



Held to ransom

Robert Mack considers the issue of kidnapping in relation to trustees' duties



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For many wealthy individuals and their families, the issue of privacy and security often permeates their lives. When such individuals or families reside or travel in countries where crime, and in particular kidnapping, are rife, the need to consider the inclusion of a mechanism in the trust deed to deal with these terrible scenarios increases. As a result, kidnap provisions have become more commonplace in modern trust deeds. But just how should trustees react in the face of a ransom demand and what steps, if any, can they take to minimise risk to both themselves and the kidnap victim before and after the trust deed is signed?

Kidnapping is a booming industry. It is estimated that over 8,000 kidnappings occur worldwide annually, with no signs of slowing.¹ With so much wealth tied up in private trusts, it seems inevitable that some trustees will be called upon by frantic family members to assist with the release of loved ones. There are, however, many issues of risk for trustees to consider.

Is there a power to act?

A ransom demand does not fall neatly into a power to appoint, pay, apply or advance. A payment of ransom is also unlikely to be classified as a trust expense and it would be most unusual to find such a power in a standard trust deed. Therefore, if there is any possibility that the settlor, beneficiary or a family member might be kidnapped, it is wise to include a specific power in the

trust deed to allow the trustee or some other person² to pay the ransom out of the trust fund. As any payment of ransom will, of course, bypass the beneficiary and go straight to the kidnappers and/or their agents, a question arises as to whether the exercise of a power to make a payment of a ransom is *prima facie* valid. Although many trust deeds have the power to make payments on behalf of a beneficiary 'to or for his or her benefit', an interesting question arises as to whether such payment could be construed to be for the 'benefit' of such a beneficiary.³ Clearly, if the beneficiary is released unharmed, that could be more easily construed as a benefit; however, if the ransom payment is followed swiftly by the murder of the beneficiary (as frequently happens), then it is more difficult to see

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any benefit at all. Even if a beneficiary is safely released he or she could allege that the trustees or the relevant power holder had acted *ultra vires*.⁴ Therefore, if there is even a remote possibility of a kidnapping, it is important to ensure that clear provisions are included in the trust deed to empower the trustee or other power holder to pay the ransom demand. Some thought must also be given to deal with a scenario where the power holder is the one that is kidnapped. Obviously, such person will be acting under extreme duress and any directions given to a trustee to pay a ransom will be tainted. As such, substitute power holders should

be specified to anticipate this possibility, and also to deal with issues of incapacity, or being incommunicado.

Trustees or other power holders may also wish to consider obtaining indemnities from the adult beneficiaries as an additional safeguard where there is no specific power in the trust deed to permit a ransom payment. Although such an indemnity would only offer limited protection (particularly as such indemnitors would likely be acting under duress), a court may be more sympathetic if the adult beneficiaries have clearly provided their consent prior to the ransom payment and have approved an otherwise uncertain distribution.⁵ A settlor may also wish to consider using a purpose trust, such as a Cayman Islands STAR Trust,⁶ and include the payment of ransom as one of the purposes of the trust. This could in theory bypass any technical objections regarding the validity of the exercise of the power to pay a ransom as it would be a specifically authorised purpose in the trust deed. However, such purposes must be lawful and not contrary to public policy as a matter of Cayman Islands law.

Where a kidnapped person is not a beneficiary of the trust (or if there is no purpose which permits the payment of ransom) but the beneficiaries or other persons wish to access the trust fund to pay a ransom, a true dilemma arises. Such individuals may be extended family members, employees or family friends; however, any such payment would be a *prima facie* breach of trust (although it may be possible to display some form of 'benefit' as previously mentioned). The only ways in which a trustee or power holder could safely proceed are either by obtaining indemnities from the beneficiaries⁷ or by obtaining directions from the court in the appropriate



jurisdiction (i.e. in the jurisdiction of the governing law of the trust (if available)). Trustees who succumb to such external pressures could be acting in breach of trust, and may also be exercising their powers in a fraudulent manner; both of which could have dire consequences for the trustee.

Payment of a ransom – is it lawful?

Trustees (or the relevant power holder) must carefully consider whether the payment of a ransom is lawful as a matter of the law governing the trust and in the place of administration of the trust (if different) and possibly in the jurisdiction where the kidnapping has taken place and/or the jurisdiction where the ransom payment will be made. Kidnappers could also be defined as terrorists under the law governing the trust and/or the place of administration of the trust. This is often overlooked and trustees must be mindful to review their local anti-terrorism legislation. It seems possible that kidnappers could fall within the definition of a terrorist, but much depends on who is doing the kidnapping.⁸ This creates several dilemmas: should the trustee first explore whether the kidnappers have a political, religious or ideological cause before they pay the ransom? It seems absurd that there should be a difference, but trustees must be mindful that the consequences of supporting terrorists are dire in jurisdictions such as the Cayman Islands.⁹ Due to the potential illegality, no waiver or indemnity from the beneficiaries could offer protection under such circumstances. If, however, the kidnappers do not have a political or ideological cause, the payment of ransom may breach some other domestic criminal code. For example, Section 134(1) of the *Cayman Islands*

Proceeds of Crime Law 2008 makes it a criminal offence if a person:

‘enters into or becomes concerned in an arrangement which he knows or suspects facilitates (by whatever means) the acquisition, retention, use or control of criminal property¹⁰ by or on behalf of another person.’

