TRUSTEE LIABILITY ISSUES – OFFSHORE

Discussion Paper
11th Annual International Estate Planning Institute, 12 – 13 March 2015

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1. INTRODUCTION

A trustee can be faced with many forms of liability including liabilities to third parties, contractual liabilities, liabilities in tort and liabilities as a titleholder (e.g. shareholder or owner or land). But perhaps one of the biggest concerns to trustees is potential liability to beneficiaries for breaches of trust. In order to fully appreciate the extent to which trustees may face liability for breaches of trust it is important to understand the duties of trustees.

2. TRUSTEE DUTIES

Trustee duties are obligations contained in the trust instrument or imposed by common law or statute, which must be carried out by the trustees. In the Channel Islands (unlike other offshore jurisdictions) generally trustee duties are imposed by statute.

Duties and powers prescribed by general law may be modified by the trust instrument, but there are minimum core obligations placed on trustees that cannot be avoided. At their basic, a duty to act honestly and in good faith and an overriding obligation to preserve and safeguard the trust property.

Importantly there is a “duty of care” on the trustees which is a standard that they must meet in every aspect of the performance of the role as trustees. The standard applied to the duty of care differs for lay and professional trustees. Licensed trustees in offshore jurisdictions will also be subject to the Regulations and Codes of Practice issued by the relevant governing authority in that jurisdiction.

Other general duties of trustees:

- Initial duties – to become fully acquainted with the terms and conditions of the trust and taking control of trust assets;
- Fundamental duty to obey the terms of the trust;
- Duty to act in the best interests of the Beneficiaries – and not in trustees’ own interest;
- Duty to avoid conflict of interest and duty not to profit from the trust;
- Duty to invest assets prudently – trustees must ensure they have sufficient detailed information to make sound investment decisions or the appointment of suitably qualified investment managers. One of the most important duties in connection with the management of trust property is to keep the suitability of investments under review;¹
- Duty to account and to communicate – trustees have a core duty to account to beneficiaries for the management of the trust assets and to keep sufficient records of the assets and books of account;
- Duty of Impartiality – duty to act impartially between classes of beneficiaries and to ensure investments are selected to ensure fairness between income and capital beneficiaries; and
- Duty to administer the trust personally – although delegation and agents may be permitted under the trust deed or statute. For example Section 15A of the Bermuda Trustee Act 1975 allows trustee to delegate certain functions to a delegate or to a co-trustee. Similar provisions appear in the trust legislation of other offshore jurisdictions.

The trustees’ failure to carry out their duties (to the required standard of care) is a breach of trust and the beneficiaries may take action against the trustees.

¹ Millett LJ in Armitage v Nurse [1998] Ch. 241
² Bermuda Trustee Act 1975 (section 10) allows any reasonable and proper investment or application of trust property, provided that the trustee acts as a prudent investor and exercises reasonable care, skill and caution.
3. **MODIFYING TRUSTEE LIABILITY**

There are different ways that trustees can exclude or modify their liability to beneficiaries for breach of trust.

3.1 **Duty Exclusion Clauses**

These clauses seek to limit the duties to which the trustee would normally be subject, making it more difficult for a beneficiary to establish that the trustee is in breach of trust.

In the US and many offshore jurisdictions some of these duties can be waived in the trust instrument, but others cannot.

For example, in the offshore world investment duties can be limited in a number of ways. It is common to include a provision in the trust instrument excluding the duty to diversify the trust fund and to allow the trustee to invest in speculative investments.

Anti-*Bartlett* clauses are typically included in trust instruments to provide trustees with a degree of comfort when owning the shares of an underlying company particularly a trading company. This is a clause negating any duty to enquire into or interfere in the conduct of a company, at any rate unless the trustees are aware of circumstances calling for enquiry, or to supervise directors. In essence it is a clause which will exclude what would otherwise be the trustee’s duty to enquire and supervise. It restricts the duties owed by the trustee and he commits no breach by acting in accordance with them. They arose from the case *Bartlett v Barclays Bank Trust Co. Ltd (Nos. 1 and 2)* [1980] Ch. 515.

