

Trusts

How and When Should a Trustee Retire?

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☞ Beneficiaries; Directions; Fees; Jersey; Jurisdiction; Retirement; Trustees

The post of trustee can be fraught with difficulty, but in the modern era it is also a source of remuneration for corporate trustees. This article looks at recent jurisprudence in Jersey, and the more ambitious or more international reader could be referred to a whole book on the subject.¹

Introduction

Under the trust laws in most jurisdictions, trustees are permitted to retire voluntarily. But what about the situation where the beneficiaries want, and have asked, a trustee to retire but he is reluctant to do so? This would often, but not always, arise where there are disputes over the trustee's fees or the terms of their retirement. In such circumstances, what should a trustee do? Is it appropriate for the trustee to refrain from retiring until those disputes are resolved? Can the Court intervene and direct a trustee in such circumstances to retire? The Royal Court of Jersey has now provided important clarification of these issues in its landmark decision relating to the *Velloz Settlement*.²

Retirement

It will often be obvious to a trustee when to retire. It may be his own choice, for example, where he feels no longer equipped to carry out the role. It may also be where one or more of the beneficiaries has asked him to retire and wishes to change trustees. In either scenario, it is important to remember that a trustee remains under an ongoing duty to act in the best interests of the beneficiaries and the trustee should have central regard to this factor when considering retirement. There are, of course, certain limitations to a trustee's ability to retire freely. One common example is where the retirement request is designed to facilitate a breach of trust. Typically, a trustee who resigns in order to facilitate a breach will be liable for that breach.

On a retirement (or removal), a trustee will usually be required to surrender trust property in their possession or control (subject to prohibitions imposed on such transfer by other legislation, such as that concerned with money laundering³) and, if relevant, assist in the transfer of trusteeship to another trustee.

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¹ R. Williams et al (eds), *A Practical Guide to the Transfer of Trusteeships*, 3rd edn (Woking: Global Law and Business, 2017), reviewed in this journal at [2018] P.C.B. 18.

² *Re Velloz Settlement* [2021] J.R.C. 140.

³ *Re Representation Kaplan* [2009] J.R.C. 082.

Protections for a retiring trustee

A trustee has the right to indemnity from the trust fund for liabilities reasonably incurred. This usually provides appropriate comfort for a trustee whilst in office. But a retiring trustee is more exposed. Once the trust property is passed over to the continuing or new trustees, the property will be placed outside the outgoing trustee's immediate control. Furthermore, if the new trustees are based out of the jurisdiction, the trustee and the trust assets will no longer be under the effective control of that trustee's domestic courts, and he may have to resort to a foreign court in order to obtain an effective indemnity or reimbursement of expenses.

For these reasons, under the trust laws in most jurisdictions, the duty to surrender trust property is subject to the right to reasonable security. In practice, it is common for trust instruments to make provision expressly for this particular situation, and in any event for there to be a negotiation of some kind between the retiring and the continuing trustees.

What constitutes reasonable security? Well, as has been stated by the Royal Court of Jersey on several occasions, what is reasonable security will turn on the particular facts of the case.⁴ In some instances, monies held in escrow may be appropriate. In other cases, the indemnification alone may be sufficient. In addition to the right to require security under arts 34(2) and 43A, in the *Z Trusts* case,⁵ the Jersey Court of Appeal confirmed that a trustee has a non-possessory lien over the trust fund. This is effectively a floating charge against the assets comprising the trust fund from time to time. As a non-possessory lien, it survives both the trustee's ceasing to be a trustee and ceasing to possess the trust fund. Moreover, the Court of Appeal confirmed that the usual equitable rule of priorities applies. So, the former trustee can have recourse to the lien—and potentially exhaust the trust fund—in priority to a subsequent trustee's right to do so. This decision, which it is fair to say has caused some controversy, is subject to an appeal to the Judicial Committee of the Privy Council heard between 14 and 16 June 2021.

Disagreements on fees

One common scenario on retirement is a disagreement over outstanding fees owed to the retiring trustee. What happens if the retiring trustee and the beneficiaries cannot agree on how to deal with the issue? The Royal Court of Jersey has held that a retiring trustee is not permitted to allow resolution of its fee position to delay its retirement, providing adequate arrangements are in place to provide security for any such fees.⁶ This principle is an extension of the retiring trustee's ongoing obligation to act in the best interests of the beneficiaries. By putting his personal interests in settling his fee position first he is at a risk of failing to properly exercise those obligations.

How and when can the courts intervene in this scenario? In particular, can courts direct a retiring trustee to execute reasonable terms of retirement which make provision for reasonable security? Despite the clarity of the principles concerning a trustee's obligations when faced with a request to retire, up until now there is very limited jurisprudence on the powers of the courts to make such directions. However, the recent, landmark decision in *Re the Velloz Settlement* has provided much needed clarity on this precise issue.⁷

⁴ See, for example, *Re Caversham Trustees Ltd* [2008] J.R.C. 065; 2008 JLR N18.

⁵ *Re Z Trusts, Rawlinson Hunter v Chiddicks* [2019] JCA 106.

⁶ *Re Carafe* [2005] JLR 159.

