Briefing

BURGES SALMON

Private Client and Wealth Structuring

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Are you sure you are a trustee?

Many trustees reading this article may be a little bemused by its title. 'Yes, of course we are!' will be the common response. And in most cases they would be right. But, in a surprisingly large number of cases, trustees may find they are not the trustees of a trust when they believed that they were - or at least not the validly appointed trustees.

Changes of trustee are common for many different reasons. Settlors or beneficiaries may want to change trustees because they think the current fees are too high or because they don't like the actions (or omissions) of the existing trustees. Sometimes changes take place to avoid adverse tax consequences by virtue of the trustee's residence in a specific jurisdiction. In other cases the trustee wants to resign, whether because it is no longer commercial for them to run the relevant structure or because they are moving out of a certain jurisdiction or no longer comfortable with a certain asset class. Whatever the reason, a document will be prepared to change the trustee.

Whilst changing trustee may sound like a simple exercise (particularly if the outgoing trustee is happy to resign or be removed), there are many potential pitfalls. We frequently come across structures where a trustee was not effectively removed or appointed which can have significant consequences both for the relevant trustees and, in some cases, for the beneficiaries.

So what are the common pitfalls?

1. **Who has the power to change trustee?**

   Trust documents often expressly provide who has the power to appoint new trustees and/or remove existing trustees. Where there are express powers, by and large (although not always) the right person will exercise the power on a change of trustee. If the trust document does state who has these powers and someone else purports to exercise them, the change of trustee will be ineffective.

   Issues are more likely to occur where more than one person has the power to appoint or remove in different circumstances or where there are notice periods that need to be complied with. For example, it is common to see cases where the trustees from time to time have the power to appoint new trustees on giving X days' notice to the settlor/protector with a subsequent provision that gives the settlor/protector the power to appoint and remove trustees which is stated as taking precedence over all other provisions. In these cases working through the provisions carefully is essential to make sure it is clearly understood how they interact.

   Issues can also arise where the trust document is silent and therefore the position is determined under the relevant governing law. It is always sensible to check the provisions of the relevant governing law again, no matter how sure you are that you know them!

2. **Who needs to consent?**

   Failure to obtain consent (or to obtain consent in the right way) is a remarkably common pitfall. If the trust document provides that X must consent to the change of trustee, then X must consent. But that isn't all. If the document provides that X must provide prior or simultaneous consent then consent after the event won't suffice. Similarly, if the document provides that X (the person whose consent must be sought) must be given a set amount of notice or informed in a certain way, these procedures should be followed (or if that isn't possible, the consenting party should acknowledge and waive, for example, the lack of notice).

   It is also important to ensure the consent is given in the correct format. If the trust provides that consent must be in writing, verbal consent won't suffice. Even if the document doesn't provide that consent must be in writing, think carefully as to how you would evidence that consent had been obtained if it isn't in writing. Pressure to keep the process moving can be difficult to resist but making sure you can evidence that you complied with the requirements in the trust document is essential in the event of a future dispute.

3. **Are there any requirements regarding the number of trustees?**

   Again, this is a pretty common issue. The first step is to check whether there are any specific provisions in the trust document regarding the number of trustees. If the trust document provides there must always be (for example) at least two trustees, this requirement cannot be ignored.

   Most modern trusts will include provisions allowing for a sole corporate trustee, regardless of whether that trustee is a trust corporation under local law. However, older trust documents may still require two trustees unless the sole trustee is a trust corporation. If the trust is governed by English law, there are very few trust companies that are trust corporations for these purposes but this is a point that is often overlooked. There is a similar issue that can arise in relation to Cayman law trusts established before 1998 and therefore this isn't simply an issue to consider in relation to trusts governed by English law.

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4. **Are there any requirements regarding the location of trustees?**
   It is perfectly usual for trustees based in one jurisdiction to be trustees of trusts governed by a different proper law. It is so common that it is often assumed that there are no restrictions in doing so. However, this isn't always the case. In some cases, particularly involving older trusts, there will be restrictions in the trust document, for example requiring at least one of the trustees to be based in X jurisdiction. There may be ways around these provisions depending on the other powers in the trust document but simply ignoring the requirements is not an option.

5. **What sort of document is needed?**
   Again, as with all of the other points raised above, the first step is to carefully read the provisions in the trust document, and take legal advice where necessary. If the trust document states that the change of trustee must be by deed, the change of trustee must be by deed in order to be effective.

   The issue can arise where, for example, a Jersey or Guernsey based trustee is trustee of a trust governed by English or Isle of Man or Cayman law and the trust provides that changes of trustee must be by deed. Neither Jersey nor Guernsey law recognise the concept of a deed to mean the same as it does under the laws of England, Isle of Man and the Cayman Islands. A written instrument is sufficient to comply with a requirement to be signed by deed under Jersey or Guernsey law but will not suffice under English, Manx or Cayman law. We have seen many cases where a written instrument has been entered into to change trustee of an English or Isle of Man law trust which specifically provided for changes to take place by deed. In these circumstances the purported change of trustee is ineffective, with the new trustee never properly appointed and the intended retiring/removed trustee remaining as trustee.

6. **Has the document been executed properly?**
   Sometimes a document has been perfectly drafted and the fall comes at the final hurdle - executing the document correctly.

   Have the correct parties signed the document in the correct places? Have signatures been witnessed where necessary? No matter how clear the instructions a professional trustee or its lawyers give when sending documents to clients for signing, there will always be cases where the document comes back signed in the wrong place, or not witnessed when it needed to be witnessed (or worst still asking the trustee/lawyer to witness the signature that they clearly didn't witness!). There is nothing that can be done about these cases, other than persevering until everyone gets it right. However, it is important to check the document has been signed correctly before you go ahead and date it and file it away - it is easy to assume the right person will have signed in the right place and only discover your mistake at a much later date, when it might be much more difficult to put it right.

None of the above points are particularly novel or profound but they are all very important in practice. Remaining as a trustee of a trust when you thought you had retired 10 years ago, or acting as trustee of a trust where you have never been appointed as such (and at best are acting as *trustee de son tort*), can be a very uncomfortable place to be and can have serious ramifications for both trustee and beneficiaries.

Burges Salmon advises on all areas of international trust law and practice. We frequently advise on trustee changes and on putting things right where problems have arisen in the past.

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