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TL4 Private Client MAGAZINE

ISSUE 4

Trustees Under Pressure

INTRODUCTION

"Pressure is a privilege – it only comes to those who earn it." **Billie Jean King**

Welcome to Issue 4! A year on from the launch of our Private Client Community we continue to see growth in the breadth, engagement and commitment from our members. Emerging from a pandemic leaves us with even more of a need to look to peers for inspiration, knowledge and confidence.

Thank you to our contributors for their interpretations on the pressure trustees have faced in the face of change. We also express our gratitude to our Community Partners whose support allows us to deliver the highest quality of content.

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CONTENTS

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FUNERAL PLAN TRUSTS – BURIED BY NEW RULES

Authored by: Edward Stone - Womble Bond Dickinson

One particular group of trustees, trustees of pre-paid funeral plans in the UK, are finding themselves under pressure due to the impending regulation of the pre-paid funeral plan sector and need urgently to mould their trusts to fit the proposed new requirements.

Under a pre-paid funeral plan, a person who wishes to ensure that they (or someone else) has the funeral they desire, contracts and pays for a funeral in advance, saving their families cost and inconvenience at what is typically a stressful and traumatic time. In order for the funeral plan provider to ensure it has sufficient funds to honour its commitments it must, under current regulations [1], apply the money paid by the customer towards a whole of life insurance contract on the customer's life or hold it in a trust which meets certain conditions:

- established by written instrument;
- more than half of the trustees unconnected with the plan provider;
- an appropriate independent investment manager appointed to manage the trust fund;
- accounts prepared annually and audited by a statutory auditor; and
- at least once every three years the assets and liabilities of the trust determined, calculated and verified by an actuary.

All relatively straightforward until January 2021 when, coincidentally at the peak of the second wave of the coronavirus pandemic at a time when funeral plan providers were at their busiest, the government passed legislation bringing the regulation of pre-paid funeral plans into the remit of the Financial Conduct Authority (FCA) and from 29 July 2022 providers of pre-paid funeral plans must be authorised and regulated by the FCA.

In March 2021, the FCA published a lengthy consultation paper on its proposed approach to regulation of the pre-paid funeral plan sector and set out the new draft conditions and rules (the New Rules) which are intended to protect customers that have, or will in future take out, a pre-paid funeral plan product. The consultation period has now ended and hopefully the regulatory landscape will be finalised in good time for when the FCA plans to open the application gateway in September 2021.

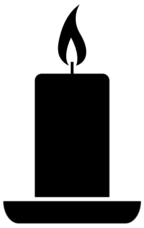
From a trust practitioner's perspective, the New Rules raise several issues for trustees, some of which stretch the laws on trusts.

1. Is a pre-paid funeral plan trust a non-charitable purpose trust?

The New Rules require that the trust must be established by a written instrument which provides that "the assets held on trust are for the benefit of customers … for the purpose of giving effect to their rights under the funeral plan contracts"[2]. This must be a statement of intent rather than requirement of form since English trust law does not permit non-charitable purpose trusts; a trust governed by English law must either be for beneficiaries or for charitable purposes. As the trust will not qualify as charitable, it will have to be for beneficiaries or else be established under the laws of a jurisdiction which expressly allows for non-charitable purpose trusts (which is presumably not the intention of the rules and regulations).

1 Art. 60 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001

2 3.1.9 R (1) of the Funeral Plan: Conduct of Business sourcebook (FPCOB)



2. Who are the beneficiaries of a pre-paid funeral plan trust?

As a trust for beneficiaries, the trustees must be able to identify with certainty who their beneficiaries are. There are several different potential classes of beneficiaries:

2.1 A customer who has taken out a plan?

Although customers might appear to be the obvious beneficiaries of the trust, their rights to a funeral or a refund are under their contract with the plan provider and the role of the trust under the New Rules is to guarantee that there are still funds available either (i) to meet the cost of their funeral (which could be many years after the plan has been taken out and necessarily after the customer's demise) or (ii) to refund a customer who cancels their plan and potentially paying their 'customer balance' (a pro-rated share of the remainder of the trust assets). Customers also potentially 'benefit' by paying less for their funeral at the time they take out the plan than they (or their heirs) would pay at the time of their death.

The FCA proposes further consultation on whether customers who cancel their contracts should be paid a 'customer balance' in addition to their refund but if the New Rules eventually do provide that customers are entitled to a pro-rated share of the trust fund, then this could make them potentially interested in the trust assets and so beneficiaries of the trust.

2.2 A customer who has taken out a plan for someone else's funeral or the personal representatives of a customer?

Customers who have taken out a plan for someone else or the PRs of a deceased customer would seem to be in the same position as customers who have taken out a plan for their own funeral.

2.3 The funeral plan provider?

The New Rules provide that a plan provider "can make a claim against the assets held on trust" in certain circumstances [3]:

(a) for the purpose of delivering a funeral; or

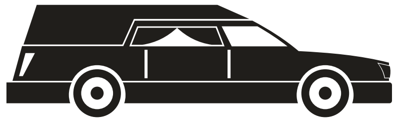
(b) providing a customer refund or paying the customer balance; or

(c) paying surpluses.

2.4 The liquidator of an insolvent plan provider?

The New Rules require that the trust must provide that [4] where a funeral plan provider becomes insolvent "an insolvency practitioner may claim against the assets held on trust, in priority to all other claims against those assets, to meet their costs properly attributable to causing the firm to continue providing or arranging funerals under existing funeral plan contracts or effecting a transfer of those contracts to a new provider".

It appears that, notwithstanding the intention that monies paid for funeral plans be held on trust for the benefit of customers, customers will only indirectly benefit from the trust and the only beneficiary of each funeral plan trust - the only person to whom trustees can properly pay money to out of the trust fund - will be the plan provider (or its liquidator if insolvent).



3. Who is entitled to any surpluses from the trust?

As the value of the trust fund should increase over time through investment, it should have more than sufficient assets to be able to meet the costs of all the contracted funerals (the solvency level). The New Rules allow a funeral plan provider to withdraw any surpluses from the trust provided that the solvency level of the trust is above 110% and the withdrawal has been approved by an actuary [5]. Where the solvency level falls below 100%, remediation is required [6] and the plan provider must remedy any shortfall using its own resources so that the solvency level is returned to 100% [7]. This implies that the solvency level of the trust must be maintained at all times between 100% and at least 110%.

Whilst it is clear that the plan provider is entitled to claim any surplus over 110%, there is a question whether anyone is entitled to any surplus above the solvency level but below 110%? The aim is clearly to ensure a cushion is maintained so that trusts can always meet their potential liabilities and, in trust terms, it would seem that the plan provider alone is entitled to this intermediate surplus but only when the trust eventually comes to an end.

It is difficult to see how these rules could work were customers ever entitled to receive their customer balance, a pro-rated share of the trust assets, upon cancellation. The amount of the customer balance would be affected by timing; trust funds' values go up and down and how would the withdrawal of surpluses by the plan provider be taken into account?).

The trustees of funeral plans are feeling the pressure and that is before they start to consider how the trusts will be taxed and what information needs to be included on HMRC's Trusts Registration Service…

3 3.1.9 R (3) FPCOB

4 3.1.9 R (7) FPCOB

5 3.2.12 R FPCOB

6 3.2.6 R FPCOB

7 3.2.11 R (1) FPCOB

Supporting Durrell & Jersey Zoo

Jersey Zoo is the heartbeat of the Durrell Wildlife Conservation Trust. All of their conservation work around the globe is underpinned by the zoo. Despite their hardest efforts, the present pandemic is having a devastating effect on the income of Durrell.

When they wrote to inform us that their global conservation program and 61-year history of saving species and habitats from the brink of extinction was in real danger due to the financial impact of the pandemic on Jersey Zoo, we asked how we could help.

After discussions with Durrell, we are delighted that ARC is now the proud sponsor of their Blue Poison Dart Frogs display.

Find out more about the Durrell Wildlife Conservation Trust, their work and the frogs on their website **www.durrell.org**

The Blue Poison Dart Frog

(dendrobates tinctorius azureus)

Native to Suriname

The poison frogs of Central and South America are famous for their toxic secretions, used by native communities when hunting. The poisons are not made by the frogs themselves, but are taken up from their diet of invertebrates, which have in turn ingested plant chemicals. However, in captivity the poison decreases considerably in strength as the food chain needed to supply them with their raw materials does not exist.

The frogs' bright colours advertise their poisonous nature. The blue poison frog's pattern of black spots on a blue background is particularly striking and varies from individual to individual. After they metamorphose into tadpoles, the male carries the young on his back to a small pool, water trapped in a hole or a bromeliad, where they develop into frogs after 10-12 weeks.

With the world's amphibians in crisis, captive populations are vital to conservation efforts.

Extremely sensitive to environmental change, amphibians give us early warning of problems that might be due to global warming, pollution and so on. The blue poison frog, like many others, is threatened with extinction.

Durrell has successfully bred this species, and their biosecure facilities at the Trust's headquarters in Jersey will enable them to continue studying and breeding the blue poison dart frog and other threatened amphibians in captivity, developing techniques to help slow their decline.

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A WORLD OF BARRIERS – THE LATEST ON FIREWALLS IN TRUST LITIGATION

Authored by: Jo Verbiesen and Alasdair Davidson - Bedell Cristin

To misquote the lyrics of the great Edwin Starr – "Firewalls: what are they good for?" It turns out the answer may be much more positive than "Absolutely nothin'".

In recent years a variety of jurisdictions have introduced, tweaked, amended and upgraded their firewall legislation in an effort to promote themselves to potential clients as safe havens where the firewall provisions will act as a comforting harbour against the inclement waves that may batter against the integrity of the trust.

For those unfamiliar with what a firewall might be (in a trust context) it's worth starting with a brief overview of the sorts of challenges that a trust may face in terms of attacks or claims against trust assets. This article does not seek to address specifically the topic of asset protection trusts which are based, generally, upon specific legislative frameworks implemented to meet a particular market demand. Nor do we seek to address the question of fraudulent transfers, the Statute of Elizabeth or insolvency based remedies for creditors.

The biggest risk to some trusts may be commercial pressures arising from within the nature of the business being carried out by companies in the structure giving rise to litigation. For others of a dynastic nature, the settlor may be concerned as to wealth leaking out through spendthrift children or divorce claims from scorned children-in-law. Typical claims may include the following:

- family provision or inheritance claims brought by a spouse, ex-spouse, child or other dependant;
- claims brought based upon community property rules in civil law jurisdictions;
- claims pursued by a trustee in bankruptcy, a receiver or some other insolvency process concerning a settlor or beneficiary's estate; and
- forced heirship claims from the executors or administrators of the estate of a settlor or beneficiary or from apparent heirs themselves.

Many of these claims may trigger considerations of forum, comity, application of international conflict of laws principles and so forth. It will require analysis of the location of the claimant, the assets in question, relevant treaties and international conventions, governing law clauses and so forth. Again, this article does not seek to address any of that in any detail but firewall legislation is an attempt to ensure, in very simple terms, that any claims concerning trust assets are adjudicated under the governing law of that trust.

Taking Guernsey's firewall provisions under the Trusts (Guernsey) Law 2007 (the "Trusts Law") as a good example, section 14 of the Trusts Law states (very comprehensively) as follows:

"Application of Guernsey law to questions of validity.

14. (1) Subject to the terms of the trust, all questions arising in relation to a Guernsey trust or any disposition of property to or upon such a trust, including (without limitation) questions as to –

(a) the capacity of the settlor,

(b) the validity, interpretation or effect of the trust or disposition or any variation or termination thereof,

(c) the administration of the trust, whether it is conducted in Guernsey or elsewhere, including (without limitation) questions as to the functions, appointment and removal of trustees and enforcers,

(d) the existence and extent of any functions in respect of the trust, including (without limitation) powers of variation, revocation and appointment, and the validity of the exercise of any such function,

(e) the distribution of the trust property,

are to be determined according to the law of Guernsey without reference to the law of any other jurisdiction.

