

## Trust briefing: Removing a trustee

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The removal of a trustee is a significant action that can have far-reaching implications for the administration of a trust. Jersey law provides a clear framework for the removal of a trustee, but the process involves various legal principles and practical considerations that must be understood by all parties involved.

Trustees and beneficiaries need to know the legal position if the relationship between them turns sour. When is it appropriate for a trustee to step down? When should the trustee stay? Should a trustee jump or wait to be pushed? Both beneficiaries and trustees also need to understand the cost implications in choosing one of these positions.

This article explores the relevant legal principles and practical considerations to have in mind when seeking to remove a trustee under Jersey law.

### Legal framework for removing a trustee in Jersey

#### Trust instrument provisions

A Jersey trust instrument will often include provisions concerning the removal of trustees by vesting a power of removal in the settlor, a protector, or sometimes a majority of the beneficiaries.

The exercise of a power to remove a trustee is a serious step. Such a power cannot be exercised capriciously, it is subject to fiduciary duties; the key requirement being that the power can only be properly exercised if the trustee removal is in the best interests of the beneficiaries as a whole.

This means that if a power of removal is exercised but there is a dispute as to whether its exercise has been a proper one, the attempt to remove the trustee may still be subject to judicial oversight at the insistence of either the beneficiaries or sometimes the trustee.

Beneficiaries and power holders who have the ability to remove a trustee under the terms of the trust should be aware that their power to remove a trustee should not be used as a rod with which to beat the trustee into submission. That sort of exercise may be subject to judicial challenge.

#### Removal of trustees by court order

In Jersey, the legal framework for removing trustees is governed by the Trusts (Jersey) Law 1984 (the **TJL**).

Article 51 of the TJL provides that the Royal Court (the **Court**) has an overarching power to make any order concerning the appointment or removal of a trustee but the legislation doesn't provide any guidance on how that power is exercised.

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In all court applications to remove a trustee, the court will be guided above all by the beneficiaries' welfare and the competent administration of the trust. If the trustee's continued involvement with the trust is detrimental to one or both of those things, the trustee should usually resign and if they refuse, the court can be expected to remove them.

There are a number of factual scenarios that may justify a trustee's removal. These can include situations where:

- the trustee is conflicted either with its own interest or with irreconcilable duties it owes to different groups of beneficiaries;
- the trustee appropriates or deals with trust assets for their own advantage;
- there has been a breach of trust or other misconduct;
- the trustee adopts an unjustified, partisan approach in its administration of the trust, to the prejudice of one or a group of beneficiaries;
- friction with one or more beneficiaries leads to an irretrievable breakdown in the relationship;
- the trustee becomes obstructive or has demonstrated a general dereliction of its duties in its management of the trust assets and/or the rights of beneficiaries to information, accounts, distributions and so on;
- the trustee refuses to or becomes incapable of acting; or
- the trustee or trustees is/are deadlocked and cannot make decisions.

As can be seen, all of these scenarios impact upon the welfare of the beneficiaries and the competent administration of the trust as a whole. The common touchstones for removal are:

- an actual or threatened misconduct by the trustee;
- an irretrievable breakdown of the relationship between the trustee and beneficiaries; or
- a conflict of interest.

## **Examining those themes in turn:**

### **Breach of trust or misconduct**

Deliberate breaches of trust are unlikely to withstand an application for the trustee's removal. A breach of trust does not have to be deliberate to justify removal but not every breach of trust will justify removal when weighed against other factors including the gravity and nature of the breaches and the cost of the transfer of the trusteeship.

There may be strategic advantages in having the trustee remain in office (and still subject to the duties of a trustee) while a breach of trust claim is underway. This is a tactical question which requires legal advice.

### **Irretrievable breakdown In relations with beneficiaries**

While a beneficiary (or group of beneficiaries) cannot change trustees at will, an irretrievable breakdown in the relationship between the trustee and beneficiaries can justify removal.

