
The outgoing Trustee: duties & obligations; the terms of indemnification; reasonable security Briefing

In the recent case of *Caversham Trustees Limited* [2008] JRC 065 ("Caversham"), the Royal Court clarified the obligations and duties of a retiring trustee in relation to the transfer of the administration of a trust and its assets to the incoming trustee and the terms upon which such transfer may be made.

In Caversham, the relationship between the Settlor (and principal beneficiary) of certain trusts and the trustee broke down and became unworkable. The trustee, Caversham, accepted it was appropriate to resign and for the administration to be transferred to a new trustee.

A dispute then arose as to the fees due to the outgoing trustee and the terms of indemnification the outgoing trustee was entitled to. As a consequence, the transfer of trusteeship became protracted, proceedings were launched and the Royal Court was critical of the delay in effecting the transfer of the administration of the trusts.

Duties and obligations on an outgoing trustee

An outgoing trustee has a duty to co-operate fully and actively in the transfer of the trusteeship and the transfer of the assets of a trust. In *Ogier Trustee (Jersey) Limited v C.I. Law Trustees Limited* [2006] JRC 158, the Deputy Bailiff said:

"On the transfer of a trusteeship the outgoing trustee is under a duty to co-operate fully and actively in the transfer by making all relevant documents and correspondence available promptly to the incoming trustee and by providing any explanation to questions reasonably raised by the incoming trustee".

In that case the outgoing trustee had already resigned and the new trustee was anxious to establish exactly what assets were owned by the trust and to get those assets under its control.

In Caversham, the trustee Caversham accepted it was in the interests of the beneficiaries that it should retire as trustee and transfer the administration to a new trustee. Subject only to retaining reasonable security in relation to its fees, its duty was then to give effect to the transfer as soon as was reasonably possible. The Court held that Caversham was under a duty to pursue proactively the transfer of the assets by:

- (a) instructing lawyers in Jersey to draft the formal documents by which the assets would be appointed to the new trust and any indemnities to be given;
- (b) marshalling and preparing the assets so that they were ready to be transferred;
- (c) ascertaining the identity of the entities to whom the assets were to be transferred;
- (d) obtaining advice, as necessary, on the steps required to effect and the tax implications, if any, of and cost to be incurred in the actual conveyance or transfer of the assets in the jurisdictions in which they were sited;
- (e) setting out a timetable for the transfer of the assets;
- (f) providing information to the new trustee to enable it properly to accept the assets;
- (g) carrying out due diligence on the new trustee; and
- (h) providing explanations to questions reasonably raised by the new trustee in relation to the assets.

The duty to transfer the trust assets was held to be subject to the outgoing trustee's right to be provided with reasonable security for liabilities whether existing, future, contingent or otherwise.

While not an exhaustive statement, all trustees ought to be aware of the above obligations and duties imposed upon them when retiring as trustee and transferring the administration and assets to a new trustee. A transfer of trusteeship is a two-way process and dependent therefore upon the co-operation of the new trustee.

Indemnification

In *Caversham*, the Court held that the right to seek security by way of indemnity is not a right which, in general, can reasonably be extended to officers and employees of “associates” of the trustee or companies, in which the trustee may have invested the trust fund on the basis that such officers or employees usually act as the nominee of the trustees and would do as instructed by them. The duty of such employees was to the company and its shareholders rather than simply to act as the agents of the trustees. Therefore, there was no legal, or other basis, for an indemnity to be required from the incoming trustee for such individuals acting in their capacity as Directors of underlying companies.

Security for fees

The retention by an outgoing trustee of the whole of the trust fund pending payment of fees due was held to be “unreasonable”.

In the case of the *Carafe Trust* [2005] JLR 159, the Court held that it was improper for a trustee to seek security over the entirety of a trust fund until its disputed fees were paid. In that case, the Court found that the trustee should have retired when the beneficiary offered to pay into escrow the full amount of the disputed fees which gave the trustee all the security to which it was entitled. The *Caversham* decision reconfirms that the right to security is a right to “reasonable” security alone and that in seeking to retain control over the entire trust funds is improper.

Carafe does not establish a general principle that escrow arrangements should be accepted by trustees in all cases involving disputes over fees. What constitutes reasonable security in such disputes will depend upon the facts of each case. Escrow arrangements would not ordinarily apply, for example, in fee disputes between beneficiaries and trustees who remain in office.

Commentary

In circumstances where a trustee concludes that its continuance as trustee is detrimental to the execution of the terms of the trust, that trustee should “press” for the appointment of or appointment out to a new trustee, failing which it should not unduly hesitate but

should apply to the Court for directions to bring that about. Such applications will ensure that the interests of the beneficiaries are protected and will also protect the trustee from potential criticism and arguably irrecoverable fees.

This briefing can only provide a general review of this area. Legal advice should be taken with regard to individual circumstances.

If you have any queries regarding the information in this briefing or simply wish to discuss your specific needs please contact:

Beverley Lacey
beverley.lacey@mourant.com

Jonathan Speck
jonathan.speck@mourant.com

Damian Evans
damian.evans@mourant.com

Mourant du Feu & Jeune
Cayman | Guernsey | Jersey | London | New York
www.mourant.com

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