For these purposes "the law of Guernsey" does not include the Guernsey rules of private international law, except those set out in this section."

There are then carve outs to respect, for example, the law governing the disposition of an asset into a trust which is not owned by the settlor. Section 3 of the firewall provisions goes on:

Section 4 makes plain that no foreign judgment outside of Guernsey shall be recognised or enforced if it is inconsistent with the Trusts Law or the Royal Court, "for the purposes of protecting the interests of the beneficiaries or in the interests of the proper administration of the trust, so orders".

"(3) No Guernsey trust, and no disposition of property to or upon such a trust, is void, voidable, liable to be set aside, invalid or subject to any implied condition, nor is the capacity of any settlor, trustee, enforcer, trust official or beneficiary to be questioned, nor is any settlor, trustee, enforcer, trust official, beneficiary or third party to be subjected to any obligation or liability or deprived of any right, claim or interest, by reason that –

(a) the laws of any other jurisdiction prohibit or do not recognise the concept of a trust, or

(b) the trust or disposition –

(i) avoids or defeats or potentially avoids or defeats rights, claims, interests, obligations or liabilities conferred or imposed by the law of any other jurisdiction on any person –

(A) by reason of a personal relationship to a settlor or any beneficiary, or

(B) by way of foreign heirship rights, or

(ii) contravenes or potentially contravenes any rule of law, judgment, order or action of any other jurisdiction intended to recognise, protect, enforce or give effect to any such rights, claims, interests, obligations or liabilities."

Guernsey is far from being alone with having enacted firewall provisions – similar sections are found in Bermuda, Cayman and Jersey. It is fair to note that each jurisdiction's firewall has drawn upon, and is heavily influenced by, the others. The essence of each and their intent is, though, broadly the same. For that reason any case law where firewall provisions have been tested or put under the judicial microscope is usually very informative to guide the wary practitioner as to the effect of these firewalls – as we all know, the legislative intent behind these bulwarks may not always survive the siege engines of litigation. There has not been a myriad of cases worldwide on the topic, but a recent judgment from Cayman illustrates, positively, how firewalls may stand up to robust examination.

Geneva Trust Company (GTC) SA v IDF and MF (Grand Court of the Cayman Islands, FSD 248 of 2017, Kawaley J, 21 December 2020)

The Honourable Justice Kawaley, sitting in the Financial Services Division of the Grand Court of the Cayman Islands, described this case in the following way:

"The present application may be described as a tale of two representatives (the Guardian and the Trustee) and two jurisdictions (Italy and the Cayman Islands). Minor roles are played by MF, the 2nd Defendant, and Switzerland. The Guardian acting on behalf of the elderly settlor and beneficiary of the Stingray Trust ("the Trust") seeks to establish the invalidity of the Trust. The Trustee seeks to uphold the validity of the Trust."

After setting the stage in his characteristically colourful manner, Kawaley J addressed the issues of:

(i) whether section 90 of the Cayman Trusts Law (2020 Revision) (now the Trusts Act) (the "Firewall Provision") provides that all questions relating to, inter alia, the validity of a Cayman Islands trust can only be adjudicated by the Cayman Islands courts;

(ii) whether a forum clause in a Cayman Islands law governed trust deed constitutes an exclusive jurisdiction clause; and

(iii) whether, therefore, proceedings brought in the Cayman Islands to determine the validity of the Trust should be permitted to proceed notwithstanding that proceedings in Italy dealing with the same subject matter were well advanced (the "Italian Proceedings").

To complicate matters further, the Trustee had already challenged jurisdiction in the Italian Proceedings; had already submitted to the jurisdiction in the Italian Proceedings; and had already obtained Beddoe relief in the Grand Court permitting it to substantively defend the Italian Proceedings.

It is perhaps unsurprising, given these circumstances, that Kawaley J found that:

(i) the Firewall Provision does not require all matters which must be determined under Cayman Islands law to be determined exclusively by the Grand Court of the Cayman Islands;

(ii) the forum clause was not an exclusive jurisdiction clause;

(iii) Italy was the most appropriate forum; and therefore

(iv) the Cayman proceedings commenced by the Trustee to uphold the validity of the Trust should be stayed in favour of the Italian Proceedings commenced by the Guardian to establish the invalidity of the Trust.

This decision is the first comprehensive analysis of the Firewall Provision in the Cayman Grand Court - earlier decisions had only expressed tentative conclusions on whether section 90 confers exclusive jurisdiction on the Cayman Islands courts in respect of Cayman Islands law governed trusts. After considering the statutory framework, the wording of section 90 itself and a survey of all of the cases that had considered previously the Firewall Provision, Kawaley J concluded that the plain and ordinary meaning of the Firewall Provision is to require certain matters in respect of Cayman Islands trusts to be determined as a matter of Cayman law (therefore either to be determined by the Cayman Islands courts or by a foreign court applying Cayman Islands law). In other words, the Firewall Provision is a governing law provision, not an exclusive jurisdiction provision. This analysis, in our view, is very likely to apply to similar firewall provisions including, for example, those in Guernsey's Trust Law.

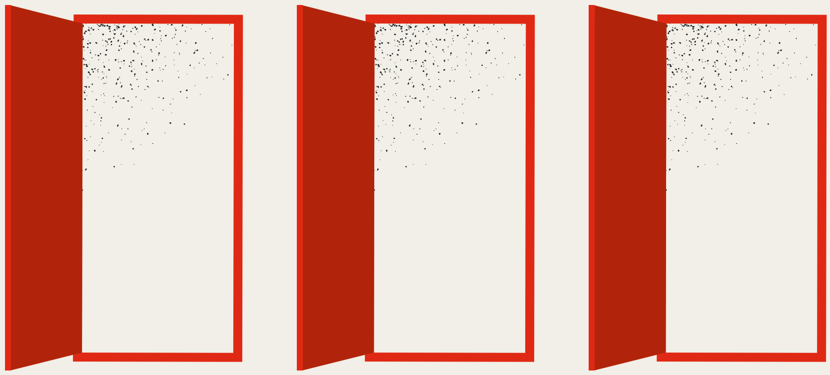
Whilst Kawaley J's interpretation of the Firewall Provision is relatively uncontroversial, his Lordship's conclusion that the forum of administration clause is not an exclusive jurisdiction clause is at first blush difficult to reconcile with the Judge's own decision in the same court one year earlier: HSBC International Trustee Limited v Tan Poh Lee & Others FSD 175 of 2019, 16 October 2019 ("HSBC"), in which he held that the same forum of administration clause was an exclusive jurisdiction clause.

The clause in question in both cases was "The courts of the Cayman Islands shall be the forum for administration of this Trust." In circumstances where the wording of the clause could not be prayed in aid of a different outcome, Kawaley J manoeuvred deftly his decision in HSBC by distinguishing the status of the claimant in this case (the putative settlor – so a "stranger" to the trust) from the status of the claimant in HSBC (a beneficiary) and concluding that "the forum for administration clause is not an exclusive jurisdiction clause enforceable against a party suing in the capacity of a stranger to the Trust". It would appear, therefore, that in the Cayman Islands at least, a forum of administration clause of this type will confer exclusive jurisdiction in respect of claims by beneficiaries, but not in respect of claims by "strangers". This may come as a surprise to trustees and settlors who thought that the Cayman Islands offered protection from creditors and other "strangers" who may choose to attack their trust arrangements.

Mr Hagen QC when dealing with the forum non conveniens point submitted that it was "blindingly obvious" that this Court should not assume jurisdiction. He was relying, as I understood it, in large part on the history of the various proceedings and where things now stood. I find that it is plain and obvious that the proposed application by the Trustee for an anti-suit injunction is unarguable, being first actively advanced nearly five years after the validity of the Trust was first challenged in foreign proceedings and over a year after the Trustee submitted to the jurisdiction on the merits of the Milan Proceedings". In short, delay defeats equity.

In what is arguably an excellent illustration of the adage "hard cases make bad law", the real rationale for the Judge's decision in this case is perhaps explained concisely in this paragraph from the judgment:

The deft judicial gymnastics Kawaley J deployed in distinguishing the prior apparently inconsistent case in Tan Poh Lee as to exclusivity may not be required in other jurisdictions, but this case will certainly assist those faced in future with tackling firewalls wheresoever they may have been erected. Future claimants may find they continue to be, with concluding due credit to Mr Starr, "nothin' but a heartbreaker".



WHAT TO DO

WITH AN INVESTMENT MANAGER WHEN THE FACTS SAY GO AND THE BENEFICIARIES SAY STAY

Authored by: Joe Donohoe - ARC

At least once in every trustee's career they will be faced with the problem of dealing with an underperforming investment manager who retains the support of one or more beneficiary. In some cases, this loyalty is a family thing, where the manager is related to the beneficiary or has had such a long association with the family as to be treated as part of it. Other times, the manager may have been originally recommended by the beneficiary who now wants to avoid the ignominy of seeing their judgement called into question. And sometimes the reason defies logic. On one occasion I encountered some beneficiaries who wanted their trustee to retain a wholly unsatisfactory manager as they did not wish to give up their annual invitation to the Monaco Grand Prix!

Whatever the reason may be, once a trustee has established that an investment manager is not performing as they should, the trustee remains vulnerable until such time as they have dealt with the situation. Even where there is no resistance from the beneficiaries, some trustees can still struggle with this problem. How best to confront the manager and what to do with them can seem like a major headache. It is possible, using peer group indices and associated analysis, to clearly establish that a manager has underperformed against their own benchmark, or their peer group, to an extent that requires remedial action. It may of course be that the manager can advance a sensible reason for their underperformance and suggest a plan of action to put things right. The trustee may accept this and give the manager a defined period to reach a set outcome. If this works out it is the most cost effective and least disruptive solution. If such an option is not sensible, or the manager fails to turn things around, then a process to select a replacement should be undertaken.

The real dilemma however arises where despite the production of clear evidence of underperformance, one or more beneficiary, settlor or interested family member demands that the trustee leave the manager in place. Now we all understand that, in the case of a discretionary trust, none of these people has the power to instruct the trustee. We all equally understand that this lack of power never seems to stop them trying! Faced with this problem, three courses of action are open to the trustee:

1. Capitulate and leave the manager in place.

2. Ignore the entreaties of the family and replace the manager.

3. Persuade the family of the wisdom of replacing the manager and involve them in the process.

Let's deal in short order with options one and two. Leaving the manager in place may seem the easiest solution, especially if the beneficiaries reassure you that they will not make any claim against you and may even provide an indemnity. Experience, however, has shown time and again that when the quantum of losses due to the continued engagement of the manager are properly understood, the beneficiaries will most likely sue the trustee and the trustee won't have a leg to stand on. The beneficiaries in question may well be a different generation to the ones who provided the comforting reassurances to the trustee.

Option two has the immediate attraction of safeguarding the trustee's position but the less attractive feature of almost certainly leading to the removal of the trustee after a difficult breakdown in relations with the beneficiaries. This is not a legal or technical issue but a sad fact of life for professional trustees who always walk the line between their legal position and their need to foster good relationships with their “clients”.

The only way to extricate themselves from this dilemma with both their integrity and business intact is to convince the beneficiaries of the value to them and the trust in changing manager. This is not an easy answer and may not always be possible to achieve. The starting point is to make sure as trustee that you have fully engaged with the manager and provided them with every opportunity to offer a solution. Failure to do this will immediately allow the manager to undermine your relationship with the beneficiary by suggesting a solution to them that you hadn’t bothered to check out. Once satisfied that the correct road to take is ousting the incumbent, the trustee should prepare a detailed, comprehensive, and emotionless case to present to the beneficiaries. The reason why a family might wish to retain the manager will almost certainly be founded in emotion and any effort to counter this with an alternative emotion-based argument is unlikely to succeed.

