

2.5 Contentious cases

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Each dispute is different and so raises different issues as to whether the trustee can continue in office. A guide of this nature cannot comprehensively address all permutations, or provide a substitute for proper legal advice. Some general points are considered in the following paragraphs.

Generally speaking, the question whether a trustee should continue in office will only arise in a dispute with trust beneficiaries. Such so-called beneficiary disputes are considered at 2.5.1 below.

Other, less common types of dispute – trust disputes and third-party disputes – are considered at 2.5.2 and 2.5.3 below.

2.5.1 Beneficiary disputes

A beneficiary dispute is an internal dispute between trustees and beneficiaries, usually involving allegations that the trustee has committed a breach of trust, but possibly simply stemming from a disagreement over the way the trust has been administered. A responsible trustee will investigate the beneficiaries' complaint and if he finds it has substance, will compensate the fund for any loss he has caused. If he does this, the beneficiaries may be willing to forgive and forget, and allow him to continue in office.

If the trustee loses the confidence of the beneficiaries, they may ask him to retire. He should consider such a request carefully, and do what is in the best interests of the trust, and the beneficiaries as a whole. He should try to disregard his own interests and in particular resist the temptation to continue in office simply in order to strengthen his negotiating position. He should weigh up all competing factors, and take appropriate advice.

If a beneficiary brings court action against the trustees, the relief is likely to include an order that the trustee be removed and a fit and proper trustee be appointed in his place. The responsible trustee will, as mentioned, investigate thoroughly, and only defend proceedings if he believes (with the benefit of proper advice) that he has a good defence. Even if he concludes that there is a good defence, he should still consider whether to continue in office. It is not essential for his defence that he does so. Retirement may ensure that the dispute does not impede the efficient administration of the trust, and may serve to defuse the situation. If he is confident of vindicating his position, it may well be proper to continue in office. Usually he will be content to abide by the court's decision over the continuation of his trusteeship.

As noted at 2.1.4 above, the court has powers to remove trustees against their will. If the beneficiary action is successful, the court is likely to make an order removing the delinquent trustee.

If, faced with a beneficiary action, a trustee's decision is to retire, he will have to deliver trust assets, documents and information to the incoming trustee. Usually his retirement is agreed as part of the settlement of the dispute. But, if the litigation continues despite his retirement, he should first take copies of such documents that may be needed to enable him to defend himself. A retiring trustee, facing claims from beneficiaries for breach of trust, is entitled to an indemnity. It would be wrong to seek an indemnity for claims that are the subject of the dispute. If a trustee believes the beneficiaries are unreasonably opposing an indemnity in respect of matters outside the scope of the dispute, he should consider seeking guidance from the court. If he is removed by order of the court, he will still be entitled to an indemnity. But, if he is found to be at fault, he is generally thought not to be entitled to a call on the indemnity until he has first made good his default.

Beneficiary actions can be brought against those individuals (directors or employees) of the trust corporation who are thought to be responsible for the beneficiary's complaint. Actions against such individuals can be brought on a number of grounds, including constructive trust principles⁵⁵ and possibly, in exceptional circumstances, on the basis of a dogleg claim recognised in *HR v JAPT*.⁵⁶ The possibility of personal liability needs to be covered, if possible, in any indemnity.

2.5.2 Trust disputes

Trust disputes concern the subject matter of the settlement. This includes claims by the settlor to set aside the trust, or by his creditors, or those claiming through them, based on constructive trust or sham principles. In such situations, the trustee's actions are not usually the focus of the dispute and a third party will not have standing to ask the court to remove the trustee. The trustee may need to consider whether such claims affect his indemnity. This is a particular issue in relation to trustee's costs associated with any proceedings,⁵⁷ as the trustee will be personally liable in relation to such costs (and therefore dependent on the indemnity being effective to recover such costs from the fund). For example, if the trust is found to be invalid, then the trustee's rights under the instrument, including his right of indemnity, will be lost. If the trust is found to be invalid because of a sham, the trustee may look to the settlor for recompense, as he has acted on instructions. The trust assets may be found to belong to a third party, and may not be available to meet

55 The leading case on directors' liability for knowing assistance in a breach of trust is *Royal Brunei Airlines v Tan* [1995] 2 AC 378.

56 [1997] PLR 99, where a director of a corporate trustee was accused of breaching his fiduciary duties. This gave rise to a claim against him by the trust, which passed to the new trustee. The Supreme Court of Victoria case of *Young v Murphy* [1996] 1 VR 279; (1994) 13 ASCR 722 suggests that such claims do not vest in the new trustee. Rather, the right to sue belonged to the trust corporation (and not to the trust) and passed to the trust corporation's creditors. See also *Alhamrani v Alhamrani* [2007] JLR 44; *Gregson v HAE Trustees Ltd* [2008] EWHC 1006.

