

Bermuda's managing trustee regime—don't you forget about me...

Ashley Fife*

Abstract

Section 30A of Bermuda's Trustee Act 1975 enables a Bermuda law trust instrument to compartmentalize duties between managing and non-managing trustees. This provides a flexible mechanism for entrepreneurial settlors and fund managers to enjoy greater freedom when managing trust investments while at the same time substantially mitigating the non-managing trustee's risk. The benefits of section 30A should not be overlooked.

A number of entrepreneurial settlors of private client trusts or fund managers of unit trust investment trusts may perceive licensed trustees to be overly concerned with risk and unwilling to implement bold investment strategies. On the contrary, a licensed trustee understandably wishes to manage its exposure for investment and other actions driven by the settlor or fund manager as the case may be. Perhaps, this issue could be resolved by the settlor or fund manager simply acting as trustee with certain administrative non-investment functions being delegated to the licensed trust company. However, tax, asset protection, regulatory, or other issues may make it unattractive for the settlor or fund manager to retain custody over the trust assets or discretions regarding trust distributions.

Section 30A of Bermuda's Trustee Act 1975 to the rescue. Section 30A provides:

A trust instrument may contain provisions by virtue of which the exercise of any of the trustees' powers may be

reserved to a managing trustee and no other trustee is liable 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.

Section 30A may be used in circumstances where a:

- i. settlor may wish to act as managing trustee, or appoint a company controlled by the settlor or a trusted adviser as managing trustee; or
- ii. fund manager may wish to establish a unit trust investment fund and to reserve investment powers to itself as the managing trustee, to a subsidiary, or an orphan entity established for this purpose.

In practice, the non-managing trustee would often be a licensed trust company.

In the scenario of an investment fund established as a unit trust, the first challenge for the licensed trustee may be to persuade the fund manager to accept its designation as a co-trustee as opposed to a 'manager' or 'investment manager'. Further, it may be that a fund manager may insist on not being a party to the trust deed, preferring instead to have its powers and duties set out in an offering document or investment management agreement.

Appropriate categorization facilitates clarity regarding the duties respectively owed by the licensed trustee and a fund manager. However, a court will not treat titles as determinative of the fund manager's and trustee's duties, and in a number of cases unit trust

* Ashley Fife, Senior Associate, Private Client & Trusts team, Appleby, Bermuda HM12: Tel: +1 441 298 3221 / Ext. 6185; Website: applebyglobal.com

fund managers may be regarded as co-fiduciaries with the licensed trustee. Many unit trust deeds include the fund manager as a party to the deed but do not describe it as a trustee notwithstanding that the fund manager may have all of the discretionary powers to manage the trust investments at the exclusion of the licensed trustee. In a unit trust investment structure, a licensed trustee may be responsible for:

- i. calculation of the net asset value, transfer agent, and other administration not extending to discretionary investment management (often engaging a licensed fund administrator); and
- ii. custodian of assets (often engaging a licensed custodian).

Where a fund manager is not expressly appointed as a co-trustee and a claim is made against the fund manager and co-trustee regarding the trust investment, the fund manager may seek to reduce its liability by arguing that it was not a trustee and, therefore, it does not owe the same duties to unit holders as the licensed trustee. The argument may be that the trustee has delegated investment powers to the fund manager and the fund manager simply owes contractual duties to the trustee and no fiduciary duties to the unit holders. These arguments, if successful, may increase the exposure of the formally appointed licensed trustee. These issues have been considered in *Galmerrow Securities Ltd v National Westminster Bank*¹ and in *Barclays Wealth Trustees (Jersey) Limited and Barclays Wealth Fund Managers (Jersey) Limited v Equity Trust Services Limited*.² In those cases, the fund managers were determined to be co-fiduciaries, owing duties to the unit holders, as opposed to merely being delegates of the trustee.

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Perhaps the second challenge, in the scenario of an investment fund established as a Bermuda law unit trust, is to persuade the fund manager expressly appointed as a managing trustee. The appointment of a managing trustee for the purpose of section 30A does not require an express reference to section 30A in the trust deed. However, it is suggested that such an express reference provides clarity regarding the respective trustees' duties and obligations. Appointment of a managing trustee in accordance with section 30A provides statutory exoneration to the non-managing trustee. Statutory exoneration provides such non-managing trustees considerably greater certainty regarding their exposure when compared to relying on exoneration provisions in the trust instrument alone. Exoneration provisions in trust instruments are often prone to attack from arguments regarding their validity, interpretation, and effect.

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Section 30A does not limit the non-managing trustees duties altogether. It remains responsible for those powers designated to it, solely or jointly with the managing trustee, in the trust deed. The non-managing trustee also remains under a duty to safeguard the trust assets, and to act honestly and in good faith. Accordingly, if the non-managing trustee has notice that the managing trustee is exercising its powers irrationally, dishonestly, or outside the scope of its powers then it may be required to intervene. This may involve an application to the Court in exceptional cases.

1. [2002] WTLR 125.

2. [2014] JRC 102D.

Conclusion

Section 30A Trustee Act 1975 represents one of the solutions offered by Bermuda's trust law to provide a settlor or fund manager with flexibility to exert more control over the trust to, for example, implement higher risk investment strategies while at the same time limiting the non-managing trustee's exposure.

Other examples of the flexibility provided by Bermuda's trust law in this regard include Bermuda's flexible regime for private trust companies and extensive regime for settlors' reservation or granting of powers. Do not forget about the benefits of section 30A of Bermuda's Trustee Act when establishing a trust for entrepreneurial settlors or a unit trust investment fund.

Ashley Fife is a Senior Associate in the Private Client & Trusts team at Appleby in Bermuda. His practice includes advising in respect of private and commercial trusts, with particular focus on pension trusts, private funds and insurance and security trusts, and assisting trust corporations to establish best practice. E-mail: AFife@applebyglobal.com

1. Introduction

The purpose of this study is to investigate the effects of the independent variable on the dependent variable. The study is based on a sample of 100 participants.

The results of the study show that there is a significant positive correlation between the independent variable and the dependent variable. This suggests that as the independent variable increases, the dependent variable also tends to increase.

2. Methodology

The study used a quantitative research design. Data was collected through a series of surveys and experiments. The sample was randomly selected from a population of 1000 individuals.

The independent variable was measured on a scale of 1 to 5. The dependent variable was measured on a scale of 1 to 10. The data was analyzed using statistical software to determine the relationship between the variables.

3. Results

The results of the study are as follows: The mean score for the independent variable was 3.2, and the mean score for the dependent variable was 5.8. There was a significant positive correlation between the two variables, with a correlation coefficient of 0.65.

4. Discussion

The findings of this study support the hypothesis that there is a positive relationship between the independent variable and the dependent variable. This is consistent with previous research in this area.

5. Conclusion

In conclusion, the study has shown that there is a significant positive correlation between the independent variable and the dependent variable. Further research is needed to explore the underlying mechanisms of this relationship.