So, the trustee needs to prepare a report which clearly shows that the performance of the manager over a reasonable period set against an agreed benchmark and a peer group comparator is unsatisfactory. The former measure will demonstrate that the manager has not done what was asked of them and what they undertook to do. The second measure will show how they have performed against a group of their peers, managing at the

same risk level, in the same currency. This opportunity set provides the trustee with their most powerful argument. They can point to an independent measure which shows that the manager engaged by the trustee has failed to do as well as their average competitor. In fact, using these indices, the trustee can even quantify how much better off the trust would be had it engaged even an average manager in place of the one in situ. Only the strongest bond with a manager will tend to survive the news that they have already cost the trust a significant amount of money.

Even if successful, this preferred solution is not without risk to the trustee. Once presented with the hard facts of the manager’s performance, a beneficiary might question why the trustee did not act sooner and hold them responsible for the opportunity loss. For this reason, it is important for a trustee to keep a manager’s performance under review and initiate action as soon as a problem is identified. Tempting as it may be not to rock the boat and risk losing a relationship, the consequences of not recognising and dealing with the problem in a timely fashion can be far more damaging to the trustee. .

RETIRING FROM A TRUSTEESHIP?

KEY LEGAL AND PRACTICAL CONSIDERATION ON TRANSFER OF INFORMATION WHEN THERE IS A CHANGE OF TRUSTEE

Authored by: Konrad Friedlaender and Alexandra Gill - Carey Olsen (Guernsey)

In this note, we will focus on some of the key legal and practical considerations that a retiring trustee should take into account before it transfers information on the trust, its interested parties and the underlying beneficiaries to third parties on a change of trusteeship.

What information do you hold as trustee?

By virtue of their office and the nature of their fiduciary duties, trustees invariably hold an array of personal and sensitive information relating to the trusts they administer. This ranges from business sensitive information (which might include information concerning the affairs of corporate structures held within the trust fund) to personal information on the beneficiaries, the settlor and other individuals (such as names, birth dates, family relationships and relations, personal preferences, personal financial circumstances to name but a few).

What are your duties regarding such information?

Trustees hold such information subject to a duty of confidentiality. The ability to disclose such information to interested parties under the trust and specifically to beneficiaries and the rights of beneficiaries to access such information, has been the subject of many Court cases and extensive academic discourse. Generally, the right of beneficiaries to obtain such information is restricted and limited to disclosure of trust documents, trust accounts and information relating to the administration of the trust fund. Personal information held by the trustee is treated as held in confidence and the duty of confidence generally takes precedence over the right to information.

Trustees must also be mindful of their responsibilities under applicable data protection legislation relating to any personal data that they hold. Where a jurisdiction has modelled its data protection law off Europe's GDPR (as is the case in the Bailiwicks of Jersey and Guernsey), trustees will be considered to be data controllers of that information as they determine the means and purposes (i.e. the "why" and "how") of the processing.

As data controllers, trustees will not only be subject to a number of wide-ranging obligations under the data protection law but, in addition to reputational risk, they will also be primarily liable for any breaches thereof including the risk of administrative fines as well as civil claims issued by aggrieved data subjects.

Any information relating to an identified or identifiable natural person is personal data for the purposes of the data protection regime some of which are held to a higher standard than others. For example, personal data relating to a person's health, religious beliefs, political opinions or, in some circumstances, criminal data could all fall within scope of the definition of "special category data".

What should a retiring trustee consider before handing over information to a successor trustee?

Whilst there has been a great deal of discussion concerning the rights that beneficiaries have to access their personal data from a trusts perspective, far less has been written regarding a retiring trustee's obligations at the end of a trusteeship.

It is generally the obligation of a retiring or removed trustee to surrender and transfer all trust property held by or vested in the trustee, to the successor trustee. The successor trustee, once appointed and receiving trust property, as well as information relating to the trust and its interested parties, will be subject to the same duties of confidentiality as the retiring trustee.

"Where we are concerned is when information is provided to the successor trustee before the appointment is effected. How then does an outgoing trustee deal with disclosure requests from a potential successor trustee which is in the process of considering whether or not to accept the trusteeship of the trust?"

Sometimes the prospective successor trustee will have received sufficient information from the beneficiaries to enable it to decide whether or not to take on the trusteeship but often the successor trustee will approach the retiring trustee for information, not only on the formal trust documentation, but also to see documents such as the trust accounts, reports, correspondence, trustee resolutions and due diligence information held by the retiring trustee. When requesting access to such information and documentation, the prospective successor trustee is a third party to the trust and generally third parties have no right to access such information. Can the retiring trustee therefore disclose such information, much of which would be confidential and/or protected under Data Protection law?

We shall examine each of these duties below.

1. Duty of confidentiality

Although the duty of confidentiality is not absolute, as a general rule the disclosure of confidential information to a third party can only be justified if that disclosure is authorised or necessary and made to protect the legitimate interests of the beneficiaries and even then the disclosing party needs to ensure that the confidentiality of the information remains protected. In the context of trusts, unless the trustee has express or implied consent to make disclosure or unless disclosure is reasonably necessary for the protection of the trustee's own interest (see Guernsey Court of Appeal In re B 35/2012) disclosure of confidential information can only be justified if the disclosure is in the interests of the beneficiaries. Where a trustee retires or is removed it is (other than in exceptional cases) undoubtedly in the interest of the beneficiaries that a successor trustee be appointed. From the prospective successor trustee's perspective, it will want to know as much as possible about the affairs of the trust to enable it to take an informed decision whether or not to accept the trusteeship.

The outgoing trustee should also, especially if it has the power to determine who the successor trustee should be, consider whether the prospective successor is an appropriate successor. It should not be disclosing any information at all to a third party if it is not satisfied that the third party would, if willing to accept the trusteeship, be an appropriate successor trustee.

The retiring trustee would be well advised to ensure that the confidentiality of any confidential information provided to the prospective trustee will be protected by entering into a Confidentiality Agreement with the prospective trustee before either handing over or granting access to such information. Granting access to review documentation may be preferable to providing copies of documentation but may not always be achievable in practice. Confidentiality Agreements should contain provisions restricting access to and further disclosure of information, bind the recipient to indefinite confidentiality undertakings and oblige the recipient to return all the information and documents received unless the recipient thereafter accepts the trusteeship. Should the recipient accept the trusteeship, it would be bound by general Trust Law duties of confidentiality.

2. Complying with data protection obligations

How does the retiring trustee however ensure that it remains compliant with its obligations as data controller under General Data Protection Regulation ("GDPR")?

For the purposes of the GDPR, the first point to be made is that the prospective successor trustee would also be a data controller as it would not be processing the information received on behalf of the retiring trustee but would, in order to assess whether or not to assume the trusteeship, determine the purposes for which it will process the data and the means of processing.

The disclosure of personal data from one controller to another constitutes processing for the purposes of the data protection regime. Whilst neither the GDPR nor Jersey and/or Guernsey's respective data protection laws mandate that the disclosing party and receiving party enter into contractual arrangements governing the proposed transfer, the Code of Practice on Data Sharing issued by the UK's Information Commissioner's Office (ICO) – which is considered to be persuasive authority in the Channel Islands – sets out best practice guidance for controllers to consider before sharing personal data (either on a one-off or regular basis).

Best practice guidance – data protection

The Code of Practice sets out in expansive detail how a data controller should approach data sharing, what to consider and how to comply with the law. This note is not intended as a detailed analysis of all the guidance and processes of the Code but rather to alert trustees of the need to be aware of the legal requirement to comply with the data protection principles when requested to disclose personal data to prospective successor trustees. It is, for example, regarded as good practice to conduct a Data Protection Impact Assessment ("DPIA") before deciding whether or not to transfer or share personal data. A DPIA assist in in assessing any risks that may arise should a trustee as data controller share such data and how the trustee could mitigate these risks. Whilst conducting a DPIA is only a legal requirement where the processing is considered to be "high-risk", assessing these risks as part of a DPIA will help a controller to demonstrate to a regulator, if challenged, that it has considered (and where appropriate) discounted risks associated with the transfer . When assessing risk, the DPIA will invite the controller to take into account factors such as the nature and sensitivity of the data concerned (including whether it falls within the scope of 'special category data'), jurisdictional risk and security issues. Trustees should also be careful to establish where the personal data is going. For example, under Guernsey and Jersey's data protection laws, a controller is prohibited from sending personal data to a recipient who is based in a jurisdiction which has not received an adequacy decision by the European Commission or is otherwise outside the UK or the European Economic Area (EEA) unless appropriate safeguards are in place. Whilst the GDPR identifies examples of "appropriate safeguards" (which include Standard Contractual Clauses approved by the European Commission), recent case law and European guidance has raised the bar - imposing additional burdens on controllers seeking to export data outside of Europe.

It is also regarded as good practice to enter into a Data Sharing Agreement with the prospective successor trustee. Such an agreement will evidence the trustee's compliance with the data protection accountability principle, the purpose for which the data is shared, what the data may be used for, set out the standards to be adhered to protect the data, record who will be responsible for complying with a data subject requests and should record the prospective successor trustee's obligations regarding the data should it either decide to accept the trusteeship or, alternatively decide to do so.

Trustees need to be mindful of these issues especially in circumstances where a change of trustee is anticipated and they may be asked to disclose personal data to, what in effect is a third party or stranger to the trust.

Furthermore, an outgoing trustee's data protection obligations do not cease once a successor trustee has been appointed and the final transfer of assets has been effected. To the extent that the outgoing trustee has an obligation to retain trust information (including personal data) in accordance with its data retention obligations, then it must continue to do so in accordance with the data protection regime. These obligations will persist for so long as the outgoing trustee retains this information.

Conclusion

With increased regulatory enforcement action being taken for breaches of the data protection regime and the risk of civil claims for breach of confidentiality and data protection, it is clear that any form of disclosure by a trustee to a third party should trigger some form of assessment of the substantive legal risks. This assessment, however, will be fact and context specific. Whilst the public has been (traditionally) quite complacent when it comes to divulging their personal details on an online social media platform, in a professional or trusts context, the implications of divulging such details can be far more serious. When taking into consideration the risks associated with the sharing of information, all organisations should have proper regard to their duties under the law as well as the potential wider ramifications following a breach not only to regulatory sanction and possible claims but also to their reputation. This is particularly important in the context of the trust industry where high net worth clients highly value their confidentiality and are willing to go to great lengths to ensure its preservation.

WRANGLING WITH WASTING ASSETS – A NEW CHALLENGE FOR CAYMAN TRUSTEES

Authored by: Bernadette Carey and Chris Duncan - Carey Olsen (Cayman Islands)

As the global financial services industry continues to grapple with the consequences of the turmoil faced around the world over the past twelve months, further unexpected challenges continue to present themselves to those in fiduciary roles such as trustees. One example of such challenges is a rise in the number of wasting assets that a professional trustee might now find it holds as part of its administrative mandate. These wasting assets (for simplicity, any asset which is going down in value or is likely to go down in value of time) can be problematic and require careful handling, with reference to the trustee's own powers and duties, to manage the associated risks.

A good example of circumstances in which a trustee can, somewhat unexpectedly, find itself with a portfolio that includes wasting assets, can be seen in a recent announcement by UBS Bank. The bank's decision to charge a negative interest rate of 0.75% on all client accounts with more than CHF 250,000[1] has no doubt left many trustees holding such accounts scrambling to ensure that they are able to manage this new liability effectively for their clients. Similar announcements from other lending institutions can be anticipated.

DEALING WITH WASTING ASSETS

Broadly speaking, and subject to the terms of the relevant trust deed, trustees have wide powers of investment to be exercised with due skill and care. A prudent trustee will therefore typically invest in and hold assets which it expects to maintain or increase in value over time. However, what should the same trustee do when the assets it holds become wasting assets due to external events such as a market downturn or the advent of negative interest rates?

