

TECHNICAL SALES BRIEFING

TRUSTEE DUTIES

KEYPOINTS

- › Acting as a trustee is an ongoing and multi-faceted role requiring the performance of a number of wide-ranging and time consuming duties
- › The settlor should consider the appointment of trustees very carefully to ensure those appointed have the necessary abilities to perform the various duties prescribed by the trust deed and by law and to avoid any potential conflicts of interest
- › Additionally, to avoid a potential breach of trust, prospective trustees should ensure they have a sound understanding of the trust property, the parties to the trust, the trustee powers and the trustee duties imposed by the deed and by law
- › Utmost offers a competitively priced professional trustee service for UK resident settlors who are considering settling their Utmost bond into trust using one of our trust drafts, although some restrictions may apply. If you are interested in how this could assist your clients you should speak to your Utmost sales consultant for more information.

INTRODUCTION AND OVERVIEW OF TRUSTEE DUTIES

Choosing trustees is an important decision and one that settlors should not take lightly. Once placed into trust, any assets become the legal property of the trustees, to manage and distribute and trustees must fulfil a number of trust duties, all requiring considerable experience, knowledge, and time, to properly administer a trust. Whilst settlors may seek to appoint family members due to their existing knowledge of beneficiaries and the family circumstances, trustee duties can be onerous and place a significant obligation on these individuals.

Trustee duties are obligations specified either in the trust deed or by law. A trustee's failure to perform trust duties is a breach of trust which may lead to action to recover any loss caused to the trust.

Before accepting the role, a trustee should ensure he or she:

- › understands the purpose of the trust
- › understands the terms of, and the powers and duties granted under the trust deed
- › can identify the trust property
- › can identify the beneficiaries and understands the interests of each of the beneficiaries
- › understands the relationship between the settlor, the beneficiaries and the trustees
- › can identify any breach of the trust or potential breaches by reviewing the trust records
- › understands how the trust will be taxed or seek advice on this aspect.

If in any doubt, it is recommended that professional advice is always taken.

A professional trustee can rely on accrued knowledge and past experience when acting as a trustee and can be expected to act impartially. Settlors should think carefully as to who to appoint as a trustee and the proposed trustee's ability to satisfactorily perform the duties of a trustee. The specific details of each key duty are set out in the following pages.



Without the proper experience and knowledge, or if a potential conflict of interest exists, it can prove difficult to act as a trustee. Where individual trustees are appointed, there should be at least two trustees in case one is suddenly unable to act, and it is worth considering how duties can practically be fulfilled, including administrative requirements such as signing documents, if individual trustees are geographically separate.

TRUSTEE DUTIES IN DETAIL

DUTY TO COMPLY WITH THE TERMS OF THE TRUST

A trustee must comply with the terms of the trust deed and beneficiaries are entitled to have the trust administered in accordance with the deed. A trustee can apply to the Court for directions if any doubt arises as to the terms.

DUTY OF UNDIVIDED LOYALTY

The legal ownership of trust property legally vests in the trustees who hold the trust property for the benefit of the beneficiaries of the trust.

As a result, a 'fiduciary' relationship arises between a trustee and the beneficiaries. A trustee's primary fiduciary duty is of undivided loyalty to the beneficiaries. A trustee must act solely in the best interests of the beneficiaries and the beneficiaries' interests must always come first.

Other duties arising from the fiduciary relationship include:

Duty to act in good faith.

A trustee must not act in the trustee's own interests or in the interest of a third party, except with the informed consent of the beneficiaries.

Duty not to profit.

A trustee must not profit from acting as trustee or by using trust property at the expense of a beneficiary. A trustee can only be reimbursed for reasonable expenses.

Duty to avoid conflict of interest.

A trustee must not place themselves in a position where their duty and interest conflict.

Duty to consider beneficiaries.

A trustee must act impartially with respect to the beneficiaries by considering all the beneficiaries in their decision making.

- › All beneficiaries with the same entitlement should be treated equally.
- › A trustee must act fairly between beneficiaries with different interests.



Appointing a beneficiary of the trust, or a relative of a beneficiary or the settlor, as a trustee may create a conflict of interest between the trustee's duties and an interest in the trust. Where there is likely to be a conflict of interest, or potential conflict of interest, arising from any trustee appointment then alternative trustees should be considered instead or the settlor should consider the use of a professional trustee services.

DUTY OF CARE

A trustee must exercise care when managing the trust. The duty of care exists under both common law based on past decisions of the courts and statutory law derived from Acts of Parliament:

Common law duty of care.

A trustee is expected to manage a trust with the same skill and care of an ordinary prudent man of business morally obliged to provide for others.

Statutory duty of care.

