

COVID-19 – Practical considerations for trustees

Insights – 09/04/2020

The impact of the COVID-19 pandemic is far reaching. This briefing considers some fiduciary and practical issues relevant to trustees in the private wealth area in Jersey during this unprecedented period of social distancing, travel restrictions and turbulent markets.

COVID-19 – does it impact on a trustee's fiduciary duties?

The impact of COVID-19 is material and global with governments around the world severely restricting what their citizens can and cannot do. The impact on businesses is unknown but it seems clear that there will be a material fall out. Financial markets have been particularly turbulent and the full effect on real estate valuations remains unclear. There is no doubt in this environment that trusts and the value of trust funds will be impacted.

That all said, the COVID-19 pandemic does not change a trustee's core fiduciary duties. Under Jersey law a trustee is required by Article 21 of the Trusts (Jersey) Law, 1984 (the **Trusts Law**) to act with due diligence, as would a prudent person, to the best of his ability and skill and must observe the utmost good faith. A trustee must also exercise his powers solely for the benefit of the beneficiaries. These core duties apply at all times and a trustee cannot contract out of these.

From an investment perspective a trustee's duties are also set out in Article 21(3) of the Trusts Law which provides that a trustee shall preserve and enhance the value of the trust property so far as is reasonable (although the duties to preserve and enhance the trust fund can and often are excluded by the terms of the trust). The performance of a trustee's duties will be enforced by the Royal Court of Jersey, if necessary, at the instigation of a beneficiary. In addition professional trustees must show a higher level of skill than a lay trustee when exercising their investment powers and discretions. It is also clear that trustees have a duty to monitor investments irrespective that the investment management function may have been delegated.

Irrespective of COVID-19 these core trustee duties and investment duties remain the same.

However, COVID-19 is having a radical effect on the world we are living in. Financial markets are seeing material volatility and businesses are needing to take radical steps to reduce outgoings, restructure loans and preserve cash. This is all happening at break neck speed. Trustees will also need to be proactive and move quickly in these turbulent times.

So in this environment with uncertain times ahead what should diligent and prudent trustees be doing? Trusts will differ materially between one another but the following guidance may be useful:

Being proactive with the trust fund:

Trustees need to consider how the key assets of the trust are likely to be impacted by COVID-19. If the trust fund comprises of an investment portfolio, has the investment strategy been discussed and refined accordingly with the investment manager? If the trust fund comprises real estate subject to a lease what has been agreed with the tenant on rental? If the trustee holds the shares in a company, perhaps operating a family business, has the trustee ensured a sufficient flow of information (e.g. management accounts and directors' minutes) to enable the trustee as shareholder to be aware of a scenario which might require the trustee to step in? If the trustee has made loans to third parties do the terms of these loans need to be reviewed and amended in light of COVID-19? Conversely if the trustee has the benefit of loans will the trustee have sufficient liquidity to meet repayment obligations? If not, what steps can be put in place?

Trustees need to be considering these issues now and anticipating likely issues further down the road.

Being proactive with key power holders:

It is common place for key functions of a trust to be reserved to third party power holders. Trustees should review their reserved power trusts to ensure that where possible they have in place appropriate mechanisms (e.g. clear succession provisions in the event of the incapacity or death of the power holder) so that the key functions of the trust can still operate in the event of a power holder being incapacitated or passing away. This is a particular issue where the investment function of a trust has been delegated to a third party power holder. Importantly, the death or incapacity of a power holder might result in the reserved power provisions coming to an end with investment powers vesting in the trustee on a discretionary basis thereby reactivating this area of the trustee's fiduciary duties.

Ensuring clear communication to the client:

This follows on from being pro-active. Clients will likely be worried and anxious in this environment and trustees can assist here with clear and concise communication on how they are or will deal with any issues whether they relate to the investment of the trust fund, the

exercise of key powers going forward or otherwise.

Assessing risk and trustee protection:

A trustee will need to carefully consider the degree of commercial risk posed by any transaction. Does the counterparty have the finances to complete? Are there jurisdictions connected to the transaction which would make completion difficult? COVID-19 has raised the risk profile of transactions not completing and counterparty risk.