The answer to this question is that it will depend on a number of factors that the trustee should consider carefully. Those factors will include the size of the 'wasting asset' relative to the rest of the trust fund and the rate at which it is decreasing in value – a small piece of property which has dropped in value due to a temporary fluctuation in the housing market may not be of any long term concern, for example. The views of the beneficiaries of the trust may also be important depending on their knowledge of the trust and its assets and may need to be canvassed: a sophisticated family with diverse assets and numerous accounts with a variety of institutions may not be concerned by the introduction of a negative interest rate that affects only small portions of their pockets of wealth. Also relevant is what steps (if any) the trustee could take to satisfactorily address the problem and how quickly those steps could be implemented. For example, the problem is much more manageable if the wasting asset in question is cash in a bank account with a negative interest rate as the balance incurring penalty interest could simply be moved. Using the UBS Bank scenario, the trustee could simply ensure that any balance over and above the CHF250,000 at UBS is moved to a different bank to ensure no negative interest is paid.

However, the problem is much more challenging when the asset is of a very high value and illiquid, like a hotel building, which may not be easily sold and where any sale may crystallize a significant loss. Further challenges – and new layers of liability - can arise when assets are held through holding companies rather than the trustee directly, both when the trustee provides directors and when the directors are independent.

1 https://www.reuters.com/article/ubs-group-rates-idUSL8N2JN0TI

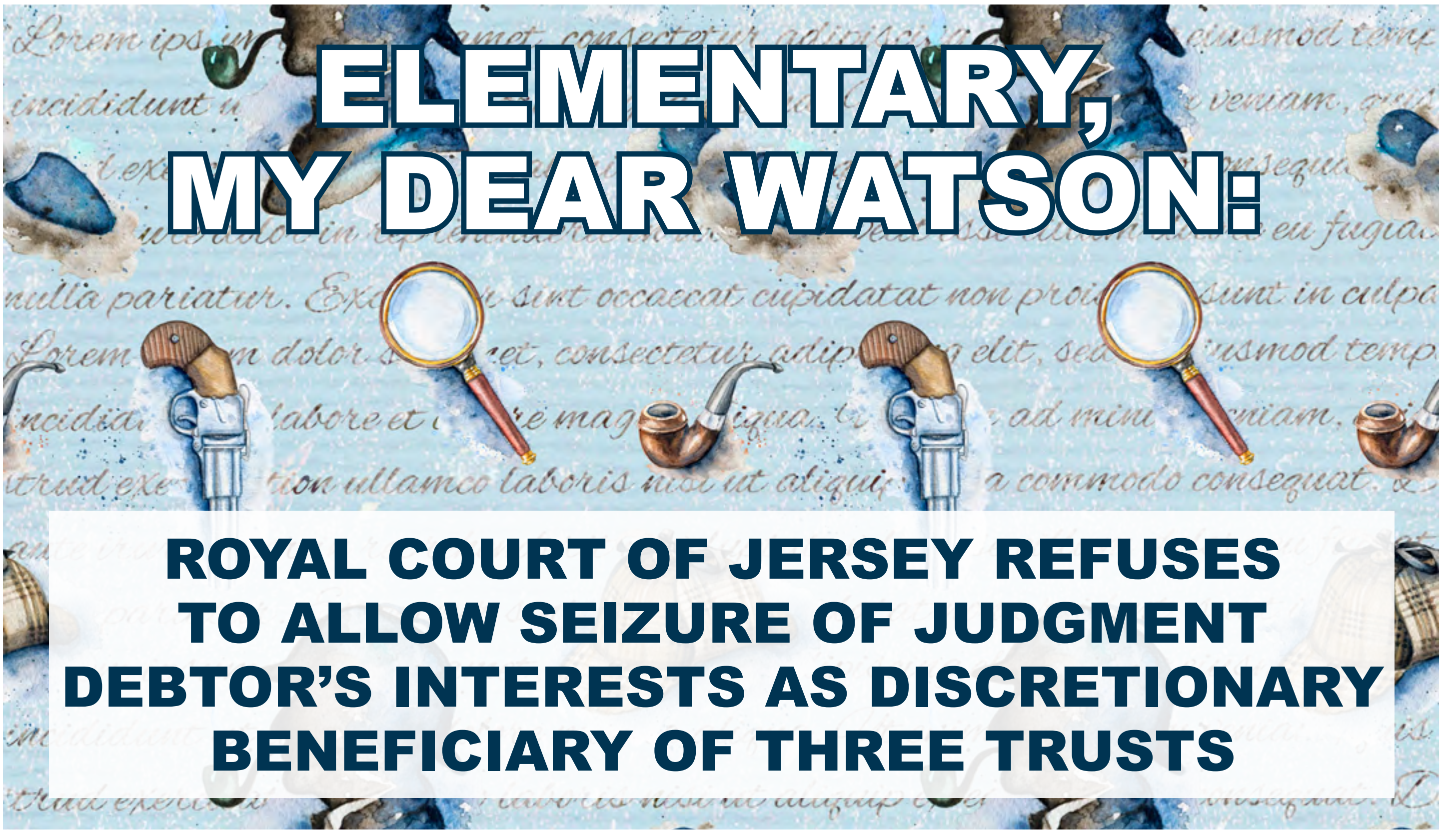
MODERN SOLUTIONS

More modern trust deeds can hold the solution. Over recent years, specialist drafters have anticipated increased market turmoil and newer trust deeds often expressly allow for a trustee to hold wasting assets, either to increase flexibility in allowing a diverse portfolio to be created or because the settlor wants a particular asset that is likely to go down in value (a superyacht for example) to be held in trust. Such a provision would read something like “the trustees may acquire and retain wasting assets and assets which yield little or no income, for investment or any other purpose”. Liability for losses connected to the trustee holding wasting assets is obviously far more limited in such circumstances, and including a wasting assets provision as a standard term in all new trusts is likely a prudent step to take. Including a power to give directions as to investments which held by someone other than the trustee is also worth considering as a means of mitigating risk and addressing the problems identified above.

Where a trust deed does not contain an express wasting assets provision (as will likely be the case with most older trust deeds), trustees will need to carefully monitor any trust assets and portfolios which may become problematic or exposed to market developments triggering a decline in value or even penalties. Faced with a scenario where trust assets are materially decreasing in value, the trustee will need to act quickly to minimize any loss in value and to avoid a potential fire sale event. Acting quickly to consider the consequences of market turmoil, and limiting the damage on this front will also help to manage the trustee’s own exposure for claims of breach of trust or duty. This is particularly important where the exoneration provisions in the relevant trust deed are narrowly drawn and the protections offered are relatively scant. In more serious circumstances, where significant loss is imminent and likely unavoidable, it may be necessary to bring an urgent application to court for directions to bless the sale of the wasting asset or to approve of the trustee taking some other action to appropriately deal with it.

CONCLUSION

The consequences of recent global events, including the imposition of negative interest rates, have led to many new challenges for trustees. Some of these are obvious, but others - including the likelihood of trust assets transforming into wasting assets - may not have previously been on the radar and can present themselves with little warning and significant consequences. Trustees should therefore ensure they are actively monitoring trust assets and that they are proactive when issues arise, both to protect the trust and to limit their own exposure to liability. Sound management, clear communication with clients and advisors, and a commitment to implementing practical resolutions will offer important protections and at least some level of stability in an otherwise turbulent environment.



ELEMENTARY, MY DEAR WATSON:

ROYAL COURT OF JERSEY REFUSES TO ALLOW SEIZURE OF JUDGMENT DEBTOR'S INTERESTS AS DISCRETIONARY BENEFICIARY OF THREE TRUSTS

Authored by: Sam Williams – Collas Crill (Jersey)

The Royal Court of Jersey has issued a landmark judgment in Kea Investments Limited v Watson [2021] JRC 009, determining that it is not possible to obtain execution measures against the interest of a discretionary beneficiary under a trust. Although a beneficiary's interest may be movable property, the Court did not consider that such property was transmissible unless expressly provided for by the trust instrument.

Background

The Jersey proceedings formed part of the well-publicised legal battle in the High Court of England and Wales between two New Zealand businessmen, Sir Owen Glenn KNZM and Eric Watson. Mr Watson had been found to have made fraudulent misrepresentations in order to secure funding from Sir Owen's company, Kea Investments Limited (Kea), and to have acted in breach of fiduciary duty. [1] In September 2018, the High Court (Nugee J, as he then was) set aside the funding transactions and ordered equitable compensation to be paid with accounts to be taken, also ordering an immediate interim payment of over £29 million inclusive of costs. Kea also obtained the benefit of notification undertakings in respect of Watson's worldwide assets, including provision for asset disclosure. In October 2020, Kea secured Watson's committal to prison for four months for contempt in relation to shortcomings in his asset disclosure. [2]

As part of its enforcement efforts, Kea registered its monetary judgment in the Royal Court of Jersey pursuant to the Judgments (Reciprocal Enforcement) (Jersey) Law 1960 in September 2019. This gave Kea the ability to take execution steps and bring enforcement proceedings against Watson's assets in the jurisdiction in the same manner as it would if it had the benefit of a Jersey judgment.

In Jersey, it is possible to apply for execution measures known as the arrêt and arrêt entre mains. These measures, which are creatures of customary law, enable judgment creditors to distrain on the debtor's movable property, both tangible and intangible. The initial attachment order operates to create an immediate proprietary interest in favour of the creditor akin to a charge on the property concerned. In the case of the arrêt entre mains, the order applies to property in the hands of a third party, such as a debt owed to the judgment debtor. The initial order can be obtained as a form of interim relief which has the effect of freezing a specific asset and depriving the debtor of the ability to deal with it. On confirmation of the order, the property may be sold or appropriated towards satisfaction of the debt.

The Jersey application

After having registered its English judgment in Jersey, Kea was informed that Watson intended to procure the appointment of a replacement trustee of three Jersey law trusts, the Kowhai, Libra and Glacier Trusts, of which Watson was on the face of things a discretionary beneficiary, in another jurisdiction. Kea therefore applied ex parte to the Royal Court in March 2020 for urgent interim relief. The Royal Court granted a suite of orders restraining the Jersey trustee from transferring the trust assets, suspending the powers of the protector and prohibiting Watson from disclaiming his beneficial interest under the trusts.

Kea also sought and was granted provisional execution measures to be confirmed at a subsequent inter partes hearing, on the footing that it was entitled to attach and seize Watson's interests as a beneficiary under the three trusts by way of an arrêt. Kea also attached the benefit of certain loans that Watson had made to the trustees and to a trust-owned company by way of arrêts entre mains.

The Judgment Creditor's arguments

The inter partes hearing to confirm the provisional execution measures took place some months later on 1 December 2020. Neither Mr Watson, the protector nor the trustee appeared, leaving Kea and a court-appointed guardian for Mr Watson's children to argue the case. The central issues for determination were the extent to which a beneficiary's interest under a discretionary trust constitutes property and, if so, whether that interest is amenable to execution by a creditor.

Kea argued that article 10(10) of the Trusts (Jersey) Law 1984 (as amended) (the Trusts Law) stated in terms that "the interest of a beneficiary [i.e. a beneficiary's interest under a trust] shall constitute movable property", and that the definition of a beneficiary pursuant to the Trusts Law encompassed both a discretionary beneficiary and a mere object of a discretionary power. The bundle of rights enjoyed by a discretionary beneficiary such as Watson therefore amounted to property and was an asset in his hands. This accorded with article 10(11) of the Trusts Law which provides that, "subject to the terms of the trust, a beneficiary may sell, pledge, charge, transfer or otherwise deal with his or her interest in any manner". The Jersey statutory position was distinguishable from that in England and Wales, where conventional wisdom holds that an object of a discretion does not have a proprietary interest or asset which is capable of being transferred to a third party.

Kea did not seek to argue that confirmation of the arrêts over Mr Watson's beneficial interest would give Kea any interest in or entitlement to the underlying assets of the trusts themselves. Instead it argued that having seized his beneficial interests, which was a matter for the Court's discretion, Kea would subrogate to Watson's rights as a beneficiary. It would then have the ability to request a distribution – something which Watson as an adjudicated fraudster and contemnor of the English High Court was highly unlikely to do – which the trustee would then be obliged to consider, seeking directions if necessary. Standing in Watson's shoes, Kea would be able to give the trustee a good discharge for any appointment of assets to it.