⁷ *Velloz* [2021] J.R.C. 140.

The court's jurisdiction to direct terms on retirement

The Velloz trust was governed by Jersey law. The beneficiaries were the settlor, his wife and his four sons and their issue. Two family charitable trusts were default beneficiaries. The assets were held mainly in the form of property situated in various jurisdictions exceeding £1 billion in value.

There were two trustees: Velloz (Jersey) Ltd ("VT") and ST PTC Ltd ("ST"), both Jersey private trust companies. The sole director and beneficial owner of VT was the eldest son of the settlor (S). ST was owned by a family purpose trust and its board of directors included the two middle sons.

VT was the sole trustee at the date of the creation of the trust, and it was envisaged by the settlor and the family that VT would in due course relinquish sole control of the Trust or otherwise yield the trusteeship of the Trust to a trustee more widely representative of the family. Accordingly, the initial structure of the Trust, with VT as trustee, was designed to be in place only for a short period.

Following inception of the trust, all adult beneficiaries requested that VT cease to be trustee of the trust, in accordance with the above wishes of the settlor. After protracted correspondence lasting several months, VT agreed, in principle, to retire subject to agreeing reasonable security for disputed fees. VT's co-trustee, ST, provided VT with draft retirement terms and security, which included indemnification and an undertaking with regards to the ring-fencing of assets sufficient to meet the disputed fee liability. The retirement terms were agreed. However, VT was not satisfied with the security offered, and negotiations between the parties could not result in any agreement.

In light of this deadlock and the detrimental effect on the trust in having the retirement unresolved, ST applied to the Royal Court for a direction, amongst other things, that it be required to execute the retirement terms. At the trial VT challenged the suggestion that the Royal Court had jurisdiction to make such a direction. VT argued that the Royal Court could order only the removal of the trustee, and removal in such circumstances was inappropriate. However, the Royal Court ruled, having principal regard to the interests of the beneficiaries and the decision in *Rawlinson and Hunter Trustees SA in the matter of the Discretionary Trust*⁸ that it did have jurisdiction to direct a retiring trustee to execute an instrument of retirement. On the facts, it considered it appropriate that VT be directed to execute the terms proposed by ST, failing which it would be removed as trustee by order of the Royal Court. Following retirement or removal, VT would also be required, in the usual way, to surrender all trust property to ST in its possession or control and do any other necessary acts to assist ST in assuming the trusteeship.

In reaching this decision, the Royal Court took the view that VT had reasonable security owing to the following: 1) its equitable lien; 2) its contractual indemnity upon retirement as referred to above; and 3) the undertaking which ST gave that it would hold in a ring-fenced fund a sum necessary to resolve VT's claim for its costs, fees and expenses.

The risks of unreasonably refusing to retire

A trustee will often lose the right to a complete indemnity for its costs from the trust fund (or be ordered to pay the parties costs) by reason of 1) his conduct which occasioned the proceedings; 2) his unreasonable conduct in forcing the continuing trustee to bring unnecessary trust proceedings; or 3) his conduct in the proceedings themselves.⁹ The risk for a retiring trustee in unreasonably refusing to retire is that he may be deprived of its indemnity and ordered to pay the parties' costs on the basis that its inappropriate conduct occasioned these proceedings.

In the *Velloz* decision ST requested that the Royal Court order that VT should be deprived of its indemnity and ordered to pay the parties' costs on the basis that its inappropriate conduct occasioned these proceedings. The Royal Court adjourned the decision, pending ultimate determination of the fee dispute.

⁸ *Rawlinson and Hunter Trustees SA in the matter of the Discretionary Trust* [2018] J.R.C. 131.

⁹ *Re Y Trust* [2011] J.R.C. 155A.

Lessons for trustees

First, in the usual course, a trustee will be acting appropriately in retiring at the wishes of the beneficiaries. In deciding to retire, the touchstone for the trustee should always be what is in the best interests of the beneficiaries.

Secondly, it is essential that a retiring trustee understands that his interests in being paid outstanding fees and agreeing on appropriate retirement terms should not take precedence over what is in the interests of the beneficiaries. In this regard, he should not use delay in retirement as leverage in those discussions. As the Royal Court stated in *Velloz*:

“Delay in retirement cannot be used by a trustee as a means of a leverage in respect of its fees. For a trustee to adopt such a stance is putting its own interests above and in conflict with the best interests of the beneficiaries.”¹⁰

Thirdly, a retiring trustee should seek to agree with the incoming or continuing trustee reasonable retirement terms and reasonable security. The terms will often not be a matter of controversy. Many such terms are based on industry standard. What is reasonable security will depend on the facts of the particular case. As the Royal Court said in *Velloz*:

“Sometimes reasonable security may take the form of monies held in escrow (as in *Caversham*¹¹); in other cases the contractual promises made by the new trustee, particularly if it was a Jersey trustee with assets in the island, might well be sufficient.”¹²

An unreasonably acting retiring trustee may be exposed to costs risks.

¹⁰ *Velloz* [2021] J.R.C. 140 at [17].

¹¹ *Caversham* [2008] J.R.C. 065 at [43].

¹² *Velloz* [2021] J.R.C. 140 at [18].