 of the Occupational Pension Scheme (Investment) Regulations 2005 SI 2005 No 3378.

None of these provisions, however, makes any reference to non-financial considerations.

Cowan v Scargill

The starting point for the case law in this area is the well-known case of *Cowan v Scargill* [1985] 1 Ch 270.

In that case Sir Robert Megarry V-C had to consider whether the trustees of a mineworkers pension scheme, half of whom were appointed by the National Union of Mineworkers ("NUM"), were acting in breach of their duties by blocking an investment plan which included an increase in overseas investment and investment in energy companies that were in direct competition with coal on the basis that such investments were directly contrary to the NUM's policy and principles.

It was decided that:

- a. The duty of trustees was to exercise their powers in the best interests of the present and future beneficiaries of the trust [41].
- b. This was a trust to provide financial benefits to individuals – not for charitable purposes – and, as such, the power of investment had to be exercised to yield the best return for the beneficiaries judged in relation to the risks of the investment

in question, on the basis that the best interests of members generally meant their best financial interests [41].

- c. Trustees must put aside their personal interests and views and even act dishonourably if the interests of the beneficiaries require it [44] / [45].
- d. If an investment is made that is less beneficial on the basis of ethical considerations then trustees would normally be open to criticism [43].
- e. It was possible that the interests of a beneficiary were not limited to financial interests. Where all actual or potential beneficiaries of a trust were adults with strong moral views it may still be in their interests to accept a reduced return in exchange for a more ethical investment portfolio, presumably on the basis that (as adults) they could consent to that course of action, but such situations were "*likely to be very rare*" [48].

Subsequent cases have distanced themselves from the reasoning in this case and, in particular, from the stark statement that the duty of trustees is to exercise their powers in the best interests of beneficiaries rather than – as is now generally accepted – to promote the proper purposes of the trust: see the judgment of Asplin J in *Merchant Navy Ratings Pension Fund v Stena Line* [2015] EWHC 448 (Ch) at [228] – [242]. Similarly, the suggestion that trustees have – except in "very rare" instances – to maximise financial interests at the cost of all other things (even acting dishonourably if required) sits uncomfortably when assessed against modern standards.

The Bishop of Oxford case

The *Bishop of Oxford* case concerned ethical investments by a charity rather than a pension scheme.

In that case the Bishop of Oxford brought proceedings against the other Church Commissioners challenging their investment policy concerning investments in South Africa, on which opinions among the clergy differed at the time. The Church Commissioners' investment policy already excluded investments in armaments, gambling, tobacco and newspapers, but the Bishop of Oxford did not consider it went far enough in relation to restricting investments in South Africa.

In his judgment, Sir Donald Nicholls V-C set out the principle applicable to the exercise of the power of investment as follows:

"...prima facie the purposes of the trust will be best served by the trustees seeking to obtain therefrom the maximum return, whether by way of income or capital growth which is consistent with commercial prudence. That is the starting point for all charity trustees when considering the exercise of investment powers. Most charities need money; and the more of it there is available, the more the trustees can seek to accomplish. In most cases this prima facie position will govern the trustees' conduct. In most cases the best interests of the charity require that the trustees' choice of investments should be made solely on the basis of well-established investment criteria, having taken expert advice where appropriate and having due regard to such matters as the need to diversify, the need to balance income against capital growth, and the need to balance risk against return".

This "starting point" was considered to be subject to three broad exceptions:

- a. **First** – direct conflicts with a charity's purposes.

In situations where trustees were satisfied that an investment would conflict with the very objects the charity is seeking to achieve, they should not invest, even if it would be likely to result in significant financial detriment to the charity. It was considered that excluding such investments was unlikely in practice to result in significant financial detriment on the basis that the exclusion of one or more companies or sectors from the whole range of investments open to trustees was unlikely to leave them without an adequately wide range of investments.

- b. **Second** – indirect conflicts with a charity's purposes.

This included situations where the proposed investment may alienate supporters or donors or make recipients from the charity less willing to be helped, in which case it would be for the trustees to balance the risks involved – with the more certain the risk of financial detriment the more certain the trustees should be of countervailing disadvantages to the charity before they incur the risk.

- c. **Third** – where the trust provides that trustees are entitled or even required to take non-financial criteria into account.