Decision

The Royal Court (Commissioner Clyde-Smith OBE and Jurats Crill and Averty) refused to confirm the arrêts over Watson's beneficial interests. While the Court accepted that the beneficial interests constituted movable property, it held that they were not inherently transmissible or amenable to execution. The Court noted that article 10(11) of the Trusts Law was expressed to be "subject to the terms of the trust" and that there was nothing in the terms of the specific trust instruments concerned which provided that Mr Watson could alienate his beneficial interest.

In addition, any attempt to appoint trust assets to a creditor of a beneficiary would meet with the objection that it would be a fraud on the power, being tainted by the intention to benefit a stranger to the trust. The bundle of rights enjoyed by a discretionary beneficiary was not equivalent to a positive entitlement to the trust assets and there was no utility in ordering distraint. By analogy, on the bankruptcy of a discretionary beneficiary, the beneficial interest would not vest in the hands of the Viscount (the executive officer of the Royal Court and official receiver) as other property would pursuant to Jersey bankruptcy law. The Court was also concerned that the consequence of the creditor stepping into the shoes of the discretionary beneficiary would be to enable the creditor to interfere with the proper administration of the trust.

On the other hand, the Court had no difficulty with confirming the arrêts entre mains in respect of the loans made by Watson to the trusts, as a result of which the debts became due to Kea instead. The Court also demonstrated some sympathy for Kea's position and granted it a period of time within which to plead factual claims against the three trusts on more conventional grounds, including resulting trust and proprietary tracing claims.

Comment

The decision will no doubt come as a considerable relief to the trust industry in Jersey. It seems likely that the Court was motivated by policy considerations and the desire to reinforce, rather than be seen to undermine in any way, the nature of the Jersey law discretionary trust as an ownership "structure" which is separate and distinct from the assets of its beneficiaries. The Court may have been influenced by floodgates-type considerations and the prospect of a rise in claims against Jersey discretionary trusts by creditors, ex-spouses and foreign tax authorities.

Having said that, given that Jersey is an international finance centre which seeks to promote itself as transparent and well-regulated, the judgment may be seen as somewhat encouraging to fraudsters seeking to insulate assets, as its effect is to make the pursuit of civil recovery claims that much more difficult. As the judgment itself acknowledges, the enforcement route proposed by Kea could have been a shortcut to avoid expensive, fact-intensive proceedings.

A key takeaway for trustees from the judgment is that they should now undertake a review of their trust instruments in order to establish whether there is express provision for beneficiaries to deal with their beneficial interests, including the ability to sell or transfer that interest, or to use it as collateral for finance. If no such provision has been made, then beneficiaries may lack the flexibility to transact in relation to their interests.

"A key takeaway for trustees from the judgment is that they should now undertake a review of their trust instruments in order to establish whether there is express provision for beneficiaries to deal with their beneficial interests, including the ability to sell or transfer that interest, or to use it as collateral for finance. If no such provision has been made, then beneficiaries may lack the flexibility to transact in relation to their interests."

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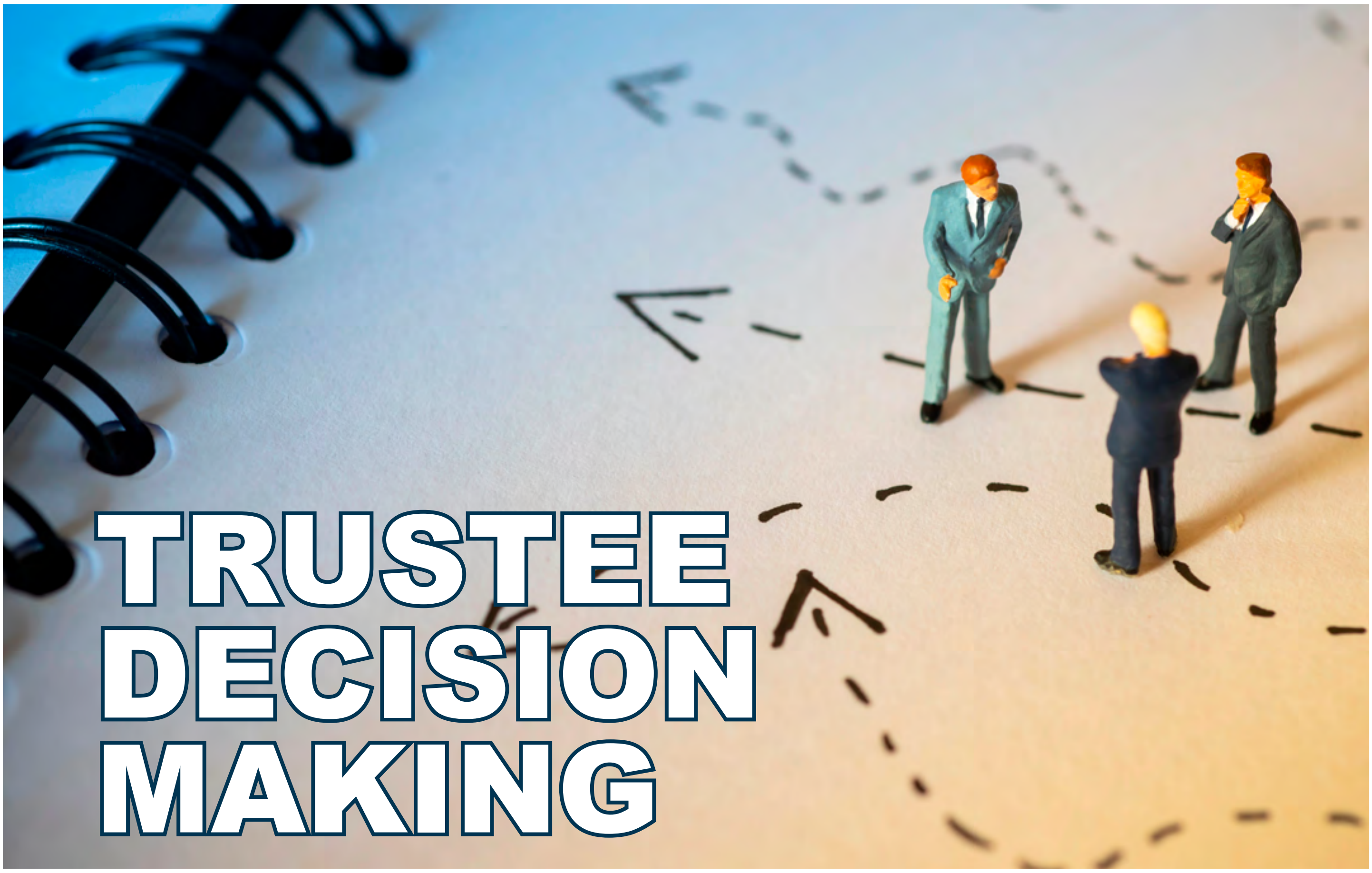

TRUSTEE DECISION MAKING

Authored by: Melody Munro - Farrer & Co

In many walks of life people are protected from direct and indirect discrimination on the basis of factors such gender, race, age or religion through rights enshrined in law. Though there is no general statutory provision against discrimination when it comes to the terms of a trust or its governance[1], this does not mean trustees can ignore the principles of no-discrimination.

Firstly, professional trustees may be required by rules or codes of conduct governing their own profession not to discriminate unlawfully and to promote equality and should be mindful of how this also applies to actions they take in their trustee role.

Secondly, a beneficiary who feels they have been discriminated against could try to argue that a trustee's decision was not reasonable in an attempt to get it overturned or, if they have suffered loss, to make a claim on that basis.

This article explores how discrimination could make trustee's decisions void or voidable, in particular in the context of the decision to make, or not make, distributions. However, discrimination could come into play in various other scenarios within a trust (for example adding or removing beneficiaries or investment decisions) and trustees should be mindful generally of their reasons for acting.

Of course, avoiding discrimination does not mean that trustees must treat every beneficiary identically. The circumstances of two beneficiaries may genuinely be very different regardless of any differences of age, gender or race. Instead, as explored below, trustees need to identify and understand when their decisions may be motivated by a factor that is not, in actual fact, a relevant consideration and discrimination, direct or indirect, can play a part in that.

Trustee decision making

Trustees can only exercise fiduciary powers for a proper purpose, in good faith and not capriciously, and having taken into account relevant considerations only. This also includes ensuring the reasons relied on are accurate.

As explored further below, relevant considerations include matters such as the terms of the trust, the identity and personal circumstances of the beneficiaries, the value of the trust fund and the assets constituting it, legal, financial or tax considerations of a decision and the views of the Settlor and purposes for which the trust was set up.

Some obvious examples of improper decisions would be: preferring one beneficiary over another because the trustee simply liked that beneficiary more; or refusing to make a distribution because it would trigger an adverse tax charge when, in fact, no tax charge would arise.

Discrimination, consciously or unconsciously, can also lead to faulty decision making.

1 Difference considerations can apply to pension trustees, this article consider the "family trust" model

1 Capricious decision making

A trustee has acted capriciously if they act for reasons that are irrational, perverse or irrelevant. Judicial guidance has confirmed this would include, for example, “if they chose a beneficiary by height or complexion.[2]”

Lord Templeman gave these examples almost 50 years ago. In 2021, we may well find explicit references to “race” instead of “complexion” and by extension, one could easily imagine a beneficiary’s sex being considered as arbitrary a characteristic as their height.

It certainly seems dangerous, based on precedent, for a trustee to base a decision purely on characteristics such as a beneficiary’s gender or race. Although it seems unlikely many trustees would make a decision based purely on these kinds of factors, trustees should take care to ensure beneficiaries do not feel they have done so as this perception by their beneficiaries could lead to problems.

2 Decision making motivated by personal views

A trustee is not permitted to allow their own moral or political views colour their judgment when making decisions.

For example, if a beneficiary is gay or transgender and the trustee has some personal aversion to that fact, that cannot be allowed to influence their decision making.

It is not only “negative” personal views that can cause issues. A trustee also cannot attempt to promote some personal “noble aim”, for example they could not resolve, without regard to the personal circumstances of the individual beneficiaries themselves, to have a general rule to make larger distributions to female beneficiaries in an attempt to “support” women.

3 Relying on incorrect assumptions or stereotypes

A trustee who relies on an assumption, which turns out to be false, will find him/herself in the position of having relied on an irrelevant consideration. This can happen as a result of unconscious bias.

The issue of gender gives rise to plenty of assumptions which a trustee may be in danger of relying on wrongly. For instance that a female beneficiary will not want to work in the family business (or will lack the business acumen to do so), that a male beneficiary will have a greater financial need as he needs to support a family (whereas his sister’s husband will fulfil that role for her) or that girls can be trusted with more funds at a younger age than boys.

Trustees must take care not to fall back on stereotypes in substitution for actual fact finding.

That is not to say that stereotypes are always false: it may well be the case that a male beneficiary is the main breadwinner in his family unit and therefore requires more regular or higher distributions than his sister. Trustees must make proper enquiries of their beneficiaries to find out the facts, not rely on stereotypes.

Trustees should also be mindful of relying on stereotypes when consulting with beneficiaries. Trustees must not only consider all relevant factors but give each factor appropriate weight. This is regularly applied – for example a trustee would not allow a distant, theoretical tax risk to override a pressing needs for a distribution.

Stereotypes could potentially cause issues here too. A beneficiary who feels ignored or overlooked could try challenge a decision on the basis that their views were not given due weight and consideration. For example, an experienced, professional trustee may unconsciously brush off an unorthodox financial suggestion from a young beneficiary but youth does not necessarily equate to folly.

Settlor’s wishes: a complicating factor

There are circumstances where the situation is more nuanced because it is not the trustee’s own views or bias which are potentially in play, but rather the Settlor’s.

