The importance of trustee minutes: A Guernsey view

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As a result of today's climate, in which professional trustees are held to increasingly high standards by regulators, courts and clients alike, the importance of fiduciaries recording their decisions has never been greater. In circumstances where a court's ruling may turn on the content (or lack thereof) of trustee minutes, and where regulatory authorities are entitled to scrutinise all available evidence of a licensee's conduct with a view to forming a judgment as to its corporate governance and compliance with AML/CFT legislation, this article considers, from a Guernsey perspective, why it is true to say that "every minute counts".

Fiduciary decisions

Written records of a trustee's deliberations as to whether to exercise a discretionary power conferred upon it in its capacity as trustee, and if so in what manner, are recognised by Guernsey law to be of a different nature to general trust "information", which may include trust accounts, the trust instrument and supplemental instruments. With respect to this latter category, the starting point is that trustees are obliged to disclose such information to trust participants upon receiving a written request to do so unless the trust instrument provides otherwise. If the terms of the trust restrict the trustee's ability to comply with such a request, the trust participants may apply to the Royal Court under section 26(2) of the Trusts (Guernsey) Law, 2007 (the "Law") for an order requiring the production of the documents sought.

The opposite presumption applies in the case of documents which reveal the trustee's deliberations as to how it has exercised its trustee functions, its reasons for any resulting decisions, and any material (including any letter of wishes) upon which such decisions may have been based (section 38 of the Law). Only when expressly required by the terms of the trust instrument or by an order of the Royal Court will a trustee need to turn over documents such as trustee minutes, resolutions, file notes or memoranda, and the Court will only make such an order if it has been established to its satisfaction that such disclosure is necessary or expedient for the proper disposal of a matter before it, for the protection of any of the beneficiaries' interests, or for the proper administration or enforcement of the trust.

However, this difference in the potential for exposure does not mean that trustees should take any less care over the content of the documents in which they record their thought processes than they do in the case of documents that are more likely to be seen by the outside world.

In exercising their fiduciary powers, trustees have a duty to act in the best interests of the beneficiaries of the trust in question, and to take only relevant, and no irrelevant, matters into account when considering how best to achieve this. This requires trustees to inquire into the surrounding circumstances of a given matter, to ascertain all the information they need so that they are adequately informed, and then to weigh up all relevant factors before reaching a decision. The only way in which trustees can demonstrate that they have adhered to these expected protocols is by producing evidence in the form of contemporaneous and comprehensive notes of their deliberations, whether that be minutes of their meetings, detailed written resolutions, or file notes of their discussions (either internal or with interested parties such as the settlor, protector or beneficiaries), as well as copies of any professional

advice taken.

Instances in which written records of trustees' decisions may fall under scrutiny include where challenges are brought alleging that the trustees have exercised a power on the basis of faulty judgment as to a state of facts or without bringing their minds to bear on exercising their discretion; where they are said to have failed to remain impartial between beneficiaries; and where trustees are seeking the court's blessing within the framework of a Public Trustee v Cooper application.

The Guernsey case of Re the AAA Children's Trust[1] provided a stark lesson as to the potential consequences of a trustee failing properly to record its deliberations. The trustee in that case applied to the Royal Court of Guernsey asking it to bless a momentous decision it had made, namely to sell a family property comprising a significant part of the trust assets (described by the deceased settlor in his memorandum of wishes as "the finest jewel in the jewel box"). The trustee's proposal to sell was inconsistent with the wishes of the settlor, who had expressed in emphatic terms his desire that the property be retained until his children attain the age of 40 unless exceptional circumstances arose, coupled with an offer price so extraordinary that news of it would "reach him in heaven". In support of its application, the trustee was unable to produce to the Court minutes relating to any particular meeting at which the momentous decision to sell was actually taken (nor was there any record or explanation of the trustee's decision to market the property in the first place). Those minutes that were produced failed to refer to the settlor's memorandum of wishes, the wellbeing of the children, or any discussion as to the value of the property or what may have constituted a suitably "extraordinary" price. Instead the minutes were described as suggesting "that the decision was taken as if [the trustees] were discussing a simple investment", while the remainder of the evidence before the court amounted to emails demonstrating that a "rolling decision" had been reached over the course of time through undocumented phone calls between only two of the three trustees.