There is a measure of friction that is sometimes to be expected between trustees and beneficiaries which will not of itself usually justify removal although it can depend on the source of the friction. This makes for a tricky area, with many shades of grey. Beneficiaries may plead breach of trust with a fallback position that a breach (even a minor one) has led to an irretrievable breakdown of relations or a general loss of confidence as a pretext to seek the trustee's removal.

There is an unfortunate perverse incentive for disgruntled beneficiaries to deliberately try to engineer a breakdown in the relationship with the trustee in order to achieve the desired removal of a trustee. The courts are aware of this and will look at who has caused (in some cases manufactured) the problem in the relationship when asked to consider the trustee's removal. Is the demand for the trustee to step down coming from all the beneficiaries? All the adult beneficiaries? Only some of the beneficiaries, or only one? Is the beneficiary a discretionary object or do they have a vested interest? When asked to step down, a trustee should consider canvassing the views of the other beneficiaries. Even where there is hostility, the hostile or dissatisfied beneficiary's interest must still be properly considered by a trustee.

It is almost inevitable that friction will make the trust slower (and therefore more expensive) to administer as the trustee deals with the beneficiary's concerns and there is greater questioning and scrutiny of the trustee's actions.

The court may still order removal, even if the cause of the disharmony with beneficiaries is unjustified, if in reality it impacts negatively on the administration of the trust. This is where it is necessary for trustees to know when to jump before being pushed, and note the cost position if it is unreasonable for the trustee to defend the application for its own removal. It is important for the trustee to engage, be seen to be reasonable when dealing with the beneficiaries, and to remember that the court's power to remove trustees protects the welfare of beneficiaries of the trust as a whole.

## Conflicts of interest

A trustee has an overriding obligation of loyalty to its beneficiaries. The court can remove a trustee who finds itself in a position of conflict – where its duty of loyalty is compromised. That can arise when the trustee finds that its own interests conflict with those of the beneficiaries, or more commonly where the trustee is caught between serving the interests of two or more beneficiaries whose interests conflict.

This latter sort of conflict can arise where a single trustee is trustee of more than one trust, with different classes of beneficiary effectively sharing the same asset. When setting up a structure like this, it is important for the trustee to have in mind what their 'exit plan' will be if circumstances change and it is not possible to reconcile the competing interests of the respective classes of beneficiary.

It is crucial for the trustee to keep the structures it manages under constant review to identify and manage any potential for finding itself in a position of conflict. The court can penalise a trustee in costs if the conflict is so obvious that the trustee should have spotted it and resigned instead of causing an application to court to be made.

## Practical considerations when removing a trustee

### Assessing the grounds for removal

Before taking any formal steps, it is important to get advice and assess whether there are genuine, valid grounds for removal.

If the trustee is acting in a manner detrimental to the good functioning of the trust, for example there is mismanagement, conflict of interest or a breach of duties, establishing grounds for removal may be relatively straightforward.

However, if the reasons for removal are more subjective, eg personality conflicts, a stronger legal basis may be needed before the court will consider the situation serious enough to justify its intervention by removing a trustee.

## Consideration of successor trustee

A Jersey trust cannot be left with no trustees. When thinking about removing a trustee, it is essential to consider who will be in a position to immediately take over the role.

Owing to the increasing complexity of regulation of professional trustees, the process of 'onboarding' a trust with a new trustee (that is, the identification of a suitable trustee who has done sufficient due diligence on the trust, its assets and its settlor and beneficiaries to be willing to act as trustee) can be a lengthy one.

If a removal application is launched without a clear plan for an immediate succession, the trust could become administratively paralysed, leading to further complications. The court will not remove a trustee if there is no suitable successor.