Take for example a large, traditional English estate comprising a manor house and grounds. It has passed from father to son for generations and, as part of a tax planning exercise, was settled into trust a few generations ago by the male owner at the time for the benefit of his issue. Under the trust, the trustees have the power, at their complete discretion, to appoint the trust funds to any of the beneficiaries (male or female). On settling the trust 70 years ago, the Settlor left a letter of wishes expressing his view that the estate should continue to pass down the male line. The trustees, for tax efficiency, are now looking to appoint the estate out of the trust but want to keep it whole, under one owner, as it is more valuable and easier to manage when kept together. The trust’s present existing beneficiaries are the Settlor’s twin 25-year-old grandchildren – one male and one female. The trustees in this situation are considering to which of them the estate should pass.

A similar example could be a trust holding shares in a family business, set up generations ago whose founder then settled his shares into trust and intended that only his sons would manage and enjoy the profits of the business. Trustees may find themselves in the situation where they need to appoint out all the shares to only one beneficiary to ensure the value of majority shareholding is preserved.

The Settlor’s wishes are always a material consideration in the exercise of fiduciary discretions but the extent that the Settlor’s wishes should be followed is a delicate line to tread.

It is common for trustees to be guided by a Settlor’s wishes and a trustee who regularly follows the Settlor’s wishes cannot be criticised purely on that basis as long as they have given due consideration to other relevant factors. Trustees may even properly be led by the Settlor’s wishes to take a decision which they would not otherwise have taken. However, trustees should always bear in mind that they must not blindly follow the Settlor’s wishes and

2 Re Manisty’s Settlement, [1974] Ch. 17

these cannot displace all independent judgment on the part of a trustee.

Trustees must therefore consider the Settlor's views but, taking all relevant factors into account, must decide how much weight to put on those wishes. If trustees simply follow the Settlor's wishes, they must make a conscious decision to do so for good reason, rather than drifting absentmindedly into doing so.

Bearing in mind those principles, looking again at the examples above, there are a range of possible decisions the trustee could take and the answer would also depend on the views, capabilities and personal circumstances of the beneficiaries or, in the examples above, even whether the tax imperative forcing a distribution is worth leaving one beneficiary with nothing at all.

On the one hand, the trustees may choose to place little weight on the Settlor's views given they were expressed many years ago when society had a very different attitude to the roles of men and women. However, on the other hand, the trustees could reasonably decide to follow the Settlor's wishes and appoint the estate / shares to the male beneficiary given the strength of the Settlor's views, the history of the trust and the nature of the trust's assets (which, of course, came from the Settlor himself).

The situation becomes even more finely balanced if we assume the Settlor is still living and in the context of this appointment expressing the preference that the assets should be appointed to his grandson not his granddaughter. There is, of course, no requirement for Settlors or beneficiaries to hold rational or unbiased views. Perversely, it could be said that a Settlor's contemporaneous discriminatory views should be given even more weight than any similar views contained in a letter of wishes from many years ago as, even being aware of the general attitude to prefer equality of the genders in society, the Settlor is still showing a preference for the male line.

Ultimately, there seems to be no one "right" answer. All a trustee can do in these situations is to weigh the competing considerations carefully and find a fair and reasonable balance.

What practical steps should trustees take?

Before making any decisions, trustees should gather relevant information, consult with beneficiaries and take appropriate advice (for example legal, tax or financial advice depending on the decisions being taken).

Then, when taking the decision, trustees should consider the information they have gathered and weigh up relevant considerations to reach a fair conclusion.

In order to reach a reasonable decision, at both of these stages, trustees should consider their own possible biases and assumptions and, if any are identified, probe whether those assumptions are based in fact or whether they are actually irrelevant considerations. For example, if a trustee identifies that they have assumed a young beneficiary cannot manage large distributions, they should go into discussions with that beneficiary with an open mind to establish their actual competence.

It is also at this stage that consideration should be given to the Settlor's wishes including whether the Settlor is likely to have been motivated by some kind of bias or prejudice. If so, trustees may want to give less weight to the Settlor's wishes than they would have done otherwise.

Although trustees are not generally required to give reasons for their decisions or disclose documents containing reasons for their decisions, this is not a reason to forgo a proper decision making process, or not to make a proper record of the decision and reasons. It is useful for the trust file to have this and if a trustee's decision were challenged in Court, it could be helpful to have contemporaneous documents setting out the reasons for the decision. In the absence of any such document, a beneficiary making a challenge might seek to argue there were no good reasons at the time (and the trustee is inventing them now) or that the trustee did rely on irrelevant considerations and that is why they did not record them.

In addition, if the trustees were making a momentous decision (such as distributing the entire trust fund) it could be prudent to seek the Court's blessing of the decision. This is particularly so in situations where the Settlor's wishes are potentially discriminatory or controversial but the trustees decide to follow them.

Beneficiaries do need to be joined to a blessing application, and if a beneficiary opposes the decision, such applications have the potential to become contentious. However, the Court's role is not to substitute its own decision in place of that of the trustee. Instead, the Court's remit is limited to considering whether the decision is one the trustees could properly have arrived at. This means that if the Court decides that trustees have taken relevant matters into account, giving them due weight and consideration, it will not withhold its blessing even if there were other possible decisions that could have reasonably been taken.

Therefore, even in the face of opposition, trustees can have their decisions approved. In fact, if a beneficiary is potentially hostile, seeking a blessing can be a useful tool as the Court's decisions will bind the beneficiaries of the trust meaning that trustees can be confident that their decisions cannot be challenged at a later date. This provides certainty for both trustees and beneficiaries..

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GOVERNANCE: AT THE HEART OF MODERN DAY ESG TRUSTEE THINKING

Authored by: Anne Baggesen - Suntera Global

Anne Baggesen, Global Head of Private Wealth at Suntera Global, discusses how approaches to governance are evolving across the modern private wealth landscape, and how that is shaping Suntera Global's own journey as a leading service provider to a global client base.

Q Across the ESG agenda as a whole, how significant is the 'G' strand for trustees?

A Ultimately, governance and responsibility are 'what we do' as a trustee. It's an intrinsic part of our role, to carry the load and to be accountable for our actions but also to channel stewardship around managing that responsibility. Arguably, the emphasis in the rapidly evolving ESG space to date has been on the 'E', but increasingly we're seeing recognition amongst clients that the governance – what underpins stewardship, responsible behaviour and integrity – is absolutely critical, and what helps everything we and our clients do stand up to scrutiny.

Q Do approaches to governance differ across the different international markets?

A It's not clear that there are regional approaches to ESG, but what we have noticed as a business with broad international reach is that different businesses and institutions can have markedly different priorities or areas of focus to one another.

Increasingly, though, institutions are talking about ESG and sustainable investing and that's a clear direction of travel globally. You do find, though, that not all firms will have a strong message or framework within their own business model – they may not all foster an inclusive or diverse working environment or policy around recruitment and employment for example.

It's a question of standardisation and evolution over time - the more global firms will be adopting strong ESG frameworks, for example, and this will affect the local and regional markets but at the same time it does feel like the more boutique firms are the ones that appear to be more concerned, expressive and agile around their governance frameworks and corporate responsibility, regardless of their global reach.

Q How is the importance attached to governance reflected within Suntera Global itself?

A We've been very clear as we have evolved as a business that having a strong culture of trustee responsibility that not only exists but thrives in each of our jurisdictions, is what makes us who we are. It's why we have local Suntera Global senior staff and Group representation making up the boards of our corporate trustees throughout the business and why our trust teams are made up of professional practitioners, many of whom are STEP qualified.

Of course, no family is the same as another, so it stands to reason that no trust will be the same either. That's why it's so important to have in place a robust Group governance framework to encapsulate the bespoke advice, guidance and assistance we provide to clients and ensure that decision making follows a responsible and safe path as well as being compliant.

The 'compliance' landscape has changed dramatically over the past decade. The drive to 'know your client' has become a highly complex, sophisticated sector in its own right, focused on transparency, anti-money laundering, substance, profit shifting, management and direction, corporate governance and more. It's now not only about ensuring we all know and understand who we are working with and accurate transaction monitoring, it's about complying with the implementation of increasing new information exchange initiatives, tax-related legislation and regulation around transparency, and demonstrating unequivocally the effectiveness of those initiatives.

Q Looking forward, are governance standards keeping up with the pace of digital change?

A The management of international family wealth has always had to adapt to changing regulatory, societal and cultural norms, and digital change is certainly a major force shaping the sector. But it's now not a question of digital disruption; rather it's about digital processes being seamlessly integrated to enhance service, accessibility and processes.

Wealth in its broadest sense is becoming more complex and as clients increasingly expect to communicate and transact digitally, so innovative, technology savvy trust companies like ourselves are increasingly "pushing" against what might be considered to be 'traditional' methods of client onboarding, KYC and reporting. But it's important that this digital adoption is not at the expense of 'traditional' high quality client service.

It's vitally important too that as clients' needs become more global, so the capability to deliver governance frameworks that embrace digital technologies becomes more critical. The role of the regulator in facilitating digital compliance and governance is largely going to dictate the pace of change and adoption across global markets, but at an industry level we are absolutely focused on ensuring we remain at the forefront of digital skills and innovation.

Q How has the Covid-19 experience accelerated thinking in the governance arena?

A It's always been the case that, as a trustee, carrying the responsibility to ensure clients and staff have a sustainable future under our umbrella of care requires us to provide and maintain a robust framework of governance. Having that right structure in place allows for flexibility to be engaged when the world around us changes.

That is really what has come to the fore over the past twelve months in light of Covid-19. The pandemic has shone a light on governance and sustainable practices, and for me those two concepts absolutely go hand in hand. For our clients, it's about more than just looking after their assets in a responsible way; it's also about ensuring that the infrastructure of our business and our risk and governance framework can withstand unexpected changes or threats – like a pandemic.

We need to be ahead of the curve when it comes to changes in regulation or legislation affecting our industry, we need to engage with and employ the right people to protect us and our clients and we need to commit to those sorts of investments in our business. Having governance at the heart of what we do is critical in supporting that and in ensuring we are fit for the future.

BREAKING UP THE BUSINESS

"NO DYNASTY LASTS BEYOND THE LIFESPAN OF THREE GENERATIONS"

Authored by: James Woods-Davison - Boodle Hatfield LLP

Trustees frequently hold trading businesses settled upon discretionary trusts on the basis that the business should be a "dynastic" asset which benefits future generations of a family in perpetuity. Noble as this intention may be, as generations pass, trustees frequently find themselves interposed between family branches which increasingly diverging views. But if one family branch runs out of patience and wants to break up / restructure the trust and divide the business, where does that leave the trustee?

A ticking clock?

The philosopher Ibn Khaldun said "no dynasty lasts beyond the lifespan of three generations" and trustees might do well to keep this at the back of their minds.

Over progressive generations, the beneficial class of a trust typically expands and is populated by individuals partly or wholly removed from the settlor and/or the operations of the business and with an entirely different outlook. This increases the potential for diverging views amongst beneficiaries and the issue of restructuring or refocussing a trust to reflect the needs of the next generation is often a question of "when" not "if" (with COVID-19 having put succession in sharper focus for many families).

A disgruntled family branch or member is likely to want to achieve economic and legal separation whilst preserving their interest in trophy (income producing) trading assets. However, dynastic businesses may not be readily capable of division. They are often businesses that have survived based upon a combination of reputation, stable culture, long-term financial planning, economies of scale and contribution by key family members.

Where one family branch seeks to divide a dynastic business (to the horror of another family branch) the trustee is not only caught in the middle of a family dispute, it is also likely in the cross-hairs for claims by whichever family branch fails to get their way. How does a trustee proceed whereby they are "damned if they do and damned if they don't"?

This question puts the core duty of a trustee to exercise its discretion and dispositive powers for the benefit of the beneficiaries as a whole in sharp relief. It also requires a trustee to engage with complex commercial issues in connection with the business.

