

trustee removal

# Insult after Injury



Occasionally it is necessary to forcibly remove a trustee. Robert Mack of Appleby looks at what should be considered when taking this action and what rights the removed trustees retain.

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**T**he office of trustee can at times seem like the most thankless job imaginable. The trustee's burden is heavy and the risks can be high, as is the chance of raising the ire of disgruntled beneficiaries. But what rights do removed trustees retain, and what factors should be considered before embarking on the most hostile of actions – the forcible removal of a trustee from office.

### The first step – removal by what power?

For a trustee to be removed from office without the intervention of the court, a specific power must be present in the trust deed; otherwise, statute or common law principles will apply. Many modern trust deeds, particularly those created in offshore centres such as the Cayman Islands, tend to include powers to remove and replace a trustee. Often the power will be vested in a protector or other power holder and will act as a “Sword of Damocles” over the head of the trustee. Sometimes, the power will be reserved to the settlor or some other person, as is permissible in the Cayman Islands. If there is a power to remove a trustee, the power holder clearly has the right to use it; however, the power must be exercised correctly for it to be valid and effective. In addition, the power to remove a trustee is likely to be classified as a fiduciary power, so its exercise should be done in the best interests of the beneficiaries. As a result, all of the beneficiaries must be considered, and not just the select few who may have a gripe with the trustee. One must look at the overall impact on the beneficiaries – would the removal unduly prejudice them in any way? The power holder must be comfortable that the trust fund will be safeguarded, the interests of the beneficiaries preserved, and the trust will be properly administered by the replacement trustee. The power holder must be confident that the replacement trustee has the necessary skills and experience to match the removed trustee. In other words, the abilities of the replacement trustee should be at least equal to or better than the removed trustee.

In the case where the trust deed is silent or the designated power holder is unavailable to act for some reason, the only alternative is to turn to the court in the jurisdiction governing the trust. The courts of most common law jurisdictions will have an inherent power to intervene

in the administration of trusts, as is the case in the Cayman Islands and, if necessary, to remove a trustee. When a court is considering exercising a power to remove a trustee it will take into account a wide range of factors, but at the top of the list should be the desire to protect the interests of the beneficiaries when trustees have fallen short of their duties. More often than not it will be those actions or omissions with a hint of *mala fides* which threaten the trust fund itself that may persuade a court to remove a trustee.

### Indemnities and Expenses

When a trustee chooses to retire, it has the luxury of negotiating indemnities and covenants. Normally, the level of the indemnity offered will mirror the level of exoneration provided in the trust deed. It is well established that a removed trustee retains the right to be indemnified out of the trust fund for fees and expenses incurred by virtue of its trusteeship even after it is removed from office. It is also possible for a portion of a trust fund to be set aside to meet future liabilities of a removed trustee. It is an open question whether a removed trustee is entitled to the same level of exoneration provided in the trust deed. The leading trust texts suggest that a removed trustee should not be put at a disadvantage by virtue of its removal from office. An interesting scenario could arise where the statutory exoneration is greater than that provided in the trust deed and the removed trustee wishes to seek the higher level of exoneration provided by statute; it seems somewhat inequitable, however, that a removed trustee should be able to pick and choose the level of exoneration that best suits its needs.

### Special Considerations

The procedural requirements can often be overlooked in the heat of the moment; however, the power holder must take care to ensure that the removal is lawful. Trustees will be keen to ensure their

removal is valid because they will continue to hold office as trustee and still retain all of their duties and responsibilities. The replacement trustee will be concerned to ensure it is validly appointed because, if it is not, it will be acting as a *trustee de son tort*. There are several traps for the unwary. In the Cayman Islands, for example, there are restrictions on the number of trustees that may be appointed for a trust holding land. A more common problem revolves around the proper discharge of a trustee. In the Cayman Islands, a trustee of a trust where two or more trustees have been appointed may only be properly discharged if there is either a trust corporation or at least two individuals to act as trustees to perform the trust. There are also special considerations with respect to STAR trusts whereby a trustee of a STAR trust must be or include a Cayman Islands trust corporation. One should also examine the original appointment of the trustee to be removed to ensure its appointment is valid, as well as ensure that any specific removal procedures are followed closely. The author has experienced the invalid appointment of trustees in practice on more than one occasion, which brings with it some unexpected benefits and drawbacks. Obviously, the power holder will need to identify clearly who the current trustee is at the outset.

The removal of a trustee can be draconian and fraught with risk for the power holder, the removed trustee, and the replacement trustee. Specialist advice should be taken at an early stage to ascertain whether a proposed removal is: (a) possible; and (b) advisable. Where the relationship has broken down irretrievably and the actions of the trustee are questionable, removal may be the best option for all concerned, however, careful attention to detail is vital to ensure the transition is completed correctly and all parties are satisfied they understand their responsibilities before, during, and after the removal. 