## Communication and mediation

In many cases, it is likely to be beneficial to communicate any concerns to the trustee first. Mediation or alternative dispute resolution (ADR) can be a less contentious way to resolve issues in the relationship, especially if the trustee's removal is due to personal or non competency-based issues. In many instances, a professional trustee may voluntarily resign if it becomes clear that irreconcilable differences will make their continued administration of the trust untenable in the longer term.

## Legal process for removal

If the issue cannot be resolved by negotiation, the next step is a formal application to the court. In Jersey law, the court will need to be persuaded that the trustee's removal is, on the evidence before it, in the best interests of the beneficiaries. Early legal advice is critical to navigating this process.

## Cost considerations

Removal proceedings can be costly and time-consuming, particularly if the trustee resists removal. It is essential to consider whether the cost and disruption of court proceedings are justified by the desired outcome.

Applications to remove a trustee by a beneficiary are classed as hostile litigation, with the usual rule that costs follow the event (ie the loser pays). Applications by the trustee and/or beneficiaries for directions as to the trustee's position are

different, as the costs in most cases will come from the fund. In both hostile and non-hostile proceedings, costs can be awarded on the standard or indemnity basis.

It is important for trustees and beneficiaries to remember that the cost risk in a removal application is in favour of the trustee. If a beneficiary makes an application seeking the trustee's removal and the trustee wins, the trustee will be entitled to its costs from the trust fund. As the loser, the beneficiary and must pay its own costs, and may be ordered to pay the trustee's costs if they are not to come from the trust fund. However, if the beneficiary wins, it will be entitled to its costs either from the trust fund or from the trustee personally, but the trustee, even though it has lost, may still be entitled to its costs from the fund if it has not acted unreasonably in the proceedings.

## Tying up loose ends

As far as the timing of a removal is concerned, there may be a good reason for a trustee to stay in office, at least for a while, and then resign. The trustee may be part-way through an important task at the time of the removal application, eg litigation, the sale or disposal of significant trust assets, a rights issue or flotation of an underlying company.

If the task being undertaken will have to be completed by a new trustee but the current trustee is best placed to see it through (factoring any time sensitivity and cost in bringing the new trustee up to speed with the relevant background) then the current trustee will often have a good argument to remain in office, at least until the task is completed. If a trustee is resolved to go at a certain point, they should say so openly to the beneficiaries.

## Indemnification, release and transition

A Jersey trustee is, by law, entitled to the provision of 'reasonable security' before it parts with any trust assets to a replacement trustee (Article 43A of the TJL).

This 'reasonable security' is for contingent liabilities that the trustee will or may have incurred in office as trustee, eg by entering into contracts, leases, guarantees, indemnities or by virtue of interacting with the world at large, and of course, tax. What 'reasonable security' is required will depend upon the nature of the liabilities, the nature of the trust assets and their location. The usual form of reasonable security is a contractual indemnity from the continuing or incoming trustee(s).

Beneficiaries often balk at the notion of a trustee they wish to remove being given 'indemnities', particularly where the relationship with the trustee has become fractious and hostile. That is particularly so where there is a concern about preserving claims for breach of trust. It is important to understand that the reasonable security to which a removed trustee is entitled is nothing to do with the liabilities that may exist between that trustee and the beneficiaries arising from the trustee's conduct while in office.

When negotiating the transition between an outgoing and an incoming trustee, reasonableness is the name of the game. The trustee is entitled to reasonable security for liabilities and the incoming and outgoing trustee should behave reasonably in the transitional arrangements. A court application for directions is always a fallback where agreement cannot be reached and the court will usually support a trustee who has acted reasonably. However, the court can penalise unreasonable behaviour in costs.

## How can Collas Crill help?

Collas Crill has decades of experience helping beneficiaries and trustees negotiate a smooth transition between trustees. Our experienced disputes specialists can help navigate the swiftest path to resolution through negotiation or, if necessary, the court process.

Please get in touch with us if you would like advice in this area. Seeking early counsel can help smooth the path of transition with minimal ongoing disruption to the trust.

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