

TECHNICAL SALES BRIEFING

THE REMOVAL AND RETIREMENT OF TRUSTEES

- › From time to time during the lifetime of a trust the position of the trustees may change because, for example, they may wish to be removed from their position or they may no longer be capable of acting in their role. In such situations, changes to the trustees may become necessary.
- › This technical briefing looks at situations that could necessitate a change of trustees and considers the options available to ensure the trust can still be effectively administered.

INTRODUCTION

Every trust must have at least one trustee who holds and administers the trust property for the benefit of the beneficiaries.

The original trustees are usually appointed by the trust deed which creates the trust. However, there can be many situations where a trustee will need to be changed and/or a new trustee will need to be appointed. For example:

- › The trustee may wish to retire from their position due to a change of circumstances;

- › One of the trustees may die;
- › A trustee may become mentally incapacitated meaning they are no longer capable of acting in their position as a trustee;
- › There may be a dispute between a trustee and a beneficiary meaning it is no longer appropriate for the trustees to continue to act as trustee.



This briefing looks at those scenarios and attempts to explain what steps can be taken to ensure the continued smooth running of the trust. It should be noted that the majority of Utmost trust deeds are written under the laws of England and Wales and thus references to 'statute' refer to the Trustee Act 1925 ('the Act'). Where appropriate we have also indicated differences with trusts written under the law of the Isle of Man where the statute is the Trustee Act 1961 ('the IOM Act').

VOLUNTARY RETIREMENT OF A TRUSTEE WITHOUT A NEW APPOINTMENT

It is both allowable, and possible, for a trustee to retire from his position without a new trustee being appointed. When considering any changes under trust, the first course of action should be to consider the powers under the trust deed itself. Usually the trust document will confirm the process for the removal and who has the power to appoint new trustees. This power will either vest in:

- › The settlor or settlors jointly (under a joint settlement);
- › The trustees jointly;
- › A protector or other person as specified.

Although retirement is also possible under statute using the provisions of s39 of the Act (s38 of the IOM Act), this states that a trustee can only retire from his office if:

- › Following the removal there will be at least two trustees remaining or a trust corporation* after the retirement, and
- › The other trustees, and anyone nominated by the trust deed to appoint trustees, consent to the retirement.

*The meaning of a trust corporation is given in s68 of the Act (part 18) and will not include, for example, overseas trust companies.

EXAMPLE 1

Siblings Paul, Georgina and John are appointed as trustees of a trust written under the laws of England and Wales. Georgina wishes to retire and the trust instrument is silent on who has power of appointment and removal. She is allowed to do so under s39 of the Act providing Paul and John both agree to Georgina's retirement, as there will still be two trustees remaining. In this scenario, Georgina does therefore not need to be replaced.

However, if Georgina was not replaced, and either Paul or John subsequently wished to retire, they would have to be replaced so as to avoid leaving the trust with only one remaining trustee. This is due to the first 'limb' of s39 of the Act which stipulates the minimum number of trustees following retirement.

DEATH OF A TRUSTEE

If a trustee dies then the number of trustees will of course reduce. If the trustee was the sole trustee then this can cause a clear and immediate issue, especially if the power to appoint and remove trustees also rests with the trustees. Here the first thing to ask is who has the power of appointment under the trust instrument?

The trust document may give the settlor of the trust the power to appoint a replacement trustee. An example of such a power is given in the extract below:

15 Appointment of new trustees

15.1 During the lifetime of the Settlor, the power of appointing new trustees shall be vested in the Settlor.

Alternatively, the trust may give the power of appointment to the trustees jointly. Again, if the instrument is silent then we would need to return to statute.

EXAMPLE 2

Following on from Example 1 on the previous page and Georgina's retirement, let's now assume Paul subsequently dies. John, as the sole remaining trustee, has the power of appointment and can replace Paul using the powers given under s36 of the Act. Here s36 states that the continuing trustees have the power to replace Paul's trusteeship.

However, what happens if John dies before a new trustee has been appointed? Now all the trustees have either retired or died and the trust no longer has any continuing trustees that are able to make such an appointment under s36.

In those circumstances, there are two possible options.

1. Either the trust documentation gives someone, other than the trustees, power to appoint new trustees - possibly the protector or appointer on certain trusts as given in the example clause below. This wasn't the case under our example, OR
2. The personal representatives can apply under s18 of the Act (s16 of the IOM Act) to assume the role of trustees themselves or appoint new trustees.