It is common for trustees of offshore settlements to hold assets through holding companies: the holding company is administered by the trustee and the trustee provides directors. Unfortunately an anti-*Bartlett* clause in ordinary form will provide no protection for the trustee, as it will then have interfered in the company. But where the underlying assets consist of one or more trading companies, the clause may be extended to cover such companies.\(^3\)

Other Offshore alternatives include:

(a) **BVI VISTA Trust**

The legislation was introduced in 2004 and allows an individual to establish a trust over the shares of a BVI company, and to disengage the trustee from management responsibility of that BVI company. In this way the trustee’s monitoring and intervention obligations are removed and the trustee is not required to interfere in the affairs of the underlying BVI company.

Previously a VISTA trust required a BVI trustee (or "Designated Trustee") to be appointed, but that was felt to be fairly restrictive. The 2013 amendments to the VISTA regime now allow for a BVI PTC to act as trustee and for multiple trustees to be appointed (provided at least one trustee is a BVI trust licence holder or a BVI PTC). VISTA is particularly useful where trustees do not want to take any element of risk concerning the management of the underlying company (which in turn could be involved in a risky venture or hold speculative investments).

(b) **Cayman STAR Trust**

The beneficiaries and/or objects of STAR trusts may be persons, purposes or both. STAR trusts must have an “Enforcer” and it is the Enforcer that is the only person (natural person or corporate entity) with standing to enforce the terms of the STAR trust. Such enforcement powers have been

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\(^3\) *Lewin on Trusts* 19th Edition 34-059

\(^4\) See the Virgin Islands Special Trusts Act 2003

removed from the beneficiaries by virtue of the Law. The Law thus makes a clear distinction
between the capacity to benefit from a STAR trust and the actual capacity to enforce such a trust.
The effect is to remove rights of beneficiaries not only to enforce the trust, but also their right to
seek disclosure of information regarding the trust and its on-going administration. A STAR trust
restricts the rights of troublesome beneficiaries who may be tempted to challenge the trust, seek
information, or even to invoke the Saunders v Vautier principle to bring the trust to an end.

The trustee of a STAR trust must include a trust company licensed to conduct trust business in the
Cayman Islands or a private trust company registered in the Cayman Islands.

3.2 Trustee Exemption Clauses

Following the Court of Appeal decision in Armitage v Nurse [1998] Ch. 241, it is now settled law in England
and Wales that trustee exemption or exculpation/exoneration clauses can validly exempt trustees from
liability for breaches of trust, except fraud. In Armitage v Nurse the court held that a trustee exemption
clause in the deed could exclude the trustee from liability for loss or damage to the trust property "no
matter how indolent, imprudent, lacking in diligence, negligent or wilful he may have been, so long as he
has not acted dishonestly".

Trustee exemption clauses are now widely used in trust instruments and professional trustees (in
particular) have come to rely on them. There is a STEP UK Practice Rule which was implemented in July
2006 which requires that reasonable steps be taken to ensure the settlor is made aware of the meaning
and effect of exemption clauses before the trust is executed. This STEP practice rule has not yet been
extended to many offshore jurisdictions. However as a matter of good practice the draftsman of a trust
should always bring the presence of a trustee exemption clause to the attention of the settlor and explain
clearly its implications. Where a trust contains a trustee exemption clause, liability insurance premiums are
likely to be lower, which translates to lower trustee fees being charged to the settlor.

Some offshore jurisdictions have imposed legislative controls on trustee exemption clauses. Since 1989
the Jersey Trust Law6 has provided that: “Nothing in the terms of a trust shall relieve, release or exonerate
a trustee from liability for breach of trust arising from the trustee’s own fraud, wilful misconduct or gross
negligence”. This position, which applies irrespective of whether the trustee is a professional or lay trustee,
has been replicated in Guernsey.7

In Bermuda Section 22(1) of the Trustee Act 1975 provides a statutory indemnification for certain losses
but excludes loss resulting from the trustees own deliberate, reckless or negligent breach of an equitable
duty.