Whilst acknowledging that the categories of exception were not closed, the Vice Chancellor nonetheless emphasised at [15] – [16] that trustees:

“...must not use property held by them for investment purposes as a means for making moral statements at the expense of the charity of which they are trustees. Those who wish may do so with their own property, but that is not a proper function of trustees with trust assets held as an investment... Trustees may, if they wish, accommodate the views of those who consider that on moral grounds a particular investment would be in conflict with the objects of the charity, so long as the trustees are satisfied that course would not involve a risk of significant financial detriment” (emphasis added)

This final sentence has been elevated into an – arguably unintended – form of “test” for trustees to apply in assessing the legitimacy of taking into account non-financial considerations in investment decisions and it is the approach that is reflected in the various investment guidance that has been issued to trustees in various contexts.

In the pension scheme context the Law Commission’s report entitled *Fiduciary Duties of Investment Intermediaries (2014) (Law Com No 350)* described this approach as the appropriate “test” for taking into account non-financial considerations at paragraph 6.34, together with an additional requirement that the trustees should have “good reason” to think that scheme members would share the concern. This approach has been incorporated into the Pensions Regulator’s guidance on defined benefit investment² and was expressly approved by Lord Wilson and Lord Carnworth in *R (Palestinian Solidarity Campaign Ltd) v Secretary of State for Housing, Communities and Local Government* [2020] 1 WLR 1774.³

In the case of charitable trusts, the Charity Commission has published its own guidance entitled *Charities and investment matters: a guide for trustees (CC14)*, which was updated in 2016.

² With effect from 1 October 2019, trustees preparing a Statement of Investment Principles are legally required to include the extent, if at all, to which non-financial matters will be taken into account in the selection, retention and realisation of investments.

³ The test was, however, subtly (and perhaps inadvertently) recast as requiring a “*significant risk of financial detriment*” rather than a “*risk of significant financial detriment*”, which are seemingly different criteria.

In that guidance, four types of investment are identified:

"a) 'financial investment', the purpose of which is to yield the best financial return within the level of risk considered to be acceptable – this return can then be spent on the charity's aims.

b) 'programme related investment', which is aimed at furthering the charity's purposes while also achieving a financial return.

c) 'mixed motive investments' where the investment does not fit wholly within either previous category and may be justified.

d) 'social investments' which were introduced by the Charities (Protection and Social Investment) Act 2016 and have the mixed purpose designed to further the charity's purposes and achieve a financial return".

The alternative structures of investment described in the guidance create greater flexibility for charity trustees to use funds for a mixture of charitable and return seeking purposes. They are all situations where charity trustees decide to use funds to pursue specific charitable purposes with the potential for financial return and do not concern the way in which, or the considerations that affect the way in which, the general assets of a charity are held and invested.

On that issue, section 3.3 of CC14 asked the question whether a charity can "*decide to make ethical investments?*" and provided the following answer:

"The short answer Yes. Trustees of any charity can decide to invest ethically, even if the investment might provide a lower rate of return than an alternative investment. Ethical investment means investing in a way that reflects a charity's values and ethos and does not run counter to its aims. However, a charity's trustees must be able to justify why it is in the charity's best interests to invest in this way.

The law permits the following reasons:

- a particular investment conflicts with the aims of the charity*
- the charity might lose supporters or beneficiaries if it does not invest ethically*
- there is no significant financial detriment.*

In more detail Trustees must ensure that any decision that they take about adopting an ethical investment approach can be justified within the criteria

above. They must be clear about the reasons why certain companies or sectors are excluded or included. Trustees should also evaluate the effect of any proposed policy on potential investment returns and balance any risk of lower returns against the risk of alienating support or damage to reputation. This cannot be an exact calculation but trustees will have to assess the risk to their charity".

Whilst the approach taken in CC14 has the merit of not seeking to extract from the *Bishop of Oxford* case what was not intended to be a hard and fast "test" to be applied, there are still a number of problems with the "no significant financial detriment" approach as the relevant yardstick for trustees.

This is not least because it is far from clear what it actually means or how it would be applied in practice: almost all investment portfolios can be said to carry a risk of significant financial detriment, even if driven entirely by financial considerations, so what additional risk introduced by non-financial considerations is required to tip the investment decision over the edge from being valid to being invalid? It is also inherently restrictive because it is premised on trustees having an overriding duty to "maximise" investment returns consistent with commercial prudence – which, as a starting point, reduces the scope for non-financial considerations influencing social and ethical investment behaviour.

In light of the *Butler-Sloss* proceedings, the Charity Commission's planned update of CC14 was delayed and the updated version is yet to be published.

The decision in the *Butler-Sloss* case

The primary argument taken by the claimants in seeking approval for the proposed new investment policy was that the effect of the first exception in the *Bishop of Oxford* case was that, in direct conflict situations, the trustees of a charity were prohibited from investing.