Under the Trustee Act 2000 a trustee must exercise reasonable care and skill for the circumstances, subject to:

- › any special knowledge or experience the trustee has or holds out as having, and
- › any special knowledge or experience it is reasonable to expect of a trustee acting in the course of a certain business or profession.

The statutory duty of care only applies in certain circumstances set out in the Trustee Act 2000 and can be specifically excluded by the Trust Deed.

DUTY TO MANAGE THE TRUST EFFICIENTLY

A trustee must implement systems to ensure decisions are made in a timely manner and to meet various obligations such as:

- › appointing a “principal acting trustee” as a point of contact with the HMRC. The actions of the principal acting trustee bind all other trustees
- › complying with FATCA (the Foreign Tax Compliance Act), CRS (the Common Reporting Standard), the TRS (the Trust Registration Service) or other registration requirements such as that under the Central Register of Beneficial Ownership of Trusts (CRBOT) where there is a ‘business relationship’ in Ireland
- › filing trustee tax returns where applicable
- › holding regular trustee meetings
- › paying tax; note all the trustees are jointly liable for any tax due.

DUTY TO ACT PERSONALLY

Trustees must act personally when making a final decision on trust matters. However a trustee may seek independent professional advice before coming to a decision.

A trustee must not be dictated to and must not delegate unless permitted by the Trust Deed or by statute. For example, where the trust is written under the laws of England and Wales the Trustee Act 1925 which permits the appointment of an attorney by deed for a period of one year only.

DUTY TO ACT UNANIMOUSLY

Where there is more than one trustee, decisions must be made unanimously unless otherwise permitted by the trust deed.

DUTY TO ACCOUNT

A trustee must keep:

- › the accounts for the trust and maintain all required records for the trust
- › the beneficiaries informed about the trust by providing information and accounts to the beneficiaries upon request.



The right to information is a complex area of law following the leading case of *Schmidt v Rosewood*. All beneficiaries of age with a vested right should be made aware of the existence of the trust and the nature of their interest in the trust so they are able to enforce their equitable rights. Where the beneficiary is subject to an overriding power of appointment or is subject to a power, such as under a discretionary trust, then trustee should consider informing and releasing information only to those who potentially may have a realistic right to benefit. Advice should always be sought in this area.

DUTY TO CONSULT

A trustee must consult beneficiaries when possible and give effect to their wishes.

DUTY TO TAKE CARE OF THE TRUST PROPERTY

A trustee must maintain and protect the trust property and vest the property into the name of the trustee.

DUTY TO PRUDENTLY INVEST

A trustee has a duty to invest prudently on behalf of the trust and should diversify the investment of trust assets in the interest of beneficiaries unless the deed provides otherwise.

Trustees should also consider whether they are under any duty to sell any part of the trust property.

DUTY TO DISTRIBUTE

The trustees are responsible for making sure that the trust assets are distributed to the correct beneficiary and in the correct amounts.

DUTY TO MAINTAIN CONFIDENTIALITY AND NOT TO MISUSE CONFIDENTIAL INFORMATION

A trustee must maintain confidentiality even after resigning as a trustee or the trust is terminated.

BREACH OF TRUST

A trustee may be held personally liable for breaches of trust if he or she acts contrary to any duties imposed. A breach of trust will cause some detriment to the beneficiaries. As trustees can only act in the interests of their beneficiaries, a newly appointed trustee should ensure he or she checks that there have been no previous breaches of trust. If there have been such breaches the situation must be remedied. The beneficiaries may absolve the trustees from responsibility for the consequences of the breach. Otherwise the trustees have to make good any loss to the trust fund from their own resources.

CONCLUSION

Both appointing a trustee and acting as a trustee are steps that should not be taken lightly. In recent times changes to UK legislation have perhaps made the act of being a trustee more onerous, including the requirement now for UK trustees to register the trust via the HMRC trust registration service and potentially also register it in other countries where the trust has 'business relationships'. The ability of the individual trustees to competently perform the many trustee duties during the lifetime of the trust (and fulfilling the duty of confidentiality after the lifetime of the trust) without being dictated to by others, breaching the trust, or being involved in a conflict of interest is of primary consideration. It is therefore important that any new trustee understands the duties of a trustee as outlined in this document prior to taking on any such role.

The appointment of a professional trustee company can alleviate many of these concerns and pressures while ensuring the trust is properly administered and managed.

Utmost provide a cost effective professional trustee solution which can be used for new Utmost drafted settlements where the trust property is an Utmost bond - although some restrictions apply. More details of this are available on our website or by speaking with your Utmost sales representative.



The information is based on Utmost's understanding of current law and HM Revenue and Custom's practice as at February 2023. Tax rules may change and depend on individual circumstances. This information does not constitute legal or tax advice and must not be taken as such. The companies in the Utmost Group can take no responsibility for any loss which may occur as a result of relying on any information in this technical briefing.

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