Section 31 of the BVI’s Trustee Ordinance restricts the liability of a trustee in these terms:

“A trustee shall be chargeable only for money and securities actually received by him
notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and
accountable only for his own acts, receipts, neglects or defaults and not for those of any other
trustee, nor any banker, broker or other person with whom any trust money or securities may
be deposited, nor for any other loss, unless the same happens through his own wilful default.”

That this restricts the trustee’s liability for the defaults of others is clear enough, but what about a default
of another whom the trustee was duty bound to supervise and what about loss that could have been
avoided had the trustee exercised due diligence? This was the question that came before the Commercial

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6 Article 30(10) Trusts (Jersey) Law 1984
7 Trusts (Guernsey) Law, 2007

39(7) The terms of a trust may not –
(a) relieve a trustee of liability for a breach of trust arising from his own fraud, wilful misconduct or gross negligence, or
(b) grant him any indemnity against the trust property in respect of any such liability.
Division of the High Court of the BVI in Appleby Corporate Services (BVI) Ltd. (as a trustee of the Clef Trust) v. Citco Trustees (BVI) Limited (2014) 17 ITELR 413. Appleby had succeeded as trustee to the Clef Trust of which Citco was the former Trustee. In conventional style, the Trustee held the single issued share of a company called Clef International Holdings Limited (CIHL) to which it provided directorship services. In turn, CIHL held a portfolio of investments which were invested through an investment manager. Both Citco and Clef were parties to the investment management agreement, by which an Investment Manager, introduced to Citco by the Settlor, was appointed.

It was common ground that the investment was not a success. By the time Appleby took control of the Fund, only $141,166 was left of $7.3m. The complaint against Citco was that it had not monitored the investment and therefore not intervened to prevent the continuing loss earlier. Citco’s evidence at trial was that it monitored the monthly trust statements for unauthorised withdrawals, but that it had taken the decision to leave the task of monitoring the performance of the Fund to the Settlor and the investment manager.

Bannister J’s finding on duty was unexceptional:

“In my judgment, any person, such as a trustee, holding property on behalf of others who delegates dispositive powers and functions such as the management of investments representing the property held, is under a duty to have in place appropriate risk management procedures in order to satisfy himself that such delegated powers and functions are adhered to and are not abused by the agents to whom they have been delegated. This is not something which, in my judgment, needs to be spelt out, as it is in the English Trustee Act 2000. It follows from the well-established principle that a trustee should not (subject always to the provisions of the trust in question) take more risks with the trust property than a prudent man of business with his own. Further... Citco had a duty not only to respond to information giving cause for concern about the management of the Company's assets, but also to inform itself at appropriate intervals on the state of the Company’s portfolio and the manner in which it is being managed... Any such review would require more than a mere glance at the NAV.”

The case against Citco was put in wilful default and simple negligence. The claim in wilful default failed. It was held that wilful default required an awareness on the part of the trustee that it was in breach of duty or recklessness as to whether it was or was not. But the Judge found that Citco was guilty of “negligence pure and simple”. This led to the question whether the exculpation in the Ordinance covered the defaults of others that the trustee had negligently failed to prevent.

Bannister J held that it did not operate to protect Citco from its own negligent failure to supervise the activities of its Investment Manager. As the Judge put it “Section 31(1) is a provision dealing with vicarious, or secondary, liability. The second limb protects an innocent trustee from the defaults of others... the first limb explicitly leaves trustees liable for the consequences of their own defaults.” The judge held that far more specific wording would have been required to achieve the result that even negligent failure to supervise others was within the exculpation. The result was that Citco, although liable, was not liable for the whole of the loss caused by the renegade investment manager: Citco could be criticised only for not taking steps to replace the Investment Manager, which is something a reasonably competent trustee would not have done immediately.