Whilst this was rejected as a proposition, the Court nonetheless granted the approval sought to authorise the trustees to adopt the new investment policy as a proper exercise of the power of investment.

In his judgment, Mr Justice Green set out the relevant legal principles to be applied at [78] – which are worth setting out in full:

"(1) Trustees' powers of investment derive from the trust deeds or governing instruments (if any) and the Trustee Act 2000.

(2) Charity trustees' primary and overarching duty is to further the purposes of the trust. The power to invest must therefore be exercised to further the charitable purposes.

(3) That is normally achieved by maximising the financial returns on the investments that are made; the standard investment criteria set out in s.4 of the Trustee Act 2000 requires trustees to consider the suitability of the investment and the need for diversification; applying those criteria and taking appropriate advice is so as to produce the best financial return at an appropriate level of risk for the benefit of the charity and its purposes.

(4) Social investments or impact or programme-related investments are made using separate powers than the pure power of investment.

(5) Where specific investments are prohibited from being made by the trustees under the trust deed or governing instrument, they cannot be made.

(6) But where trustees are of the reasonable view that particular investments or classes of investments potentially conflict with the charitable purposes, the trustees have a discretion as to whether to exclude such investments and they should exercise that discretion by reasonably balancing all relevant factors including, in particular, the likelihood and seriousness of the potential conflict and the likelihood and seriousness of any potential financial effect from the exclusion of such investments.

(7) In considering the financial effect of making or excluding certain investments, the trustees can take into account the risk of losing support from donors and damage to the reputation of the charity generally and in particular among its beneficiaries.

(8) However, trustees need to be careful in relation to making decisions as to investments on purely moral grounds, recognising that among the charity's

supporters and beneficiaries there may be differing legitimate moral views on certain issues.

(9) Essentially, trustees are required to act honestly, reasonably (with all due care and skill) and responsibly in formulating an appropriate investment policy for the charity that is in the best interests of the charity and its purposes. Where there are difficult decisions to be made involving potential conflicts or reputational damage, the trustees need to exercise good judgment by balancing all relevant factors in particular the extent of the potential conflict against the risk of financial detriment.

(10) If that balancing exercise is properly done and a reasonable and proportionate investment policy is thereby adopted, the trustees have complied with their legal duties in such respect and cannot be criticised, even if the court or other trustees might have come to a different conclusion”.

The approach taken by the Court is to be applauded not only for distancing itself from any suggestion that trustees should be applying some form of rigid “*risk of significant financial detriment*” test, but also for introducing some much-needed flexibility into what are often complex and multi-faceted decisions. This is particularly so given the relatively extreme facts of the case. It is difficult to suggest that an investment policy that excludes c.50% of the investment universe does not contain at least a risk of significant financial detriment and so, applying the previous approach in the *Bishop of Oxford* case, it is difficult to see how the approval of the new investment policy could have been given.

Where this decision leaves trustees is as follows:

- a. Where a particular type of investment is expressly prohibited by the trust deed then trustees are not permitted to invest on the basis that they do not have the power to do so and so it would be invalid as an excessive execution.
- b. Where there is a possibility of conflict – whether direct or indirect – the trustees have the power to invest and whether they do so or not turns on the normal principles applicable to the exercise of discretionary powers for the balancing of competing considerations.

What that means is that in possible conflict cases the decision of trustees to take into account non-financial considerations in setting their investment policy ought not to be capable of being set aside unless the trustees have acted irrationally or with

inadequate deliberation⁴, i.e., having taken into account irrelevant considerations or failing to take into account relevant considerations in a sufficiently serious way that amounts to a breach of duty.

Does the decision go too far or not far enough?

Whilst this is a welcome development in linking the issues surrounding the taking into account of non-financial considerations more directly to orthodox principles for the setting aside of exercises of discretionary powers, the reasoning of the Court is not without difficulty.

It is, in particular, unfortunate that when characterising the purposes for which the investment power is to be exercised, the Court continued to adopt the language of "maximising" investment returns.

Whilst this was qualified by the statement that it is only "normally" the purposes for which the power should be exercised, it nonetheless replicates the unsatisfactory starting point from the *Bishop of Oxford* case which forces trustees into a false premise that non-financial considerations are difficult to justify because they pull against the mythical yardstick of the "maximisation" of returns. That myth is very different from investment reality because the weighing of possible returns against long-term and short-term financial risk typically permits of an extremely wide range of investment options, even where the considerations involved are solely financial ones, and it is not a helpful characterisation of the sort of balancing exercise that trustees will perform in determining where they place their investment portfolio along that spectrum to talk in terms of "maximising" investment returns.