In its judgment, the Court reiterated that the test it had to apply was whether the trustee had taken into account all relevant and no irrelevant matters and had avoided reaching a decision that no reasonable body of trustees could have reached. After commenting that it was "surprising that professional trust administrators (who are charging substantial fees for their services) did not prepare a dossier of relevant information for consideration...at a meeting convened for the purpose of considering this momentous decision and that they did not convene such a meeting", the Court found that "it is impossible to discern what the Trustees had in their minds at the relevant time or times" and therefore that "it was impossible...to say that the proposed transaction should be blessed by the court".

In a more recent Public Trustee v Cooper case before the Royal Court[2], where the trustee sought the Court's blessing in respect of a decision to distribute the trust assets, the application was granted on the basis that "the documentation shows [the trustee] acting responsibly and rationally throughout, with decisions properly recorded and reasoned. Not only is their application meritorious, but a responsible trustee could not have acted otherwise on the facts available to them".

Regulatory scrutiny

While the above-mentioned cases serve as salutary reminders to trustees as to how to ensure good practice in their fiduciary record-keeping, there is another whole sphere – that of regulation – in which failings relating to written records may land a trust company in serious trouble.

All Guernsey companies are required by statute[3] to cause minutes of meetings of their directors to be recorded. With respect to trust service providers ("TSPs"), they will need to

minute meetings held in all their various capacities, including meetings of their board (for example when deciding to take on trusteeship of a new trust), meetings held in their capacity as trustee (for example when considering whether to make a distribution of trust assets), as well as meetings of the boards of any underlying companies which they administer. TSPs are further obliged to keep and preserve written records (including minutes) of trust business in order to comply, from a "competence and effective management" perspective, with the Code of Practice for TSPs published by the local regulator: the Guernsey Financial Services Commission ("GFSC").

In addition to basing conclusions as to a trust company's corporate governance on any available written evidence of its management, the regulator will also scrutinise records of decisions taken with respect to the on-boarding of clients. It will expect a trust company to be able to demonstrate that it has obtained all relevant information and taken into account all material facts relating to AML/CFT considerations before agreeing (or continuing) to engage with them. An entity may also be judged on the quality of its written reports when raising a suspicious activity report to the attention of its MLRO.

The GFSC has placed great emphasis on the importance of regulated entities, including fiduciaries, evidencing good governance and regulatory compliance through record keeping. This can be seen both in the literature it has produced (for example thematic reviews, the AML Handbook and various guidance notes) and in the public statements it has issued (alongside severe penalties) against erring licensees following enforcement action[4].

By way of illustration, one such regulated entity was criticised for having "failed to evidence its consideration of the suspicion reporting requirements on several occasions as well as documenting reasons for delays in making disclosures to the Financial Intelligence Service". In another case, the GFSC carried out a review of the minutes kept by the licensee and determined that they were "perfunctory in their nature considering the number and depth of issues discussed". After commenting that "Minutes should be an accurate and clear record of the discussion and decisions made at a meeting", it found instead that template minutes had been used, meaning that "the records of the company would not have been accurate and complete and represented a misleading record of affairs". The enforcement team further concluded that there was "no evidence that the financial sanctions targets were reviewed at any time", nor that "consideration as to the potential breach of UN, EU or Guernsey sanctions had been undertaken".

Conclusion

So what can be learnt from the above snapshot of recent Guernsey regulatory and court decisions? It is certainly the case that failing to record fiduciary and corporate governance decisions can result in a trust company being criticised and even penalised, but it seems that the degree and extent of record keeping expected is reasonable rather than excessive. A prudent professional trustee will already be meeting to discuss a proposed decision (whether momentous or not) before making it, and will be considering all relevant factors when weighing up the potentially competing interests of the relevant parties. Similarly, a diligent trustee will already be taking care in deciding which clients it should accept and how it should run its business. As long as no short cuts are taken in recording these deliberations in writing, a trustee will be recognised to be acting properly and will be protected by both the judiciary and the regulator.

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[1] Guernsey Judgment 29/2014

[2] A (as Trustee of the Trust) and R1, R2, R3. R4 and R5, Guernsey Judgment 25/2016

[3] Section 154 of the Companies (Guernsey) Law, 2008

[4] https://www.gfsc.gg/commission/enforcement/public-statements

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