Another argument deployed by Citco turned upon the powers contained within the Second Schedule to the Trustee Ordinance. Paragraph 8 provides that a trustee is not bound or required to interfere in the management or conduct of the affairs or business of any company in which the trust fund may be invested and may, unless he has notice of any wilful negligence or wilful default or fraud or dishonesty on the part of the directors, leave the management of the trust fund to the directors. This also did not protect Citco: “the fact that Citco had no obligation to involve itself in the management of the Company did not relieve it of the duty to satisfy itself from time to time that nothing untoward was affecting the value of the shares.”
Neither was Citco able to rely upon the provisions of section 4(q) of the Second Schedule. That provides for a power “to engage the services of such investment counsel advisor or manager as the trustees may from time to time think fit... without being liable for any consequential loss...” Bannister J took the view that “for much the same reason” this did not assist: “the exception would require it to be far more explicitly drawn before it could relieve Citco from the consequences of its own negligent breach of duty.”

3.3 **Extended Powers Clauses or Authorisation Clauses**

The trust deed can confer wider powers on the trustees, expressly authorising the trustees to do acts which they would not otherwise be able to do, for example to acquire wasting assets or assets which yield little or no income for investment purposes.

3.4 **Indemnity Clauses**

A trustee acts as principal and incurs personal liabilities to third parties with whom he deals in the administration of the trust, whether or not he is acting in accordance with his powers and duties as trustee. A trustee’s right of indemnity affords protection to the trustee by entitling him to pay or reimburse himself out of the trust property in respect of the personal liabilities which he properly incurs in the administration of the trust. The general principal is that a trustee is, subject to the terms of the trust, entitled to be indemnified out of the trust property in respect of liabilities, costs and expenses properly incurred by him in connection with the performance of his duties and the exercise of his powers and discretions as trustee.  

This general rule has been given statutory force in many offshore jurisdictions including Bermuda where Section 22(2) of the Trustee Act 1975 provides: “A trustee may reimburse himself or pay or discharge out of the trust premises all expenses incurred in or about the execution of the trusts or powers.”

In addition the trust instrument may contain a provision entitling the trustee to an indemnity out of the trust fund in respect, not only of costs and expenses incurred in the proper administration of the trust, but also for any liability for breach of trust (save perhaps for liability arising out of the trustees individual fraud). This may not be as effective as an exemption of liability clause as its efficacy is dependent on the continuing solvency of the trust, but it can operate to the prejudice of beneficiaries.

4. **ALTERNATIVE PROTECTIONS FROM LIABILITY**

4.1 **Contractual Liabilities**

A trustee who enters into a contract will generally be personally liable under the contract and his personal liability to the other contracting parties (subject to any contractual limitations) will be unlimited. A trustee will often negotiate a contractual limitation on his liability to a specified amount or to the extent of the trust assets available to meet a claim.  

Several of the offshore jurisdictions (including BVI, Jersey and Guernsey) have statutory provisions that limits the contractual liability of a trustee in certain cases to the trust assets. In Jersey under art 32 of the Trusts (Jersey) Law 1984 and in Guernsey under s42 of the Trusts (Guernsey) Law 2007, liability under a

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8 Lewin on Trusts 19th Edition 21-003
9 ibid 21-011
10 Section 32 of the Trusts (Jersey) Law 1984 provides as follows:

32 Trustee’s liability to third parties

(1) Where a trustee is a party to any transaction or matter affecting the trust –

1. (a) if the other party knows that the trustee is acting as trustee, any claim by the other party shall be against the trustee as trustee and shall extend only to the trust property;
2. (b) if the other party does not know that the trustee is acting as trustee, any claim by the other party may be made against the trustee personally (though, without prejudice to his or her personal liability, the trustee shall have a right of recourse to the trust property by way of indemnity).

(2) Paragraph (1) shall not affect any liability the trustee may have for breach of trust.
contract (and other transactions and matters) is limited to the trust property if the trustee informs the third party that he is acting as trustee, and the trustee is personally liable only if he fails to inform the third party of that fact and the third party is otherwise unaware of it.

