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The role of trustee, while undoubtedly interesting and rewarding, can also be a hugely onerous one in that it attracts a range of risks and gives rise to problems that cannot always be easily managed or resolved. These problems can increase in their scope and complexity for trustees who hold a mandate to manage structures with multiple layers of entities and assets located around the world. Finding a solution to the more knotty trust problems can be an arduous and costly task, and require different steps – and the use of different processes or procedures – across different jurisdictions. Below, we compare examples of just some of the types of problems encountered by trustees and potential solutions available in the Cayman Islands (Cayman), with those that commonly arise in England and Wales.

England and Wales

1. Types of problems encountered

- Trustee mistakes
- Attacks by third parties
- Defective trust instruments
- Internal attacks

2. Trustee mistakes

Potential problems	Solutions
Unintended tax consequences as the result of a disposal.	The leading case relevant to these situations is <i>Pitt v Holt/ Futter v Futter</i> , which was heard by the Supreme Court in 2013. If the tax charge is a result of a failure by the trustee to take its decision properly, then (provided the trustee accepts that it has committed a breach of trust) an application may be made to have the transaction set aside. If the trustee did take advice, but the advice was negligent, this remedy (known as the <i>Hastings-Bass</i> principle) is not available.
Unintended tax consequences as the result of a declaration of trust.	If <i>Hastings-Bass</i> -type relief is unavailable, a trustee (or indeed settlor, if it is the creation of the trust itself which caused the problem) may be able to apply to court to have the relevant transaction set aside on the grounds of mistake, following principles laid down in <i>Pitt</i> . The mistake must be causative and basic to the transaction, and it has to be sufficiently serious to make it unconscionable or unjust to leave the mistake uncorrected.
Defective execution of a power by trustee.	Where the mistake is not the trustee's alone, trustees may also have to consider bringing professional negligence claims against advisers whose advice was defective. In that case, careful attention must be paid to limitation periods and clarifying the parties to whom duties of care were owed, who has suffered loss, and who can properly bring claims. If the defective execution is merely a matter of form an application can be made to court under its inherent jurisdiction to ensure the transaction is perfected.

3. Attacks by third parties

Types of attacks	Responding to attacks
Actions brought by creditors of beneficiaries: claims against trust assets in the event of the insolvency of a beneficiary.	Under section 423 of the Insolvency Act 1986 the court can on the application of a creditor set aside transactions, including the settlement of assets onto trust, if the purpose was to put assets beyond reach of someone who might bring a claim, or otherwise to prejudice their claim. The lookback period is unlimited in time. Trustees faced with such an application may consider it appropriate to apply to court for directions before taking substantive steps in the proceedings. If a beneficiary with powers in relation to a trust is the subject of a judgment against him which is enforceable in England, the English court may (subject to certain considerations) potentially appoint a receiver over those powers if that would facilitate enforcement of the judgment debt.
Actions brought by creditors of the settlor: claims that the settlor did not truly transfer ownership of trust assets including to the extent that the trust is a "sham", or transferred the assets into trust to put them out of reach of creditors in breach of insolvency legislation.	There are no firewall provisions under English law: the enforcement of judgments (including foreign judgments) against trustees will be a matter to be decided on the facts having regard to the rules applicable to that particular claim, including, in many cases, English public policy. The English court is reluctant to interfere with the rights of trustees and their beneficiaries unless presented with clear evidence of fraud or other wrongdoing, but it has shown itself to be intolerant of trusts which appear designed to enable the settlor to retain practical control whilst giving the appearance of surrendering beneficial ownership. As a general rule, trustees faced with accusations of sham should marshal evidence of their independence from the settlor.
Actions brought in relation to proceedings involving beneficiaries: claims in relation to English financial remedy proceedings to vary trusts in order to require provision to be made for the benefit of one or both divorcing spouses.	Variation orders in matrimonial proceedings will, of course, be enforced by an English court against English-resident trustees or English assets. Foreign trustees of English law trusts should give consideration as to where assets should be held in light of this, and any trustee who is sought to be involved in or joined to English matrimonial proceedings should seek directions from their home court as soon as possible.
Estate disputes: claims brought on the death of a settlor as to whether trust assets fall into his or her estate, whether because of forced heirship or proprietary estoppel or other claims, and how the assets should devolve.	Specialist advice should be obtained by any trustee who is the subject of proprietary estoppel or forced heirship claims as the trustee must avoid taking a stance which makes it vulnerable to pay costs of proceedings personally. As to forced heirship claims in particular, the English court may (depending on the facts and the jurisdiction in which the judgment was obtained) refuse to enforce foreign judgments on such claims on grounds of public policy, but the law on this issue is complex.