It is clearly the purpose of an investment power to generate returns – to grow the assets – but in so doing the issue is not one of "maximisation" but of properly balancing all relevant considerations impacting financial risks and returns as are appropriate to the particular body of trustees exercising that power.⁵

⁴ See the relevant taxonomy for the setting aside of exercises of discretionary powers explained by Morgan J at first instance in *British Airways v Airways Pension Trustees Ltd* [2017] L.R. 16 at [349] – [353] and the decision in *Pitt v Holt* [2013] UKSC 26.

⁵ The Law Commission also considered in its report entitled *Fiduciary Duties of Investment Intermediaries (2014) (Law Com No 350)* that it was unhelpful to characterise the purpose of an investment power as being simply to "maximise" investment returns: see paragraphs 5.52 – 5.55. The Law Commission did, however, still support a characterisation by reference to trustees achieving the "best realistic return", but it is far from clear how that is different in substance from the concept of "maximising" returns.

In this sense the decision in the *Butler-Sloss* case did not go far enough.

In another sense, however, it arguably went too far in placing the only effective limitation on the taking into account of non-financial considerations – at least in conflict cases – on whether the trustees have acted rationally, properly taking into account all relevant and no irrelevant considerations.

If taken to its logical extreme, this could lead to trustees – having balanced all relevant considerations and no irrelevant considerations – deciding to exercise the investment power for purely ethical reasons. Provided that decision was not irrational – which is a high-threshold to cross – it would not, on the approach taken in the *Butler-Sloss* case, be capable of being challenged. Indeed this possibility is expressly countenanced by Mr Justice Green in his legal propositions and, whilst he warns trustees to be “careful” about making decisions on purely moral grounds, he does not say that it would be impermissible to do so.

It is, however, at best doubtful that this is correct.

If an investment is made without any regard to financial considerations, can it properly be characterised as an “investment” at all? Is it not at that point the exercise of the investment power not for the purpose of investing but for some other purpose of using charitable funds for charitable objects? Whilst charities can of course normally do that through the exercise of their other powers, they cannot and ought not to be able to do that through the exercise of their investment powers. If that is right, making investment decisions purely on moral grounds ought to be an invalid exercise of the investment power for an improper purpose – whether or not the relevant considerations have been properly balanced by the trustees.

The Court itself appears to have had reservations about the potential breadth of its own approach.

In articulating its final legal proposition the Court inserted language that the investment decisions reached would need to be “reasonable” or “proportionate”. This does not, however, accord with orthodox principles because (as Mr Justice Green recognised) unless the decision is so unreasonable that no reasonable body of trustees could have reached it, the Court is only concerned with how the decision is reached, not with whether it agrees with the outcome or as to whether the decision is a “reasonable” or “proportionate” one. This unexplained departure from orthodox

principles appears to be the Court attempting to row back from the breadth of its own position, albeit in an unexplained and seemingly unprincipled way.

The reality, however, is that investment decisions are rarely as black and white as being made “purely” for moral reasons and, even when trustees are motivated by non-financial considerations, there is invariably a range of financial and non-financial considerations involved.

Where along the spectrum of a decision motivated entirely by financial considerations and a decision motivated entirely by non-financial considerations does the dial shift from being the exercise of the power for a proper purpose to the exercise of the power for an improper purpose?

The reasoning in the *Butler-Sloss* case does not seem to provide the answer to that question.

A possible answer is to be found in the cases concerning the exercise of discretionary powers for multiple purposes. It is well-established that trustees can act for more than one purpose and, as explained by the Supreme Court in *Eclairs Group Ltd and Glengary Overseas Ltd v JKK Oil & Gas plc* [2015] UKSC 71, provided the dominant purpose⁶ for which the trustees act is a proper purpose, any subordinate purposes for which the trustees act cannot invalidate the decision. If, therefore, the dominant purpose of the trustees in investing the assets is to generate an appropriate return relative to its appetite for risk, where trustees decide to pitch their investment portfolio within the broad range of investment options this will typically generate ought to be capable of being influenced either in part or entirely by non-financial considerations as a subordinate purpose.

The way this approach would work in practice is that:

- a. An investment would not be available to trustees unless the dominant purpose in investing the assets (consistently with the concept of an investment) is to generate an appropriate level of return relative to the investment risk being taken.