All of the above would have to be checked prior to any ransom payment, under extreme pressure. Trustees would therefore be wise to inform the family of the necessity for these checks prior to any ransom being paid or even contemplated.

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Trustee or kidnap committee?

The power to pay a ransom can be vested in a trustee, kidnap committee or other power holder (such as a protector or enforcer) so long as it is set out in the body of the trust deed and it is permitted under the governing law of the trust. For example, certain powers, including a power to appoint income and capital, can be reserved to a settlor or other persons as a matter of Cayman Islands law (see the short discussion in footnote 2 of this article). It is a matter of negotiation between the prospective trustee and the settlor/client as to whom should retain this power, but from the trustees’ perspective, they would be better off avoiding the responsibility for several reasons. It is unlikely that a trustee (who is often located in an offshore centre) will have first hand knowledge of the circumstances of

the kidnapping, nor would he or she have the necessary skills to liaise with security experts and law enforcement agencies in the country where the kidnapping occurred. It would be better for the trustee if the power was vested in an individual (or group of individuals) who are in the region, have knowledge of local customs, and have the contacts and language skills that will increase the chances of a successful release. Crucially, by doing this a trustee can avoid pressure, potential liability for breach of trust and criticism if the power is vested with a third party. In other words, if the power to pay a ransom demand is removed from the trustee, so is the burden — and the risk.

Trustees’ exoneration

Trustees will be concerned to carefully review the exoneration language in the trust deed before they consider making any payment of ransom, even if such payment is specifically authorised by the trust deed. If possible, specific exoneration language should be included in the trust deed at the drafting stage to ensure the trustees are fully protected under such circumstances. If no such provisions are present, the trustee should seek indemnities from the maximum number of beneficiaries possible prior to making any ransom payment (although the validity of such indemnities may be called into question if given under duress).

Kidnap insurance

It may be possible to obtain kidnap insurance, and the payment of the premium could be justified as a trust expense, so long as the trust deed permits it. If there is no specific power in the trust deed, trustees should consider taking advice to ascertain whether such expenditure is permitted as a matter of the law governing the trust.



Directions – is there time?

Trustees faced with a situation where the payment of ransom could bring exposure may wish to seek the directions of the Court prior to taking any action. Although it may be impractical in most cases, if a trustee does have the luxury of time, obtaining directions is an excellent way to minimise risk generally. Most courts would likely be highly sympathetic to any such application and a directions hearing would most likely be expedited under such circumstances. In addition, a directions hearing could be conducted in chambers, thus preserving confidentiality and keeping the matter highly discreet.

Conclusion

Trustees who are alive to the possibility of kidnapping should raise the topic with the settlor at an early stage and map out an action plan. Wherever possible specific powers or purposes should be drafted into the trust deed to permit the payment of ransom, but trustees should be wary of the pitfalls of inheriting this power. In an uncertain world, it is always better to be safe than sorry. ■

1. Statistics on kidnapping are notoriously unreliable due to under-reporting of such events. That said, it is estimated that between 1997-2007 kidnappings worldwide have risen by over 250 per cent. Latin America accounts for approximately 75 per cent of all reported kidnappings, with Colombia being the most prevalent country for kidnapping.
2. Section 14 of the *Trusts Law (2009 Revision)*, for example, allows the settlor of a Cayman Islands trust to reserve a wide number of powers to himself or other persons. Careful selection of the power holder in this case is critical and the power holder should be a person who has a low risk of being kidnapped.
3. Courts in common law jurisdictions have generally construed the term widely, however, the author has been unable to locate a recorded decision exploring whether the payment of ransom by trustees would constitute a 'benefit.'
4. This is even more likely if there is no specific power in the trust deed to authorise the trustees to make ransom payments and there are no specific exoneration provisions to protect the trustees if a ransom is paid to a non-beneficial object of the trust.
5. Although if there are minor and unborn beneficiaries, it will prove more difficult and time consuming to obtain their consent as a Directions hearing will likely become necessary. The issue of duress may, however, work against the trustee if the beneficiaries claim they were left no choice but to grant their consent under extreme circumstances.
6. This is a special private purpose trust which is permitted in the Cayman Islands. It is possible to combine non-charitable purposes and beneficiaries in a STAR trust.
7. Trustees should however recognise that there are inherent limitations to personal indemnities generally and the effect of duress cannot be overlooked, as previously mentioned.
8. For example, see Section 19(3) of the *Terrorism Law (2009 Revision)*, which states 'a person commits an offence if he (a) provides property; and (b) knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism.' Also, Section 21 of the *Terrorism Law (2009 Revision)* states: 'a person commits an offence if he enters into or becomes concerned in an arrangement as a result of which property is made available to another; and (b) he knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism.' That said, the risk may be fairly remote and the Attorney-General may not seek to prosecute trustees under such circumstances on public policy grounds.
9. Section 27 of the *Terrorism Law (2009 Revision)* provides a fine of KYD4,000 and two years' imprisonment on summary conviction and a fine and imprisonment for 14 years on indictable offences. In addition, trustees could become criminally liable in the country where the kidnapping has taken place.
10. 'Criminal Property' is defined in Section 144(3) of the *Proceeds of Crime Law 2008* as follows: 'Property is Criminal Property if (a) it constitutes a person's benefit from criminal conduct or it represents such a benefit (in whole or in part and whether directly or indirectly); and (b) the alleged offender knows or suspects that it constitutes or represents such a benefit and includes terrorist property.' An arrangement to pay a ransom could