In the recent Guernsey case *Investec Trust (Guernsey) Limited et al v Glenalla Properties et al* (Judgment 28/2014) the Court of Appeal of Guernsey was asked to consider the provisions of a Jersey law trust and the ability of Guernsey-based trustees to rely upon the Jersey statutory equivalent to section 42 of the Guernsey Trusts Law, such that they could limit their liability to the value of the trust assets. In doing so, the Court of Appeal considered the nature of the legal status of a trustee under the law of the trust in respect of that trustee’s contractual obligations under various high value loan agreements. In the absence of direct authority on this point, the Court of Appeal drew upon the authorities with respect to partnerships and limited companies.

The Court held that where a third party is aware that it is contracting with a trustee it seems that "such knowledge, properly analysed, puts the other party into a position closely analogous to that of the party transacting with a company or partnership with a separate personality. Through some means the other party has become aware that the human being with whom he or she is about to contract is not contracting as the individual person who appears before them... the other party is immediately put on notice that a distinction from the mere individual person is being put forward. The other party might know, in general terms that trusteeship is a special category of relationship. If they do not they are on notice to ask the individual what they mean by purporting to act as a trustee...the other party to the transaction is being made aware that the individual wishes to contract not in his personal capacity but in the interests of other persons, that is, with a different status”.

This line of reasoning led the Court of Appeal to the conclusion that there was no relevant distinction to be drawn between the character of trusteeship, which should lead to the application of a different rule as regards the extent of liability for a trustee where its trusteeship is recognised by a jurisdiction and of where the other party to the transaction has been made aware, and the case with respect to corporate entities or partnerships with separate legal personality. The Court further considered that this created no unacceptable conflict with the rule that the proper law of a contract governs its effects and that, as a matter of private international law, the courts of Guernsey should recognise the applicability of Article 32 of the Jersey Trust Law. The Court of Appeal therefore held that the applicability of Article 32 of the Jersey Trusts Law should be recognised by the Guernsey courts in considering the extent of the trustees’ liability such that it was limited to the assets of the trust without any personal liability.

4.2 Reserved Powers Trusts

Many of the offshore jurisdictions now have bespoke reserved powers legislation allowing a settlor to grant or reserve certain powers of the trust to himself (or another) without undermining the validity of the trust. Interestingly this is also permitted as a matter of English law provided that the trust is not made so thin that there is, with a different status.

Bermuda’s new reserved powers legislation\(^ {11} \) is fairly unique in that it helpfully absolves a trustee who has acted or refrained from acting in compliance with or as a result of a valid exercise of any of the powers

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\(^{11}\) **Bermuda’s Trusts (Special Provisions) Amendment Act 2014** introduced new Section 2(3)

The powers that can be reserved or granted as listed in the 2014 Act include the following:

1. A power in the settlor or other donor of trust property to revoke the trust in whole or in part.
2. A power to vary or amend the terms of a trust instrument or any of the trusts, purposes or powers arising thereunder in whole or in part.
3. A power to decide on or give directions to advance, appoint, pay, apply, distribute or transfer the trust property.
4. A power to act as, or give directions as to the appointment or removal of directors or officers of companies owned by the trust, or to direct the trustees how to exercise voting rights with respect to the shares of such companies.
5. A power to give directions in connection with investments or the exercise of any powers or rights arising from such trust property.
6. A power to appoint, add, remove or replace any trustee, protector, enforcer or other office holder or advisor.
referred to in the 2014 Act, from any liability for breach of trust or other fiduciary or equitable duty. Further, in the event that a trustee has been prevented from acting in accordance with those powers, or any exercise of those powers by reason of applicable law or insufficient rights or powers in relation to the trust property, the 2014 Act provides that the trustee shall not by reason alone of such non-compliance or failure to act, commit a breach of trust or other fiduciary or equitable duty.

Guernsey’s reserved powers legislation has fairly similar provisions.12

4.3 Separation of Liability – Managing Trustee or Delegate

It may be possible for trustees to further limit their liability by separating out the responsibilities of trustees (where there is more than one trustee), or by delegation.

Managing Trustee: Several of the offshore jurisdictions, including Bermuda13, have legislative provisions which allow for a trust instrument to reserve certain trustee powers to a managing trustee, and absolve the other trustees from liability for any of the decisions, acts or transactions of the managing trustee in so far as they amount to exercise of powers reserved by the trust instrument to the managing trustee.