⁶ In that case both Lord Sumption and Lord Hodge preferred a move to a causative purpose rather than a dominant purpose, but because the point had not been argued the majority did not feel able to support that suggested change in approach.

- b. On that basis – contrary to the suggestion in the *Butler-Sloss* case – an investment “purely” for moral reasons that cannot be justified on financial grounds would be an improper exercise of the investment power.
- c. This is, however, unlikely in practice to provide a significant limitation in terms of the broad range of investment options properly available to trustees consistent with that dominant purpose.
- d. Where within that broad range the trustees set their investment portfolio is a matter for them in the exercise of their discretion, capable of being influenced by both financial and non-financial considerations, subject only to the orthodox principles set out in the *Butler-Sloss* case that the trustees exercise that discretion rationally, taking into account relevant and not irrelevant considerations.

This approach would accordingly have the benefit of retaining the vast majority of the additional flexibility introduced by Mr Justice Green in the *Butler-Sloss* case, whilst at the same time addressing some of the concerns the Court itself appeared to harbour as to where that flexibility could potentially lead in extreme cases.

It is also consistent with the approach taken by Mr Justice Green on the facts of the *Butler-Sloss* case itself.

The Court was strongly influenced in approving the new investment policy by the fact that the trustees and investment managers were still targeting a “4%+CPI” investment return. There was no suggestion that this was the trustees “maximising” investment returns but what was nonetheless clear was that the dominant purpose of investing the assets was still to generate what the trustees considered was an appropriate level of return, even though the way in which the trustees wanted to generate that return and the investment risks that the trustees wanted to run were highly influenced by the subordinate purpose of investing in an environmentally responsible manner.

How far will the decision be applied?

The Court considered the fact that the investment strategy was specifically aimed at achieving consistency with the charity’s own charitable purposes to be central to its reasoning.

It is not, however, immediately apparent why the application of orthodox principles to the exercise of discretionary powers should necessarily be limited to that situation.

There is no reason in practice why the trustees of a charity that supports those in financial hardship should be any less concerned to invest in a way that is environmentally responsible than a charity that is concerned with protecting the environment. It is important in this regard not to conflate the exercise of a discretionary power to invest with the use of charitable assets to pursue charitable purposes in line with the objects of the charity. Whilst it is clear why charitable activities should be limited by reference to the charity's objects, it is less clear why the exercise of the investment power ought to be so limited, provided it is being exercised in a way that generally promotes the purposes of the trust.

It should be noted in this context that in the *Butler-Sloss* case both Charities in fact had mixed charitable objects of both (i) the protection of the environment and (ii) the relief of poverty.

Whilst it is far from clear how the new investment policy promoted the interests (at least directly) of those who might stand to benefit from the Charities pursuing their relief from poverty purpose, this did not prevent the trustees from using environmental considerations to delimit the scope of their investment portfolio.

There is also a wider social obligation in support of applying the approach taken by Mr Justice Green more widely than its immediate facts – both within and beyond the context of charitable trusts.

In reaching the view that the trustees should be authorised to adopt their new investment policy, the Court appears to have been influenced by the fact that, as explained at [87], "*there needs to be a dramatic shift in investment policies in order to have any appreciable effect on greenhouse gas emissions and for there to be any chance of ensuring that there is no more than a 1.5°C rise in pre-industrial temperature*". It would be unsatisfactory if the law were to preclude that sort of dramatic shift in other non-charitable contexts by continuing to refer to an overly prescriptive and arguably unworkable "*risk of significant financial detriment*" test based on a false premise that the overriding purpose for which the investment power had to be exercised was always to "maximise" investment returns.

The *Butler-Sloss* decision paves the way to permit that sort of radical shift – within orthodox legal principles – and the Court ought to be slow to halt that progress in other

areas where fiduciaries are tasked with responsibility for the exercise of investment powers.

For more information on our Trusts, Tax, Probate and Estates practice, [please click here](#).

If you are viewing this document on LinkedIn, you can download it by clicking on the



icon in the top-right-hand corner when in full screen view.

The views expressed in this material are those of the individual author(s) and do not necessarily reflect the views of Wilberforce Chambers or its members. This material is provided free of charge by Wilberforce Chambers for general information only and is not intended to provide legal advice. No responsibility for any consequences of relying on this as legal advice is assumed by the author or the publisher; if you are not a solicitor, you are strongly advised to obtain specific advice from a lawyer. The contents of this material must not be reproduced without the consent of the author.