4. Defective trust instruments

Common issues	Possible solutions
Lack of clarity in drafting.	Apply to court for a declaration as to the proper meaning of the trust deed. The trustee will need to set proceedings up so it can remain neutral and have beneficiaries (or representative beneficiaries) argue for particular constructions.
Failure of drafting to achieve intended result.	Consider whether rectification of the trust deed is available. If there is an error in the drafting of the trust deed it may be possible to obtain an order rectifying the deed if there is sufficient evidence as to the settlor's true intentions and the fact that the trust deed does not achieve them.
Lack of a necessary power.	Examples include where a trustee lacks a power of sale and it is imperative that the trust property be disposed of. In such cases the trustee can apply to court for an order under section 57 of the Trustee Act 1925 giving the trustee the relevant administrative power (but not dispositive power) if it is necessary and expedient.
Unanticipated tax charge.	It may be appropriate to vary the trust under the Variation of Trusts Act 1958. Consent of all adult beneficiaries must be obtained and the court must be satisfied the variation is in the best interests of minor and adult beneficiaries. The question whether such applications may be made in private is nuanced and so careful thought needs to be given to any potential publicity which the application may attract.

5. Internal attacks

Examples of attacks	Examples of responses
Allegations by beneficiaries of breach of trust, especially investment loss claims.	Trustees faced with investment loss and other breach of trust claims should consider their position carefully, ascertain likely liability of themselves or third parties, and be mindful of protecting privilege in any advice they obtain on the merits of any claim. Consider requests for information impartially. Do not assume that information has to be provided, particularly if the motives for the request are suspect or overtly hostile. Record reasons for any decision reached, even if those reasons are not shared with the beneficiary concerned, and be prepared to justify the position taken in court or, if necessary, apply for directions. Trustees should keep a cool head – respond to the correspondence from the disgruntled beneficiary calmly, reasonably and carefully, and consult extensively with the other beneficiaries and any protector. Equally, trustees should not cling to office unnecessarily if the beneficiaries have reasonable grounds for wanting a trustee to be removed, and if they become aware of a conflict of interest they should take proactive steps to resign or face potential costs sanctions. Similar considerations apply to protectors. The English court encourages alternative dispute resolution and the trustee should be proactive in proposing alternatives to litigation, including mediation which is particularly well-suited to multi-party trust disputes.
Applications by beneficiaries to enforce rights under a trust: commonly applications for the provision of trust information, potentially in the build up to a claim for breach of trust or an application for removal	
Applications by beneficiaries to remove a trustee.	
Applications by beneficiaries to remove a protector.	

6. Top tips

- Keep thorough records, particularly of decision-making by the trustee. All relevant factors should be taken into account when making decisions to ensure that the trustee is acting in the best interests of the beneficiaries. Demonstrate independent decision-making and occasional refusal of beneficiary requests to protect against allegations of sham.
- Take advice to ensure the trustee properly understands the extent of its duties and powers, the scope of its duties in the particular situation to act rationally, honestly and in good faith, and the relevant matters which should be taken into account, or irrelevant matters which should be ignored.
- Consider applying to the Court for approval under *Public Trustee v Cooper* if there is a momentous decision to be made, especially if it is controversial, and bear in mind the possibility of applying pre-emptively for directions in the event the trustee's role is question or it is being placed in an impossible position.
- Take professional advice on the tax consequences of decisions (and, where practical, ensure the beneficiaries have done the same), and expert investment advice and ensure regular consideration of the performance and risk profile of investments made using trust assets.
- Maintain constructive communication with the beneficiaries and other relevant parties. Remaining up to date on a beneficiary's situation will help resolve any issues that arise faster and will inform a trustee's decision making.

1. Types of problems encountered

- Trustee mistakes
- Attacks on a trust by third parties
- Defective trust instruments
- Allegations of breach of trust

2. Trustee mistakes

Potential problems	Solutions
Transaction involving the trust triggers unintended tax liability.	An application may be made to the Grand Court of the Cayman Islands on the grounds of mistake in order to set aside the problem transaction. Statutory <i>Hastings-Bass</i> provisions can now be found in section 64A of the Trusts Law (2020 Revision) and allow the setting aside of the exercise of a fiduciary power in whole or in part or subject to such conditions as the Grand Court thinks fit. No breach of trust or duty needs to be established.
Voluntary dispositions are made in error, based on misunderstandings.	Section 64A is also a helpful tool to resolve this issue. Depending on the class of beneficiaries, the size of the voluntary disposition, and the terms of the trust deed, the parties may also be able to resolve the issue outside of court, through reliance on or negotiation of indemnities and releases or settlements with third party service providers.
Trustee fails to obtain consent or approvals prior to implementing change.	If the failure was simply a mistaken exercise of a fiduciary power and the consensus between the parties is that the Court can and should provide a remedy, then section 64A will again be of assistance. However, if bad faith or breach of duty is alleged then the trustee may face a breach of trust action, and find itself a respondent to a writ action by the beneficiaries before the Grand Court. A reminder that, to avoid these scenarios, trustees have access to the <i>Public Trustee v Cooper</i> doctrine to seek prior approval/sanction of momentous decisions, and that exoneration, anti-Bartlett and limitation of liability clauses in the trust deed may have a role to play.

