COLLAS CRILL

'Trust me': What to inspect when you are expecting... a trust

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The 'Trust me' series from Collas Crill's Guernsey International Private Client and Trust team is intended to highlight key considerations and provide practical pointers for professional trustees and corporate service providers on a variety of topics.

When taking on new business, whether it be establishing an entirely new structure or the appointment as new trustee of a long-standing trust, there are a plethora of issues for a trustee to consider. In this guide we aim to highlight a few that we frequently see to assist trustees in avoiding potential pitfalls.

DORAs/IORAs:

Trustees will be familiar with the use of an instrument of retirement, appointment and indemnity (commonly known as a DORA or IORA) for transfer of trusteeship. A DORA/IORA will usually follow a fairly standard format, but there is no 'one size fits all'. Common errors we see occurring in DORA/IORAs are:

- Incorrect powers used/incorrect person appointing the new trustee. If a trustee has not been validly appointed it can cause all subsequent actions of the 'trustee de son tort' to be invalid. When discovered some months or years down the line, this can have a significant and detrimental impact on all the parties related to the trust. Ultimately, this can end in lengthy negotiations or a costly and time consuming application to Court.
- Indemnities granted to a retiring trustee providing either insufficient protection from liability or being unreasonably wide in scope. Indemnities provide important protection for a retiring trustee and a retiring trustee should ensure they are satisfactorily protected. Conversely, new trustees should ensure that any indemnities they agree to provide contain reasonable limitations.
- Chain indemnities for previous trustees being missed, leaving the retiring trustee in breach of its own obligations.
- Lack of protector consent. This could invalidate the appointment of a new trustee, with same issues highlighted above.

For such a significant step in a trusts 'life', it is always prudent to have the DORA/IORA prepared or reviewed by legal advisers.

'Healthcheck' of the trust records and key agreements/arrangements:

A full review should be carried out of all key documentation and records. Examples include:

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- The trust instrument and all supplemental trust instruments.
- Agreements and contracts. For example: loan agreements, service agreements, lease agreements, investment management agreements and any other contractual arrangements in place.
- Annual accounts prepared by the previous trustee. If there are none, at a minimum copy financial ledgers should be sought (noting a trustee's duty to keep accounts under the Trusts (Guernsey) Law, 2007).
- Copies of all tax and regulatory filings made.
- All Power of Attorney issued.

A review of all documentation should provide a clear understanding of the structure, all associated parties and the scope of powers of third parties. It could highlight at the outset potential issues the trustee may need to address and if professional advice is required.

A clear understanding of the trust's assets should also help to ensure the new trustee properly receives and takes control of those assets. A common issue seen is the failure to assign the benefit of existing loans from the outgoing trustee to the incoming trustee. Guernsey has no statutory provision for automatic vesting of trust property (as exists in other jurisdictions), so specific action is required to ensure all assets are properly vested in any new trustee.

We know that some trustees use 'take on' checklists as part of the on-boarding process. While it is not possible to cover all eventualities in such lists, it could be a practical and very useful aide memoire of issues to consider.

Consider the impact of any background known

For example:

- Is the structure or any key person party to any on-going or potential litigation that the trustee may be drawn into?
- Are there any family disputes that could impact the trust?
- Are the assets of a nature that may be problematic for a trustee to hold?
- Are there any jurisdictional complications e.g. is a beneficiary intending to move to the US?
- What, exactly, does the business underlying the structure do?

Such information should flag to the trustee at the outset the actions it might be required to take or be drawn into. This might also have a practical impact on fee levels proposed to a client at take on stage. In the extreme, information that comes to light may even necessitate the trustee turning down the new business.

CDD/KYC

All trust professionals are (or should be) aware of the CDD/KYC requirements incumbent upon them. Doing the leg work to gather all necessary information and documentation at the outset is not only ensuring good regulatory compliance, but also giving the trustee a full picture of the trust they will be administering.

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Plan ahead

It is prudent to meet with the family or ultimate client at the outset and any advisors already on board to gather as much information about the structure as possible. For example:

- What is known about the beneficiaries and their potential financial or wider requirements?
- Is a letter of wishes needed?
- Was the establishment of the new structure based on sound tax advice? If any tax advice was obtained, it is sensible to ensure that the trustee is permitted to rely on that advice if not addressed to the trustee themselves. All such advice should be reviewed, to make sure the on-going administration of the trust complies with tax requirements.

In our experience...

We become involved in a whole host of situations that can befall trustees when taking on new trusts. Some come about due to lack of planning and diligence (not always on the trustee's part) and some are just sheer bad fortune. In our experience, taking the time to review and work through each aspect and taking advice where felt appropriate - at an early stage - should all help to mitigate trustee risks in this area.

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