Duty under pressure

In broad terms, a discretionary trust means what it says; discretion is vested in the trustee alone and no one beneficiary, however senior, can dictate to the trustee what to do, nor can any group or even a majority of beneficiaries do so. In this context the trustee has a duty to consider exercising the powers they have in the interests of the beneficiaries as a whole and come to a good faith conclusion on that question. In doing so they must take into account only relevant considerations and reach a decision open to a reasonable body of trustees.

This backdrop, in principle, means a trustee can break up a dynastic business, assuming this decision could be said to be within the scope of a decision made by a reasonable body of trustees.

However, there are tensions that invariably arise from this point that are common across wider trust disputes (e.g. the relevance and weight that should be placed upon a settlor's letter of wishes, to what extent a trustee has or should have consulted with beneficiaries or to what extent a trustee has taken into account relevant considerations). This said, despite these pitfalls, a trustee that adopts a well-planned approach to their decision making at an early stage is more likely to make decisions that are reasonable, rational and defensible.

Decision making for trustees in respect of trading businesses is often necessarily more difficult by the fact that it was often never intended that the trustees would involve themselves directly in the business. Rather, in many cases, businesses are settled into trust with the intention of optimising tax, asset-protection and/or succession planning.

This is particularly relevant for trustees protected by an anti-interference (anti-Bartlett) clause which, broadly, absolves the trustee of a duty to involve themselves in the operations of a business. Notwithstanding a trustee's duty to monitor the business (which merits an entirely separate discussion) for better or for worse many trustees may have relatively limited information.

"Lifting the hood"

Trustees are bound to make proper enquiries and not simply to act on the information to hand. It is likely that a trustee will need to delve into the operations of the business in more detail. As part of a duty to inform themselves, the trustee should seek expert advice as necessary (e.g. valuation, corporate finance, legal or tax advice).

Unlike other more "static" trust assets (e.g. an investment portfolio or property) a trading business is a 'living and breathing' entity. In parallel with investigating the business 'as usual' it may well be relevant to understand how the family / beneficiary dispute itself might impact the business (e.g. could this trigger key persons to leave the business, might it impact reputation/valuation, will it affect recruitment of external talent, will it drain management time?).

The extent to which a trustee discharges its duty of consideration in investigating the business is notably, a decision in itself. A trustee is not expected to continue seeking more information indefinitely and therefore will need to take a proportionate approach.

Adopting a practical / tactical approach

Looking forward, it is likely that a substantive decision to divide a business is a "momentous" one and therefore appropriate for blessing by the court pursuant to a category 2 Public Trustee v Cooper application (another subject that merits a discussion in itself). Whilst a dispute is at an early stage, it is worth a trustee bearing in mind that any such application will necessarily require full and frank disclosure to the court. It may therefore be prudent for a trustee to ensure that its strategy and documentation is progressed with full and frank disclosure in mind.

In parallel, a trustee might consider managing its documents and recording its decisions at an early stage in a way which is mindful of the potential for disclosure orders made against it in the future. Hostile beneficiaries may use ancillary claims to exert pressure upon the trustee to act in a particular way or to force disclosure of documents or reasons for its decisions which the trustee would not otherwise choose to disclose.

On reflection

Whilst there is often no easy answer to trustees facing the break-up of a business, trustees can improve their position by adopting a considered strategy and taking proportionate action at an early stage. In this way their decisions are more likely to be reasonable, rational and defensible. Notably, the court's role is to assess whether or not the decision is one that a reasonable trustee might take rather than a decision it would take.

Stepping back, societal trends provide an interesting backdrop for these potential disputes. Global wealth generated since the Second World War is unprecedented [1] and we are in the midst of the third post-war generation. It the title to this article is right, a number of dynastic businesses and their trustees could be in for a turbulent ride.

1 https://ourworldindata.org/grapher/gdp-per-capita-maddison-2020

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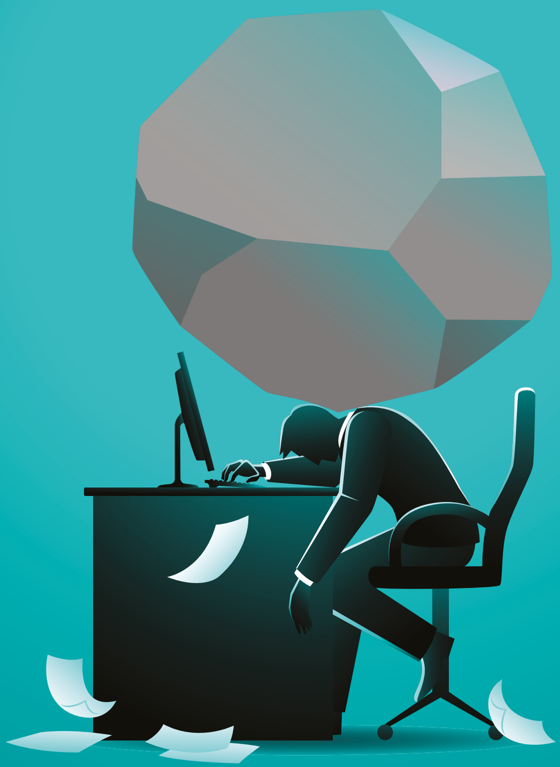
TRUSTEES UNDER PRESSURE – INCREASING REGULATION



Authored by: Richard Grasby - RDG Fiduciary Services

The “offshore” trust business began at the end of WWII and took off in the 1980s and 1990s. Today there are many jurisdictions where trust and corporate services are a major part of their economy and the “users” of such services are mostly non-residents. Such jurisdictions have one or more regulatory bodies responsible for certain sectors of the economy – including financial services.

Regulation of trustees has been present in many jurisdictions for several decades and is on the increase. In the Cayman Islands, for example, the first iteration of the Banks and Trusts Companies Law was passed in 1966 and there have been many revisions since that time. Further consultations are also underway. Other jurisdictions such as Hong Kong and Switzerland are approaching mainstream trustee regulation for the first time as discussed below.

The main area of regulation associated with trustees is in respect of anti-money laundering and counter-financing of terrorism (“AML/CFT”) and this has been and remains a huge area of focus. The reasons for increased AML/CFT regulation and the potential use of trusts for such purposes is well-known. AML/CFT has expanded to cover record-keeping and transparency whilst global tax initiatives result in the fact that trustees are also heavily tied up in AEOI and economic substance related matters.

Specific trustee regulation is mainly designed to introduce some form of consumer protection for the users of trust services and also to protect the reputation of the jurisdiction.

If persons are offering trust services from a particular jurisdiction and something goes wrong or is done badly then it is likely that the reputation of that jurisdiction will suffer. Therefore, it is advisable for the jurisdiction to set certain rules. The jurisdiction does not want persons using their jurisdiction – usually for profit- without a certain degree of vetting. The main issues which often determine the degree of regulation are whether or not the trustee is acting “by way of business” and the potential range of persons to whom their services will be offered.

“By way of business” is worthy of an article itself but for these purposes we will assume some form of remuneration to represent a profit for the trustee (or some form of benefit to an affiliate of the trustee as in the case of certain bank-owned trustees). So, to use the Cayman Islands as an example, an applicant for a full licence to carry out trust business must comply with many issues. An applicant for a “restricted” licence is only intending to (and is only permitted) to offer trust services to a specified class of trusts and thus the requirements are reduced. Until 2008 the Cayman Islands did not have registered, unlicensed private trust companies (“PTCs”). PTCs are now permitted to act for connected settlors and a full licence holder must provide the registered office. The company name must make it clear that the company is a PTC. A full licensee may have any number of “controlled subsidiaries” which do not themselves need a separate licence.

Other jurisdictions have different types of regulation depending on the scope of services and therefore the perceived risk. For example, in the BVI, one of the exemptions for PTCs is that it only carries out ‘unremunerated” trust business.

The would-be settlors of trusts (together with their advisers) should draw comfort that the persons offering trust services to them from many jurisdictions have gone through some form of application process and are subject to supervision.

Regulation of a trust company will typically involve a combination of laws, regulations and guidance covering some or all of the following:

- **the names of companies – i.e. trust and trustee may be restricted to licence holders; use of the designation PTC may be mandatory,**
- **scrutiny of the owners and directors of the company and restrictions on changes,**
- **the expertise of certain key personnel,**
- **professional indemnity insurance,**
- **audited financials,**
- **capitalization requirements,**
- **the requirement to implement and follow multiple policies relating to[1]:**
  - **governance,**
  - **record keeping,**
  - **cyber security,**
  - **complaints,**
  - **conflicts of interest,**
  - **segregation of assets,**
  - **AML/CFT,**
  - **business continuity,**
  - **outsourcing,**
  - **staff training**
  - **marketing of services**
  - **expected standards[2].**

Hong Kong introduced AML/CFT for non-bank owned trust companies in 2018. In 2020, the Hong Kong Monetary Authority issued a consultation paper on proposed trustee regulation for certain types of trustees [1].

This process highlighted a number of the key issues with trustee regulation.

The first is the difficulty with trustees of existing trusts not having "clients" or "customers" but in the marketing and set-up stage trustees can be said to have clients.

Another point to note in the regulation of trustees is that the regulator's role must not impact on the jurisdiction of the court. The court's role in managing the relationship between the trustees and beneficiaries in crucial and the regulator should not impinge on this. However, a trustee's behaviour towards beneficiaries could result in action being taken by regulators after the fact. Most recently trustees have been found guilty of AML/CFT offences [4]. Those of us who have been involved with regulatory inspections will be familiar with requests to tighten up policies and procedures.

Trustee services are -in most cases- a business and the adage that "time is money" rings true. Private equity has put a lot of money into the trust and corporate services industry and generally looks to maximise revenue. Increased regulation tends to lead to a consolidation of the trust industry. More staff time is taken on regulatory (non-chargeable) time and this affects revenue and ultimately profits. If fees are increased to compensate, this can affect the trustee's competitiveness.

If a trust company has 40 fee-earning staff charging USD250 per hour, then a requirement for each of them to do 10 hours training per year has a theoretical cost of USD100,000 [5] and an additional 15 minutes per day of regulation-linked administration a further USD600,000 [6] per year. But the benefits of proper regulation (not regulation for regulation's sake) and the costs (time, revenue and reputational) of regulatory action being taken against a trustee would usually outweigh such amounts.

A current focus is on the "managed trust company" whereby one trustee provides infrastructure for another to set-up and operate their own licensed trust company. The Cayman Islands currently has a consultation [7] on this issue and there may be a move to more substance and thus fewer licensees.

1 See for example https://www.cima.ky/trusts-regulatory-measures . A number of these would apply to all trustees.
2 Including ethical and professional standards.
3 https://www.hkma.gov.hk/media/eng/regulatory-resources/consultations/Consultation_paper_on_enhancing_the_regulation_and_supervision_of_trust_business.pdf
4 See for example recent fines in Singapore https://www.mas.gov.sg/regulation/enforcement/enforcement-actions/2020/mas-imposes-composition-penalty-of-1100000-on-asiaciti-trust-singapore-pte-ltd-for-amlcft-failures and Jersey https://www.gov.je/news/2021/pages/TrustCompanyFined.aspx
5 Not including the cost of the training!
6 Based on 240 days.
7 https://www.cima.ky/upimages/commonfiles/PrivateSectorConsultationPaper-RulesandSoGonMinCriteriaforMaintainingPhysicalPresence_1614375706.pdf

CONTENTIOUS DECEASED ESTATES AND THE VALUE ADD OF THE RIGHT PROFESSIONAL INDEPENDENT ADMINISTRATOR

Authored by: Hannah Davie and Ami Sweeney - Grant Thornton UK LLP

Death is one of the few inevitabilities that affects everyone.

The Covid pandemic has further compounded the position and increased death rates across the globe.

Given this increase, it is not surprising that we have also seen an upturn in the number of family disputes following the death of a family member and the need for private client and probate practitioners to deal with a greater number of contentious deceased estates.