10. (1) The power of appointing new trustees of this Settlement shall be vested in the protector for the time being and shall include power to appoint as trustees (in addition to the power in sub-Clause (2) below to appoint as trustees any corporate body) any person or persons whether resident in the United Kingdom or not.

PLANNING POINT

It should be noted that in the example above there is no requirement to appoint a new trustee following the death of Paul. However, if the power rests in the trustees, relying on s18 could be problematic if the personal representatives did not wish to take on the role. Remember here that the role of trustee cannot be forced upon a person, and thus if the executors refused to act the trustees would have no option but to approach the court under s41 of the Act to appoint a trustee. We will discuss s41 later in this briefing.

Where a trustee dies it is very important to consider the ongoing administration of the trust. Depending on the remaining number of trustees, this may involve making an appointment of a new trustee or perhaps appointing a corporate trustee. Although the trust can continue to be administered with only one trustee, if this person loses capacity or dies then replacing them could be both costly and time consuming. The next section explores this matter.

INCAPACITY OF A TRUSTEE

The incapacity of a trustee is possibly the trickiest scenario to deal with and the process of removing them as a trustee will depend on whether the trustee has a beneficial interest in the trust. It must also be remembered that here 'incapacity' has a specific meaning under the Act and is usually defined in any trust instrument.

Where a trustee becomes unable to act through incapacity, it should initially be determined whether the trust document itself gives the power for the other trustees to remove / replace the incapable trustee. If there is no such power, the continuing trustee can appoint another trustee

to replace that person under s36 of the Act. However, where the incapacitated is also a beneficiary that has a vested interest in the trust then s36 cannot be used without the consent of the Court of Protection (COP) as provided under s36(9) of the Act. A vested interest will include where the beneficiary has an immediate determinable beneficial right to the trust property. Example includes where the trustee being replaced is also the beneficiary of a bare trust or has a right to payment under that trust, such as under a discounted gift trust. This can be best illustrated by returning to our previous example.

EXAMPLE 3

Following Georgina's retirement the trustees were Paul and John. Let's imagine that Paul dies but, before that happens, John becomes mentally incapacitated.

Paul's death has left John as the sole trustee so there is therefore no capable continuing trustee to make an appointment under s36 of the Act. In this scenario, two possible routes can be taken:

(a) If all the beneficiaries are aged over 18, have capacity, and together are absolutely entitled to the trust

fund, they can give a written direction to John's attorney directing them to appoint a replacement for John. If, however, any beneficiary who may benefit (including those with contingent interests such as remaindermen) is under 18, or not mentally capable, only option (b) is available

(b) An application should be made, by all the beneficiaries who are over 18 and capable, to the court under s41 of the Act (also s41 of the IOM Act) for a court order to replace John.

PLANNING POINT

When looking at the current trustees consideration should be given to the issues highlighted in the previous sections, especially in relation to the loss of mental capacity. Whilst conversations around this matter can be extremely difficult to discuss, it is very important that all involved understand the possible issues. If a trustee

dies, or loses mental capacity, replacing their trusteeship in some circumstances can be time consuming and potentially very costly. Again, the use of corporate trustees can be advantageous here although the cost of the service would need to be considered.

REMOVAL OF A TRUSTEE FOR BEING INCAPABLE OR UNWILLING TO ACT

A trustee can be replaced under s36 of the Act for reasons other than incapacity. These reasons include:

- › Being unfit to act;
- › Being incapable of acting;
- › Refusing to act;
- › And being out of the United Kingdom for over 12 months (with United Kingdom being England, Scotland, Wales and Northern Ireland).

Again, it may be that the trust gives someone other than the trustees (e.g., the settlor or protector) the power to remove a trustee. Here this person could simply remove the person by deed. However, if the trust provided that the trustees have the power of appointment then often they will need to use s36 of the Act. Here the remaining trustees can replace the person as a trustee for the reasons cited above provided the beneficiary has no vested interest in the trust (see previous page).

The matter of whether a trustee is 'incapable', 'unfit' or 'refusing' are difficult in practice to determine. Clearly a trustee disagreeing with a potential course of action isn't necessarily their refusal to act. Conversely, if a trustee refuses to sign any trust documentation, but gives no valid reason for such a refusal, then it may be said they are refusing to act. If in doubt legal advice should be sought here and the trustees should make sure their reasons are adequately documented.

