

# Collas Crill explains... The duties of a trustee under Guernsey law

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## What is a trustee?

A trust exists if a person (a "*trustee*") holds or has vested in them, or is deemed to hold or have vested in them, property which does not or has ceased to form part of their estate for the benefit of another person (a "*beneficiary*"), and/or for any purpose, other than a purpose for the benefit only of the trustee. [1] A trustee is therefore a person (an individual or entity) that holds or has vested in them property for the benefit of beneficiaries (or furtherance of purposes).

## What are a trustee's core duties?

The powers vested in trustees are of a fiduciary nature, meaning a trustee must, in the exercise of its functions, observe the utmost good faith and act *en bon père de famille* ("like a good father"). [2] A trustee must also act as a prudent person of business, including a duty to act with reasonable skill and care.

A trustee must execute and administer the trust, and exercise its functions under the trust in accordance with the Trust Law, the terms of the trust instrument and only in the interests of the beneficiaries or advancement of the purposes (as relevant). [3]

## Does a trustee have any specific duties under Guernsey law?

Sections 22 to 29 of the Trust Law set out the statutory duties of trustees of Guernsey law trusts. In summary:

- Section 22 – General fiduciary duties – as described above.
- Section 23 – Duty to get in and preserve trust property: Ensuring that trust property is held by the trustee or vested in them/under their control and to preserve and enhance, so far as is reasonable, the value of that property.
- Section 24 – Duty not to profit: This is subject to certain exceptions, including where expressly provided for in the trust instrument. This is the reason Guernsey law trust instruments must contain a trustee charging (remuneration) clause to enable a professional trustee to charge for their services.
- Section 25 – Duty to keep accurate accounts and records.
- Section 26 – Duty to provide information: Duty to provide full and accurate information as to the state and amount of the trust property at the written request of certain parties and covers applications to the Royal Court for the provision of information.

- Section 28 – Duty of co-trustees to act together.
- Section 29 – Impartiality of trustees: Where a trust has more than one beneficiary or purpose (or a beneficiary and a purpose) the trustees shall not execute the trust for the advantage of one at the expense of the other.

Note, however, that it is common practice in modern Guernsey law trust instruments to expressly exclude the application of the more onerous duties, where the Trust Law allows. For example, section 23(b) (duty to preserve and enhance), 26(1)(b) (duty to give information), 29 (duty to be impartial) are frequently disapplied.

There is also a strong body of case law in Guernsey and in England and Wales (the latter being persuasive in Guernsey) providing some colour to the statutory duties and supporting and defining the roles and duties of trustees.

### What must a trustee do to ensure they comply with their duties?

Trustees should always observe the terms of the trust instrument to ensure they act within the scope of their powers and obtain any necessary consents (such as protector or enforcer consents). It is important to review and understand the trust instruments themselves. The trust instrument often provides invaluable information such as the scope of the beneficial class, the scope of powers and scope of trustee liabilities. For reasons outlined above, a professional trustee charging for their services should review the trust instrument to ensure they are permitted to be remunerated. It is also worthwhile checking the trust instrument for exclusion of the statutory duties, as mentioned above, as this may inform how a trust should be administered.

Alongside this, trustees should be mindful of any letters of wishes. Whilst these are non-binding, a trustee may leave themselves open to criticism if they depart from the provisions of a letter of wishes without good justification.

Regulated fiduciaries must of course be consistently aware of and compliant with their regulatory duties. Note that the Guernsey Financial Services Commission has relatively recently introduced The Fiduciary Rules and Guidance, 2020. Ensuring robust compliance and administrative processes and procedures can assist with this. Consistent and accurate record keeping, including detailed resolutions, formal accounting records and the execution of instruments to formalise the exercise of a power (where necessary), are some key examples.

Adequate training of employees is important, to ensure all understand their duties and responsibilities (both in law/regulation and practically in relation to particular trusts).

Good communication with beneficiaries and other parties to the trust (such as settlors, protectors, investment managers) helps to make sure the trustee receives the information they need to ensure the smooth (and compliant) administration of a trust.

It is important to take professional advice where required (for example, legal or tax advice). In our experience, it is easier (and therefore more cost effective for all involved) and will mitigate trustee risk to address existing or potential issues at an early stage by seeking the relevant advice.

[1] Section 1 of the Trusts (Guernsey) Law, 2007, as amended (the "Trust Law")

[2] Section 22(1) of the Trust Law

[3] Section 22(2) of the Trust Law

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