Delegation: Many of the offshore jurisdictions also have legislative provisions absolving trustees from the acts or defaults of any delegate or sub-delegate acting within the requirements of the statute, provided that the trustees honestly believed delegation to that delegate on those terms to be in the best interests of the trust as a whole.14

5. WHAT TO DO IF IT ALL GOES WRONG

There are several options for offshore trustees to avoid a difficult and potentially litigious situation if matters go wrong.

5.1 Rely on Court Directions

Offshore trustees will not hesitate to seek the blessing or directions of the Court15 if they are not sure how to exercise their powers and wish to avoid a difficult situation, and will not proceed unless and until the court has provided guidance and authorised them to do so. Acting on the Court’s directions relieves trustees of liability for breach of trust. Essentially a trustee cannot be sued for breach of trust if it does what the Court says. An application for directions is commonly known as a Public Trustee v Cooper application after the case of the same name.

5.2 Insurance Claims

Trustee liability insurance is now common ground. Generally this increases the overall cost of trust administration. Trustees should ensure that there are express provisions in the trust deed permitting them to purchase insurance and to fund the premiums from the trust fund. Also trustees should beware of exceptions in the insurance policies which could leave them exposed to liability. Furthermore, typical insurance policies cover only current claims and yet a trustee may still incur liability after retirement. Thus a trustee would require insurance indefinitely and it is doubtful whether sufficient and effective policies

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(7) A power to add, remove or exclude any beneficiary, class of beneficiaries or purpose;
(8) A power to change the governing law and the forum for administration of the trust.
(9) A power to restrict the exercise of any powers, discretions or functions of a trustee by requiring that they shall only be exercisable with the consent, or at the direction, of a person or the persons specified in the trust instrument.

12 Section 15 Trusts (Guernsey) Law 2007 provides:
15(3) A trustee who acts in compliance with the valid exercise of any power referred to in subsection (1) does not, by reason only of such compliance, act in breach of trust.

13 Section 30A of Bermuda Trustee Act 1975 (inserted in 1999)
14 Section 15A of the Bermuda Trustee Act 1975 (inserted in 1999)
15 Public Trustee v Cooper [2001] W.T.L.R. 901. Trustees may seek the directions of the Court where: (a) they have a ‘momentous’ decision to make; and (b) they are deadlocked or disabled by a conflict of interest such that they have no other option.
would be available upon the retirement of trustees. Liability insurance premiums are generally reduced where the trust contains a trustee exemption clause. No insurance policy will cover instances where a trustee is not personally liable – either because he is covered by an exoneration clause or he is excused by the Court.

5.3 Hasting Bass Legislation

Bermuda and Jersey have both recently introduced Hastings Bass legislation providing statutory clarification of the Court’s discretion to set aside a fiduciary’s exercise of a power where the exercise of that power was flawed.

Bermuda’s Trustee Amendment Act 2014\(^\text{16}\) preserves the rule in Hastings Bass as it had been applied prior to the UK Supreme Court’s decision last year in *Pitt v Holt and Futter v Futter*.

Under the Amendment Act, the Court, in relation to exercise of a fiduciary power, may upon satisfying itself that certain conditions have been met, set aside the exercise of a power in whole or part, unconditionally or on such terms as the Court may think fit.

The conditions are that:

(a) The person did not take into account one or more considerations that were relevant to the exercise of the power, or took into account one or more considerations (whether of fact, law or a combination of fact and law) that were irrelevant to the exercise of the power; and

(b) but for the failure to take into account such relevant considerations, or having taken into account such irrelevant considerations, the person who holds the power:

(i) would not have exercised the power;

(ii) would have exercised the power, but on a different occasion to that on which it was exercised; or

(iii) would have exercised the power, but in a different manner to that in which it was exercised.

The Amendment Act has retrospective application.