57 Normally, the trustee will take a neutral stance, cooperating with the parties and abiding by the court's order (the case often cited in support of this is *Alsop Wilkinson v Neary* [1995] 1 All ER 431). The trustee would be entitled to his costs for taking a neutral stance.

the trustee's indemnity. There are some authorities suggesting that, in this situation, the court may allow the trustee to look to the fund, provided there is no wrongdoing, to meet costs associated with such proceedings.⁵⁸

Trust disputes which include questions over the terms of the trust on which the trustee holds the trust property may be resolved by approaching the court for directions. A trustee is generally entitled to recover his costs of such an application from the fund under his right of indemnity.

2.5.3 Third-party disputes

A third-party dispute is between trustees and third parties, for example based on a contract entered into by the trustee, or based on tortious principles. These will not affect the trustee's indemnity. But the scope of the indemnity needs to be considered as the trustee is likely to be forced to incur costs, for which he will be personally liable. He will look to recover these from the fund, under the indemnity.

The trustee's duty in such situations is to act as would a prudent man of business to maximise the trust estate. He should investigate such claims and obtain proper advice, with the option of seeking the court's guidance, in what is commonly known as a Beddoe application.

If the trustee ignores a possible claim, which as a result becomes time barred and valueless, he may be in breach of trust, and liable to the beneficiaries. If he proceeds with a claim against a third party, he does so in his own name, and is personally liable for the costs of instructing lawyers (which he will seek to recoup from the fund, under this indemnity). If the claim is unsuccessful, he will be personally liable for his own and possibly the third party's costs. However, he will only be entitled to recover these costs under his indemnity if the court considers that he has acted reasonably. What may appear reasonable at the outset of litigation may, when judged with hindsight at the end of the case, be unreasonable. The safest course is to make a Beddoe application. Where a court directs a trustee to proceed with a third-party dispute, and he follows those directions, then he secures his right to an indemnity from the fund win or lose. The trustee will need to meet the costs of making the Beddoe application itself. The court hearing the Beddoe application may order that these costs be reimbursed from the fund, but this is not guaranteed and there will be a delay before the application is heard. One solution is for the trust instrument to include a suitable provision permitting the trustee to pay costs from the fund on an indemnity basis.⁵⁹

2.5.4 Practical points on indemnities in a contentious situation

The scope of the indemnity is a matter for negotiation between the outgoing and incoming trustee. The trustee is not entitled to insist on an indemnity that covers

58 *Re Holden* (1887) 20 QBD 43; *Bullock v Lloyds Bank* [1955] Ch 317.

59 See *Underhill and Hayton Law of Trusts and Trustees* [81.18], suggesting a provision that: *A trustee shall not be liable for acting in accordance with the advice of counsel, of at least ten years standing, with respect to the settlement. The trustees may in particular conduct legal proceedings in accordance with such advice without obtaining a Court Order. A trustee may recover from the Trust Fund any expenses where he has acted in accordance with such advice.*

risks which are merely fanciful.⁶⁰ If agreement cannot be reached, consideration should be given to seeking guidance from the court as to what is reasonable.⁶¹

Generally, the incoming trustee's liability under the indemnity will be subject to a cut-off date, which will be agreed by reference to the relevant limitation period (discussed at 2.3 above). The outgoing trustee should seek advice on the relevant limitation periods, which depend on the nature of the possible liability and claims and the relevant law. Generally speaking, the relevant limitation period is likely to be six years and to start either from the date of the event giving rise to the claim against the outgoing trustee, or alternatively from the date the loss is suffered.

An audit may take place in contentious situations. This may extend to companies owned by the trust. The incoming trustee will generally have power to meet the costs of an audit from the trust assets.

Fee disputes are commonly encountered when a trustee retires, particularly if his retirement was occasioned by beneficiary dissatisfaction. The retiring trustee should ensure that his charges are consistent with the charging clause. This will in some cases permit him to charge an exit fee on termination of the trusteeship, possibly calculated by reference to the value of the trust fund. Generally, the outgoing trustee is entitled to retain assets to cover his fees, pending resolution of the fee dispute. He should not hold the trust assets to ransom until his fees have been paid in full; discussed at 2.2 above, dealing with the former trustee's lien.

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60 The House of Lords considered that the trustee was seeking an indemnity for fanciful risks in the case of *Concord Trust v Law Debenture Trust Corporation plc* [2005] UKHL 27.

61 In a directions application. Otherwise the trustee could be exposed to costs if he is found to have acted unreasonably.