If the trustee is also a beneficiary that has a vested interest in the trust then s36 cannot be used without the consent of the Court of Protection (COP) as provided under s36(9) of the Act. A vested interest will include where the beneficiary has an immediate determinable beneficial right to the trust property. Example includes where the trustee being replaced is also the beneficiary of a bare trust or has a right to payment under that trust, such as under a discounted gift trust.

EXAMPLE 4

If we return to our initial example where Paul, John and Georgina were acting as co-trustees. Let's now assume John leaves the country and has been out of the UK for over a year. If Paul and Georgina wished to remove John as trustee, owing to him being out of the country for over a year, they are able to do so under s36 of the Act. However, if John was, say, an absolute beneficiary under the trust then s36(9) states that he cannot be removed

without the consent of the COP as he has some vested rights. This would not apply if John could only benefit by the trustees using their powers of appointment to appoint capital to John. For example, assume this trust was discretionary in nature John was simply a member of the class of beneficiaries that the trustees could appoint capital to using their discretion. Here, at the time of removal John has no vested rights.

PLANNING POINT

Many modern trust documents will contain a clause that removes the ability to replace a trustee simply due to them being outside of the United Kingdom for more than 12 months. This particular clause is perhaps somewhat dated in the modern world, where people often work or live abroad for extended periods. Furthermore, nowadays a trustee can still monitor and potentially perform their function as a trustee whilst overseas - due simply to the advance of modern communication technology. However, when the Act was first drafted in

1925 it would perhaps make sense to extend the power of replacement to such circumstances, whereby the continuing trustees may not have been able to contact the overseas trustee.

Still, it is worth checking the trust deed to make sure that such a clause exists especially if a trustee is considering leaving the UK for an extended period. Without such a condition the remaining trustees could remove the overseas trustees which could be problematic.

DISPUTES

Conflicts between trustees can be problematic, especially as trustees will often need to act unanimously when using their powers. Where family members are appointed as trustees, their own personal interests and disputes can sometimes get in the way of their role as a fiduciary.

As detailed earlier, it can be difficult to remove a trustee on the basis they are 'refusing' to act. After all, the remaining trustees would need to be able to show, if challenged, that the trustee was in fact refusing to act and not simply acting against their proposed action!

EXAMPLE 5

Let's go back to our example where Paul and John are trustees following Georgina's retirement. Paul and John continue as trustees but, before long, a family dispute arises between them and the beneficiaries, led by Ringo who is their first cousin.

Ringo believes that Paul and John are not acting in the best interest of the trust, nor the wishes of his late grandfather who was the settlor of the trust. He wants both Paul and John removed as trustees to be replaced with a corporate trustee who he believes will act independently. As no-one was nominated by the trust deed to remove trustees, Ringo's only option, assuming that Paul and John refuse to accept his argument and retire, is to approach the court under s41 to remove them using the court's inherent jurisdiction.

Generally hostility between the beneficiaries and trustees is not sufficient in itself for the court to exercise its jurisdiction. The court must regard the removal of the trustees as being in the best interests of the beneficiaries.

Further, the courts will of course take into account that the settlor appointed the trustees in the first instance. In this case Ringo's grandfather presumably had good reason to choose Paul and John as trustee. Any challenge here would need to be quite robust especially as the settlor's views cannot be sought.

CONCLUSIONS

The role of the trustee should not be taken lightly and the examples discussed in this briefing are not uncommon, especially where life company trusts are used and individual trustees are appointed. Advisers would be wise to consider the following points:

- › Check the trust document for guidance in terms of removal / appointment of trustees, the legislation only provides for a “backstop” option which should not be relied upon. Be aware of the limitations of the trust in the various scenarios and, where possible, plan ahead of any potential issues;
- › When looking to remove a trustee, check the trust document for the minimum number of trustees required; it may specify a minimum number which could be one. However, having one trustee is never advisable unless that trustee is a corporate trustee;
- › Deceased trustees should be replaced as soon as possible to avoid future issues, especially where only one trustee remains;
- › Mentally incapacitated trustees should also be replaced (using s36 or clauses within the trust) as soon as practicably possible, to avoid possible issues should other trustees die or also become mentally incapacitated;
- › The trustees appointments should be continually reviewed and in certain circumstances it may be appropriate for them to consider being replaced; for example on early onset of a degenerative mental health condition;
- › Removals and appointments should be completed by formal deeds;
- › To avoid disputes, corporate trustees should be considered, although this will often need to be weighed up with the relative costs.

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