The rule in *Re Hastings Bass* had been construed as providing the Court the power to declare a fiduciary’s exercise of discretion void if:

- the effect of the exercise was different from that which the fiduciary had intended; and
- it is clear the fiduciary would not have acted as it did had it failed to take into account considerations which it ought to have taken into account, or taken into account considerations which it ought not to have taken into account.

The rule in *Re Hastings Bass* had been used by fiduciaries to set aside flawed exercise of powers where the exercise had unforeseen adverse tax or other consequences. However, in May 2013, in the cases of *Pitt v Holt and Futter v Futter*, the United Kingdom Supreme Court determined that a fiduciary’s act is not void if it is within the scope of the power that it is purporting to exercise, but that it may be voidable if, on application by a beneficiary, it can be shown to have been in breach of the fiduciary’s duty to take into account relevant considerations. As a consequence, following *Pitt v Holt and Futter v Futter*, fiduciaries would no longer be able to have their decisions set aside where they have acted within their powers and in accordance with professional advice, notwithstanding that the advice may have been incorrect. In those circumstances, the fiduciaries would be required to consider pursuing the adviser to recover any loss which resulted from the negligent advice. Further, a beneficiary may consider whether a claim is available.

\(^{16}\) Section 47A Trustee Act 1975
against the fiduciary for breach of duty. Consequently, without statutory intervention to preserve or reinstate the rule in Hastings Bass as it existed pre-*Pitt v Holt and Futter v Futter*, setting aside a fiduciary’s exercise of a power would likely be a more time consuming and expensive procedure with far less certain outcomes. Further, fiduciaries may have found themselves increasingly exposed to claims for breach of fiduciary duty (and advisers for negligent advice) from beneficiaries when, previously, a fiduciary itself may have considered making an application to Court to have the exercise of its power set aside.

6. **OTHER CONSIDERATIONS**

**Change of Trustee or Termination of Trust Relationship**

Many of the offshore jurisdictions have statutory provisions governing the appointment and retirement of trustees. But when trustees are removed or retired or the trust relationship otherwise comes to an end, it is usual for the outgoing trustees to seek express covenants for indemnity from the new trustees in respect of liabilities of the outgoing trustees and otherwise to take steps to protect their position in relation to the reimbursement of properly incurred expenses. This usually results in negotiating indemnities and releases in the deed of appointment and retirement of trustees.

Often it is possible for a retiring trustee to rely on the non-possessory lien, but in many instances it is also necessary to rely on a possessory lien over trust property or trust documents and a chain of covenants. In many of the offshore jurisdictions, chains of indemnity are now regarded as fairly standard, particularly in jurisdictions (such as Jersey) where it is doubtful whether the concept of the non-possessory lien currently applies.\(^\text{17}\)

Jersey amended its Trust law in 2012\(^\text{18}\) to simplify indemnities to former trustees of mature trusts. Where there is an indemnity chain and the outgoing trustee is under a contractual obligation to procure from the incoming trustee express indemnities in favour of each of the preceding trustees, the incoming trustee may now simply indemnify both the outgoing trustee and all former trustees without the need for the various former trustees to be contacted and made parties to the document. Article 34 of the Trusts (Jersey) Law now provides that, should the need ever arise, such former trustees may sue on those indemnities notwithstanding the fact that they were not parties to the documentation which created them.

Bermuda is also looking to change its privity of contract rule so this should soon have similar effect in Bermuda.

Should you have any questions or request for further information please contact:

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\(^\text{17}\) STEP’s *A Practical Guide to the Transfer of Trusteeships*, 2nd Edition

\(^\text{18}\) Article 34(2A) of Trusts (Jersey) Law 1984 provides: "If the provision for security to which paragraph (2) refers is extended or renewed by a contract, or other arrangement, to which the trustee who resigns, retires or is removed is not party, and –

(a) the contract or other arrangement expressly provides that the trustee may in his or her own right enforce a term of the contract or other arrangement; or

(b) a term of the contract or other arrangement purports to confer a benefit on the trustee, and in either case the contract or other arrangement expressly identifies the trustee, the trustee may enforce that term in his or her own right."
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