Fundamentally in all transactions trustees must make sure they are adequately protected in the transaction documents. Where the trustee is entering into contractual obligations this might include ensuring appropriate limited recourse wording is incorporated limiting the liability of the trustee. It could also mean ensuring an appropriate indemnity is drafted for the benefit of the trustee. Given the heightened risk, ensuring a trustee is adequately protected in these turbulent times is paramount.

Practical considerations relating to trustee meetings

Notwithstanding the current difficulties in holding face to face trustee meetings, clear decision making and accurate record keeping by trustees continues to be essential. This is not least because trustees find themselves acting during an unprecedented and uncertain period which may, in time, be subject to the scrutiny of the beneficiaries; and trustees will be better able to defend their actions if the decisions taken are properly documented.

Importantly, trustees are under a duty to keep accurate accounts and records of the trustee's trusteeship and administer the trust in accordance with its terms. This includes any formalities under the trust deed in relation to how frequently trustee meetings are held and how trustee decisions should be taken. For example, where there is more than one trustee, the trustees may be required to act by majority or unanimous decision or where there might be specific provisions relating to a corporate trustee acting by authorised representatives. If the trustees do not adhere to these formalities, then the decision might be called into question.

If face to face meetings are not possible trustees could hold a "virtual" trustee meeting by telephone or video conference, subject to the terms of the trust deed. When calling a virtual meeting, it is good practice to circulate clear instructions as to how to participate, an agenda and any relevant papers well in advance of the meeting so that the participants can review these. It also helps to appoint a chair whose role will be to run the meeting, ensure participants have their say and that a clear decision is reached. A minute should be prepared recording the decisions taken at such virtual meetings.

Alternatively, where technology does not permit a virtual meeting or is not practicable, the trustees could take and record their decision by written resolution (again, subject to any

formalities under the trust deed). The exact wording of the resolution can be circulated by email together with any relevant papers and agreement given by electronic signature or by email under the e-communications provisions of the Electronic Communications (Jersey) Law 2000, as amended (the **Communications Law**) (which we discuss in further detail below).

A corporate trustee, including a PTC, will also need to follow the requirements under its memorandum and articles of association, in particular in relation to notice, quorum and proceedings at meetings, to continue to ensure that board meetings are properly convened and held. Helpfully, most modern articles of association allow for meetings to be held by telephone and also permit board decisions to be made by written resolution. If they do not, then an amendment to the articles of association might be possible so as to permit this.

The current travel restrictions may also cause issues where the articles of a corporate trustee require directors to be physically present in Jersey in order to attend meetings and form part of the quorum. This may not be an issue if the directors are sufficient in number that the non-Jersey director need not be counted in the quorum. However, if this is not the case, then the non-Jersey director could consider the appointment of an alternate director who is resident in the Island on a temporary basis until travel restrictions are lifted. Alternatively, it might be possible under the articles to delegate director powers to a committee of directors comprised of a smaller number of directors, or if the articles permit, a committee of other persons.

The need for witnesses and company seals on supplemental deeds

Commonly, signature blocks for supplemental deeds include provision for a witness for individual signatures and a company to sign under seal or by two authorised signatories. However, a question that is arising at the moment is whether there is an actual need for witnesses and seals for signatures on supplemental deeds, such as deeds of appointment. In the private wealth context, Jersey trust law does not in itself prescribe requirements as to how such supplemental trust documents are to be entered into, although there are certain rules generally in Jersey law for the execution of particular types of documents such as wills and powers of attorney or in relation to unit trusts. It should be noted that the term "deed" under Jersey law does not have a specific meaning. This differs from some other jurisdictions, such as England where a "deed" requires certain formalities as a matter of general law.

Therefore, when considering whether witnesses or company seals are required, the starting point must be reference to the trust documentation itself. There are two aspects to this:

- The first is that the trust deed may specify that certain actions of the trustee, or any other person with power under the trust deed, must comply with certain formalities. Commonly these include a requirement that an action must be carried out by "deed" or "instrument in writing". There may be variations within the same trust deed. For example, it is often the

case that a trustee may be able to make payments of income without the need for a formal document but can only add a new Beneficiary by an instrument in writing. Even if there is no requirement under the trust deed, the trustee may still wish to enter into a document to carry out an action (perhaps to obtain an indemnity from a Beneficiary on making an appointment, for example) but in this case the formalities for signing that document would not be governed by the trust deed.

