Snapshot: investment losses in Guernsey

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If you think that your trustee or investment manager has incurred a loss on your behalf, your first actions should be to:

- **Check your contract carefully, and understand the wording**

  Terms of engagement often contain provisions which may purport to set out the services that the trustee or investment manager have agreed to provide, indemnify them (particularly in the case of trustees), release them from liability and limit the amount of the damages that the trustees or investment manager may be required to pay if they become personally liable for any loss.

  The general legal position is that trust instruments may provide that the trustee shall be released from liability and indemnified out of the trust fund provided it has acted honestly and in good faith. Based on this approach, it may be possible, subject to statutory restrictions in the applicable jurisdiction, for a trust instrument to relieve a trustee from liability, or even indemnify a trustee out of the trust fund, for loss arising as a result of its own gross negligence.

- **Understand what the general global conditions are like for investments**

  It's critical to take the time to research what factors may have an impact on your investments so you can make informed decisions. Understanding what's going on in the market, domestically and globally, is important as it may have an impact on your investments. This can include things such as growth, unemployment rates, interest rates and inflation and even political events.

- **Check your timing – don’t wait too long or you might be out of time**

  The prescription period for contractual and tortious claims is six years from the date upon which the cause of action accrued (save in respect of personal injury, for which the period is three years). For breach of trust claims the limitation period is three years from the date of knowledge of the breach; save that no prescription period will apply to an action brought against a trustee in respect of any fraud to which the trustee was privy or for any action to recover trust property.

Prescription periods are stopped from running at the point at which a Summons is provided to HM Sergeant for service.

There are four reasons why you might not end up having a claim:

1. **Limitation** – In Guernsey this is called prescription. If you're suing a trustee, you only have three years from the date of breach in which to sue, starting from when knowledge is accrued. If it's an investment manager, then that's a contractual relationship and you have six years, but it depends when the loss occurred and knowledge is a relevant factor. If you miss this window your claim will be time barred unless you can show a good reason as to why it was not possible to bring the claim within the required timeframe (and even then the claim may still be refused due to limitation).
2. **Due diligence** – Much turns on the extent of the due diligence performed by the trustee or investment manager as a professional and regulated entity and the appropriateness of the investment. This will include all documentation and information relating to the investment which can be delegated if their powers allow.
3. **Trust instrument or investment management contract** – It may have an exculpation clause in there, so the trustee or investment manager is not liable for certain acts or omissions depending on what the contract says. They may well seek indemnification from the beneficiary in respect of any losses, so you have to be careful in looking at the relationship between the parties. That said in the matter of *Manita Khuller v First International Trustees Ltd, Court of Appeal [2020]* the trustees had attempted to rely on the Trust deed that contained provisions to protect them from liability except arising from their willful misconduct or gross negligence. The trustee was found to have been grossly negligent in appointing an unregulated adviser as they had not properly delegated their responsibilities.
4. **Loss** – This is a substantive point - have you actually suffered a loss? You may think on paper your investment has gone down but does that just reflect the market? Could it have been avoided? Your investment manager may have done all they could to shore up the position. In order to be successful in bringing a claim you will need to show that there was a breach that caused the loss as a starting point as this is the case for negligence.

For more information on this, we recommend watching Mathew Newman's recent Citywealth interview. Watch it here:

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