

# COVID-19: The impact on trustees.

As the Isle of Man looks forward to a “new normal” following the almost complete eradication of COVID-19, Isle of Man trustees will likely breathe a (hesitant) sigh of relief as business in the Island’s trust and corporate services industry starts to resemble something closer to what it looked like prior to the pandemic. In this article we take a look at the challenges that trustees will have dealt with over the last few months together with ongoing issues they may face as we (hopefully) continue to move towards business as usual.

## The impact of COVID-19 on trustees

Regardless of the effect on day to day business life during the height of the pandemic on the Island, trustees were of course required to continue to manage trusts in accordance with the duties owed to trusts and beneficiaries as a whole.

Carrying out those duties will have been made all the more difficult by the practical effects of COVID-19.

Here is just a short list of some of the problems that trustees may have faced:

- The inability to hold trustee meetings in person;
- The inability to meet clients in person (including settlors, beneficiaries and protectors);
- Difficulties in obtaining the necessary KYC for new trust clients;
- The inability to physically sign documents;
- Difficult investment market conditions;
- Fluctuations in the value of trust property;
- Difficulty in obtaining lending;
- Concerns regarding the ability to pay debts;
- Delays in being paid by debtors; and
- The potential frustration of contracts.

Whilst it is hoped that the impact of those issues will start to lessen as time goes by, trustees may wish to use this time to take stock of the position of their trusts and consider ongoing challenges that they may face and the steps they can take to manage those issues.

## New trust objectives

As a result of the pandemic, the longer-term objectives of trust structures may be out of date. For example, families that previously wanted to provide income over the life of beneficiaries may now be in need of capital distributions to compensate for weakened financial positions that were not anticipated prior to the pandemic. Alternatively, there may be a greater focus by settlors on successful asset protection for future generations having witnessed the almost over-night effect of the pandemic on some asset values.

Trustees should consider having discussions with their clients to obtain up to date views on their objectives in light of the effects of COVID-19 and thereafter consider whether any steps are required to be taken as a result. In doing so, trustees must of course be guided by their powers under the trust deed and their duty to act in the interests of the trust and beneficiaries as a whole.

## Competing beneficiary interests

In addition to new objectives, trustees may now also be faced with clients that have competing interests or different views on the purpose of their structure.

Whilst trustees are not required to follow the wishes of settlors and beneficiaries and they must in fact make their own decisions in respect of any issue (following professional advice, if necessary), competing views from beneficiaries may make the running of the trust, on a practical level, very difficult for trustees.

For example, one beneficiary may request that the trust is wound up and the assets distributed whilst other beneficiaries may wish the trust to continue in place. In such circumstances, it may be necessary for trustees to consider applying to the Isle of Man High Court of Justice pursuant to section 61 of the Trustee Act 1961. Under this legislative provision, trustees can apply to the court for its opinion, advice or direction on any question concerning the management or administration of the trust property.

Provided that the trustee has acted properly in making the application to court, the trustee will be deemed to have discharged its duty in connection with the matter in which the court’s assistance was sought. Whilst trustees cannot simply put any problem they have before the court, there are circumstances where it is appropriate, and in fact in accordance with the trustee’s obligations to act in the best interests of the trust, for the court’s assistance to be obtained.

## Investments

It is often the case that the trust deed will provide trustees with a wide discretion to invest trust assets as they see fit. However, the unpredictable effect of COVID-19 on global financial markets will likely have made a trustee's ability to make an accurate assessment of the investments it is responsible for much more difficult.

If they have not done so already, trustees should obtain up to date valuations of the investments they hold, consider them in light of the up to date objectives of the trust and determine whether expert advice should be sought. Regard should be had by trustees to their investment review obligations as set out at Part 2 of the Trustee Act 2001.

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## Underlying companies

It is extremely common for trust structures to involve trustees holding shares in companies; those shares forming part of the trust fund held by the trustees for the benefit of the trust and the beneficiaries as a whole.

It can be expected that, where a trustee holds shares in an underlying company, they will have made an assessment that the directors of the company have the necessary professionalism, skill and expertise to manage the companies for the benefit of the trustee as shareholder of the company.

However, this does not mean that trustees are thereafter absolved from any responsibility for the performance or well-being of the company. If the company suffers losses, trustees may be in breach of trust if they failed to interfere in the company's management and the directors' actions would have been a breach of trust if undertaken by the trustees. This will be highly dependent on all the circumstances of the case, including the type of company, and what a reasonable and prudent trustee would have done. For example, trustees would usually be expected to take a greater interest in investment companies (as the holding of investments is, as noted above, common for trustees) as opposed to a trading company.

Either way, trustees cannot simply shut the door to any responsibility for underlying companies unless there is an effective so called "anti-Bartlett" clause in the trust deed which is wide enough to exclude the duty of trustees to supervise or intervene in the business affairs of underlying companies. Careful consideration needs to be given to the drafting of anti-Bartlett clauses and the wider terms of the trust deed before trustees seek to rely on such a clause to exclude liability.

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## Powers and indemnities

The wide ranging and un-expected effects of COVID-19 may mean that trustees are being required to consider courses of action that were not previously anticipated or that they would not have considered in ordinary circumstances. For example, trustees may be asked to consider making riskier investment decisions or to accept lending from non-traditional lenders.

Trustees should double check their trust deed to ensure whether they have the necessary powers to take such decisions and whether those decisions fit within the trustee's overriding duty to the trust and beneficiaries as a whole. They should consider what indemnities they already have in place with their clients and/or in the trust deed and whether further specific indemnities are required for particular courses of action.

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## Requests for information

As a result of all the uncertainty caused by the pandemic, trustees may have found, and may continue to find, that the contact received from beneficiaries is increased where beneficiaries may now wish to take a closer interest in the affairs of a trust that they will or may benefit from. Trustees may therefore find themselves faced with more requests for information and copies of trust documents.

As always, trustees will need to exercise care in understanding what documents beneficiaries are entitled to. The starting position is that beneficiaries have a right to seek disclosure of trust documents from the trustees. However, there are no documents that beneficiaries have an absolute right to obtain and it depends on the category of documents sought and the particular circumstances of each case. For example, a beneficiary will usually be found by a court to be entitled to trust accounts whereas it would be very rare for trustees to be required to disclose notes of their deliberations.

## Books, records and advice

Whilst it has always been necessary for trustees to maintain good books and records, it might be said that particular focus should be placed on this as a result of COVID-19.

As noted above, trustees may receive more contact from beneficiaries, may have to consider competing interests and may have to make more difficult and unexpected decisions. Trustees would be well advised to make detailed and thorough notes on matters that arise as a result of the pandemic, their deliberations on the same, any advice taken and ultimately the decisions made.

The need to obtain third party advice including from lawyers, accountants, valuers and financial advisors may also be heightened in these uncertain times.

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## Conclusion

As noted at the beginning of this article, while there will likely be some optimism among trustees on the Island, the wide-ranging effects of the pandemic on trustee business will likely last for a period of time.

As the Island and its finance industry seeks to get back to some level of normality, trustees would be well advised to take stock of the trusts they are in control of, consider how the pandemic has affected their ability to act in the interests of beneficiaries and trusts as a whole and what adjustments and/or actions are needed to assist the trustees in managing their trusts against this new landscape.

For more  
information  
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