- If there is a requirement for an action to be exercised by "deed" or "instrument in writing" (or any other description), then the second aspect to consider is whether the trust deed defines that term. If the trust deed is silent on the definition then there should be no need for a witness or company seal under Jersey trust law. However, there are a significant number of trust deeds that do set out – normally in the definitions clause – that a witness or the use of a company seal is required for a "deed". Occasionally the requirements may be more onerous, such as the need for two independent witnesses. If such a provision is included, then any attempt by the trustee to exercise its powers without obtaining such formalities could be void. If this is causing an issue then thought could be given to amending the trust deed to remove this requirement.

In addition to the trust deed, it must always be remembered that a corporate trustee must also comply with its own memorandum and articles and internal procedures. The articles must always be checked to ensure that there are no requirements for signature of documents or use of seals. The minutes of the trustee authorising the trustee to enter into the document must also reflect the manner in which the documents are going to be signed as opposed to how the trustee has traditionally signed them. A corporate trustee must also consider its internal procedures and regulatory requirements.

Even if not a legal requirement, a witness is normally preferred to evidence the signature of individuals who are entering into supplemental deeds. It may be that some individuals do not experience difficulties finding witnesses, perhaps depending upon the country in which they are located. However, given the current circumstances there may be flexibility to dispense with this requirement.

Electronic signatures

Another issue facing trustees is the use of electronic signatures for supplemental deeds. From a general legal perspective, Jersey is well placed for the use of electronic signatures. In Jersey, generally, an electronic signature will be legally effective to conclude a contract, so long as:

- for a legal entity, there are no restrictions on the use of electronic signatures in its constitutional documents (this is particularly relevant when a company had old or outdated constitutions);
- the law of the place of a company's incorporation (if not Jersey) permits electronic

signatures and doesn't otherwise contain restrictions on the type of document that can be signed by way of electronic signature;

- there is nothing in the contractual terms themselves that prohibit electronic signatures; and
- it is applied with the requisite intent and appropriate authority.

The Communications Law was amended on 9 October 2019 by the Electronic Communications (Amendment of Law) (Jersey) Regulations 2019 to clarify the provisions around electronic information, electronic signatures, and the making of contracts by electronic means. A signature, seal, attestation or notarisation is not to be denied legal effect, validity or enforceability only because it is in electronic form as long as the above pre-conditions are carefully considered and confirmed.

As with the requirement for witnesses, it is always necessary to check the terms of the trust documentation to see if there are any particular formalities for the action being taken or the document being entered into.

For many supplemental deeds, the use of electronic signatures will be effective but each case needs to be checked.

The corporate team at Ogier have produced a fuller briefing on the use of electronic signatures which can be found [here](#). Also see below for details of how Ogier can help you use technology to manage and sign documents.

The Ogier approach

As part of our commitment to innovation as a core pillar of our service delivery, Ogier has invested heavily in technology over the past few years to enhance the way we do business and deliver our services to clients. This places us in a position of strength in these challenging times. A few examples of how we can assist include:

- Docusign: We were an early adopter of this software, which allows our teams as well as third parties to securely sign a wide range of documents electronically. This can be done from a mobile device and takes only moments to complete. The fact that we have been using it for a number of years and have experience of "virtual closings" should assist us in offering our usual high level of service to clients.
- Virtual meetings: We have the technology to arrange video (up to 50 participants) or audio (up to 250 participants) meetings and calls that can be used as part of the completion mechanics of a transaction.
- Compiling documents: We rely on software to electronically date and otherwise compile counterparts of documents as well as electronic bibles.

- Full remote working capabilities: We have the infrastructure and support teams that enables our entire global business to work remotely and so far we have seen a seamless transition and in many ways it is business as usual for us.

This is another example of how at Ogier we make the complex simpler. Contact our private wealth team should you have queries or require our assistance.

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

Disclaimer

This client briefing has been prepared for clients and professional associates of Ogier. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Regulatory information can be found under [Legal Notice](#)

Meet the Author



James Campbell

Partner

Jersey

E: james.campbell@ogier.com

T: [+44 1534 514230](tel:+441534514230)

Key Contacts



Josephine Howe

Partner

Jersey

E: josephine.howe@ogier.com

T: [+44 1534 514201](tel:+441534514201)

Related Services

Private Wealth

Legal

Related Sectors

Trusts Advisory Group