This escalation in contentious deceased estates has been brought about for various reasons including:

- The Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020, which allowed the remote witnessing of wills after 31 January 2020. There are concerns for wills witnessed via this method prior to 30 January 2020 and also that this method may result in an increase of fraud or undue influences cases, given that the witnesses were not in the same room as the testator when the will was signed.
- The increased awareness of wills and the ability to now witness wills at home, means there has been an increase in the number of homemade DIY wills, which often do not meet the statutory requirements.
- The higher value of estates, due in part to the rise in property prices over the last century, and people's expectation and reliance on the anticipated inheritance.
- The increased use of complex multi-jurisdictional structures and trust to hold family wealth and
- The rise in number of multi layered families and ultimate beneficiaries.

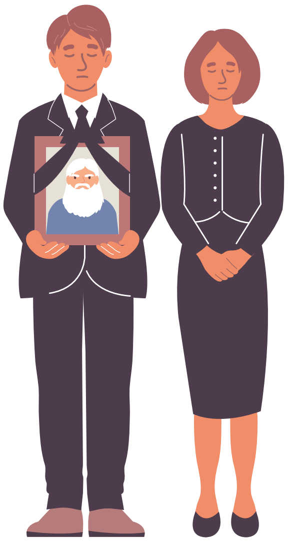
It can often be the case that where there is a dispute following the death of a family member, that it cannot be resolved whilst the current personal representatives or executors are in place and often requires Court intervention and ultimately the appointment of independent administrators.

In some cases, the selection of the independent administrator is left to the president of the law society closest to the deceased's place of residence, but this process can take circa.6 months and does not provide the beneficiaries with any visibility or choice as to who will be appointed.

Whereas, by nominating a professional independent administrator, who you know has the skills specifically needed to address the issues within the deceased estate, can ensure a far more efficient appointment and a more cost effective process in the long term.

We have seen an escalation in enquires relating to deceased estates and being nominated as independent administrators to deal with the administration of the estate in the following situations, for the reason set out below:

"Whereas, by nominating a professional independent administrator, who you know has the skills specifically needed to address the issues within the deceased estate, can ensure a far more efficient appointment and a more cost effective process in the long term."



1. There is a suspicion that assets have gone missing prior to, or post death

- As forensic accountants and asset recovery specialists, Grant Thornton UK LLP (GT) can use our Corporate intelligence and forensic capabilities to investigate what assets the deceased held prior to death (or at the relevant date of dissipation) and what their respective values may have been at the relevant dates. Also, if assets have gone missing, or appear to have been dissipated or transferred out the estate, we are able to trace those assets and recover them as an integral part of the independent administrator role, without the need to instruct additional service providers.

2. The assets identified to be recovered are held in various offshore jurisdictions

- As accounting professionals who are part of a global network with offices across the world, we work seamlessly across jurisdictions, which is key in these types of disputes, and enables us to engage the best possible people locally to support us in each of the relevant jurisdictions.

3. The assets are held in complex structures

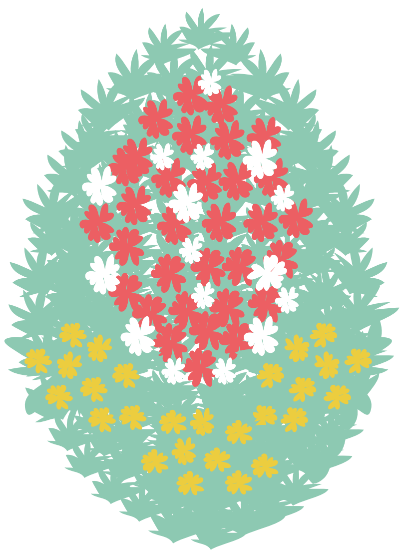
- Given more complex corporate structures are used to hold and manage family wealth, obtaining the information needed and gaining control of the relevant structures or of the deceased's interest in these structures, is often not straight forward. In situations such as this, we can be appointed as Receivers by the Court to take control of entities to ensure they are safeguarded as further reference below. Also, should it be required, we can appoint independent directors to a board, to enable investments/holdings to be managed/maintained.

4. There is ongoing litigation involving the deceased, either as a defendant or claimant

- In the deceased estate of the Russian oligarch Boris Berezovsky (the Estate), there were considerable assets to be secured and realised and ongoing litigation, where Berezovsky was the claimant, as well as substantial litigation as the defendant, which needed to be dealt with. The beneficiaries, along with the applicants and claimants of the litigation needed someone capable, to take control of the Estate and take the reins in relation to the ongoing litigation. Hence Kevin Hellard and Nicholas Wood of GT were appointed as Joint Receivers of the Estate. The Receivers had limited powers granted by the Court, which were to identify and secure assets and establish the Estates liabilities. The Receivers also had the power to deal with the ongoing litigation.
- The Receivers stayed in office for 12 months before one of remaining Executors came forward, a family member of Berezovsky. However, the Court felt that dealing with the Estate was too complex for them to deal with alone. Therefore, the Court appointed them as a 'Special' Administrator, so that they could deal with the grave and personal effects.
- The Court also appointed Messrs Hellard and Wood, as 'General' Administrators. The General Administrators had responsibility on behalf of the Estate for the legal proceedings and had powers to realise assets and also investigate the assets and liabilities within the Estate.

5. There are insolvency concerns

- Administering a contentious deceased estate, can be complex and legally complicated. So, if the estate is thought to be insolvent and the liabilities are thought to exceed the value of the assets, or there are concerns as to whether the estate may become insolvent, the process can be even more challenging.
  - Concerns with regard to the value of the estate can arise for a variety of reasons for example:
  - due to the assets within the estate having reduced in value, which is particularly pertinent given the COVID pandemic and the effect it has had on numerous industries worldwide
  - assets in the estate have been dissipated and can no longer be traced or recovered
  - the complex legal structures or jurisdictions in which assets are held, mean legal action is required to recover them and there are insufficient funds in the estate to pursue such claims
  - legal claims have been issued by the deceased or against the deceased, which need to managed as the outcome is likely to effect the solvency position of the estate.



- The process followed by the executors once there are insolvency concerns is particularly important, given the personal liability which can be imposed once the estate is considered to be insolvent, if mistakes are made with administering the estate and the payment of liabilities. Hence, where insolvency is identified as a potential issue, the benefits of involving an Insolvency practitioner who has experience of dealing with deceased estates is tangible.

6. Issues have been identified with current executors or personal representatives

- We have been appointed to a deceased estate, where the executors have realised assets and misappropriated the sale proceeds and have transferred/sold assets for less than their true value for their own benefit. In addition, they have not provided the beneficiaries of the estate with a full account or an explanation as to what happened to these assets. In this situation, we have utilised funding from GT to obtain legal advice and counsels' opinion on the potential claims available and we are currently agreeing a fee structure with our instructed solicitors, which will enable them to work on this matter on a contingent fee basis, should an full account not be provided and we need to procced with pursuit of the legal claims accordingly.

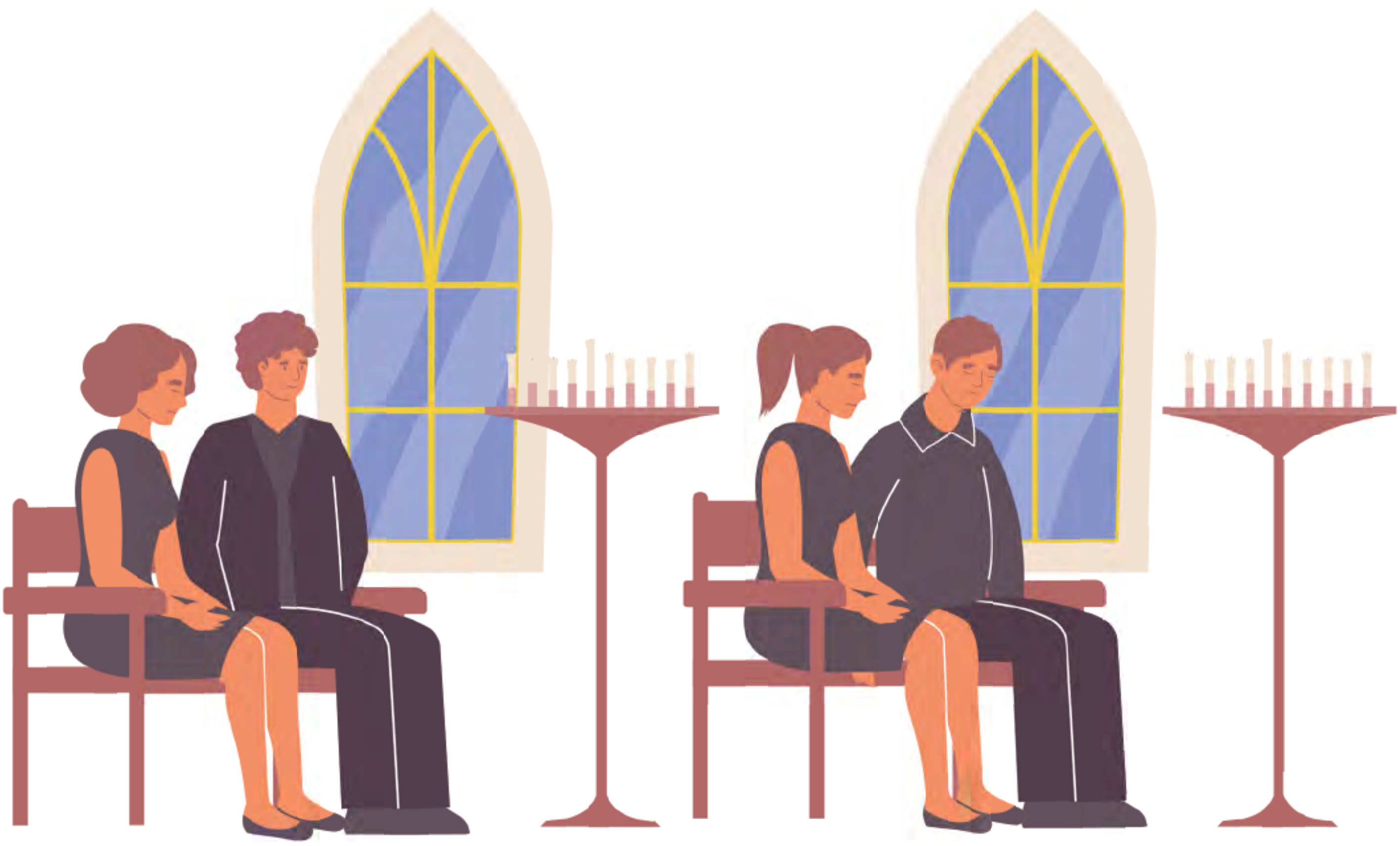
7. Flexibility regarding fee and funding structures

- Having the ability to be flexible with regard to our fee structure and the availability of various funding options for us and the lawyers/counsel we instruct has real benefits for beneficiaries, especially in situations where there are not necessarily sufficient funds available to otherwise pursue such claims.

In each of these situations, utilising the skills of a professional independent administrator, who has experience with asset tracing and cross jurisdictional asset recovery skills, along with the ability and experience to manage cross border litigation and complex and often emotive disputes sensitively is key.

Having all of these skills within a professional independent administrator adds real financial benefits for the ultimate beneficiaries.

If you have any queries or concerns relating to a deceased estate, please do get in touch, as we would be happy to talk through with you and see if we can help your client.



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Covid-19 Clause

Book with Clarity

If the event runs on the designated date and any delegate is unable to attend due to:

- Local travel restrictions of the attendee
- Restrictions in the country hosting the event
- Any requirement to self-isolate or quarantine
- General travel restrictions

All bookings will have the option of:

- Sending a replacement at no extra cost
- Transferring to the 2022 date at no extra cost
- A full refund

If the event does not run as scheduled all bookings will have the option of:

- Transferring to the 2022 date at no extra cost
- A full refund

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