3. Attacks by third parties

Types of attacks	Responding to attacks
Claims by creditors to trust assets: Cayman trustee is usually joining to these proceedings, including as part of foreign estate, bankruptcy, or matrimonial proceedings.	Cayman's firewall provisions, found at sections 90-94 of the Trusts Law (2020 Revision), have a role to play in that they broadly provide that Cayman law must be applied in relation to certain questions and that an order of a foreign court in respect of a Cayman trust will not be recognised if Cayman law is not applied. Steps should be taken to confirm where assets of the trust are located and consider whether advice is needed in those jurisdictions.
Allegations of sham: Claims by creditors or family members/ former spouses of the settlor that the trust is a sham, or assets have been placed into trust to evade creditors.	It is important to review the settlor's reserved powers and confirm they are consistent with section 14 of the Trusts Law (2020 Revision), which expressly provides for the reservation of specific powers to the settlor and confirms that their inclusion does not invalidate the trust. Consider also the operation of Bankruptcy Law (1997 Revision), or the operation of the Fraudulent Dispositions Law (1996 Revision) to confirm that assets were not transferred into trust with an intent to defraud creditors or at an undervalue. Consider seeking declaratory relief in the Grand Court that the trust is valid.
Forced heirship disputes: Claims by heirs of the settlor based in other jurisdictions to trust assets.	In addition to relying on the firewall provisions explained above, consider applying for directions from the Grand Court as to whether to submit to jurisdiction of the foreign court for the purposes of defending the foreign proceedings and for <i>Beddoe</i> relief authorising the payment of the trustee's costs from the trust fund in doing so.
Estate disputes: Claims to trust assets by beneficiaries of the settlor's estate, usually on the basis of undue influence or incapacity of the testator.	Undue influence and incapacity is usually very difficult to prove, but the Grand Court will follow the tests set out in the English case of <i>Re Beane</i> deceased. The Trustee may also apply for directions from the Grand Court under section 48 of the Trusts Law or Grand Court Rules Order 85 as to how to proceed/respond to such an attack on the trust.
Enforcement of foreign judgments: Foreign judgment creditor seeking to enforce over trust assets.	Where a party is seeking to enforce a foreign judgment, the Foreign Judgments Reciprocal Enforcement Law (1996 Revision) applies although it presently only extends to judgments from Australia and its external territories. Judgments from all other countries are enforceable at common law; a creditor can sue on the judgment debt as an unpaid debt obligation in a fresh proceeding brought in the Cayman Islands.

4. Defective trust instruments

Common issues	Possible solutions
Ambiguous drafting.	Consider a construction application to the Grand Court under section 48 of the Trusts Law for a declaration as to meaning and effect of the provision(s) in question.
Trustee not properly appointed due to lack of formality or a technical issue.	If all of the necessary parties are available and consent, ratification may be sufficient. Where the issue is discovered later and the appointment is challenged or dispositions have been made by a trustee not properly appointed, directions of the Grand Court should be sought.
An amendment or variation is required but there is no power to amend or vary the terms of the trust leading to assets being held in an inflexible structure where effective administration may be difficult or significant and detrimental issues are encountered.	If all beneficiaries are adults and have capacity, a variation on the basis of the rule in <i>Saunders v Vautier</i> may be possible. If more appropriate, an application to vary the trust pursuant to section 72 of the Trusts Law (2020 Revision) may be made provided the variation is 'not to the detriment' of the beneficiaries. Section 63 of the Trusts Law, which allows the Grand Court to confer on trustees certain powers not contained in the trust deed on the grounds of expediency in the management and administration of the trust, may also be helpful.
Purposes no longer suitable or their execution obsolete (Cayman STAR trusts).	Apply to the Grand Court to reform purposes of a STAR trust cy-près pursuant to section 104 of the Trusts Law.

5. Internal attacks

Examples of attacks	Examples of responses
Allegations by beneficiaries of breach of fiduciary duty or breach of trust.	Trustees should take immediate steps to understand the allegations made against them, the history of the trust and the extent of their exposure to liability (and take legal advice on those matters).
Application for removal of trustee by beneficiary.	Trustees should pursue any obvious strong defences to breach of trust claims based on the terms of the trust such as limitation or exoneration provisions and <i>anti-Bartlett</i> clauses. A trustee may consider it appropriate to apply to Court for directions of its own volition (including an application under the Confidential Information Disclosure Law (2016 Revision)) or to file a defence to an application by beneficiaries or protector/enforcer. If relationships have irretrievably broken down, a better step may be to proceed to negotiations for an amicable resignation and appointment of a replacement trustee. Determine whether an all-parties meeting or mediation might assist, or if a restructuring exercise may be of benefit where the situation involves family tension or disputes.
Proceedings by Enforcer of a STAR Trust to enforce the trust.	
Requests for disclosure of trust information as a preliminary step in respect of a claim against the trustee.	

6. Top tips

- Keep accurate and up to date trust records, including as to the location of the trust assets, as these are likely to be critical in the context of responding to any and all attacks. Record all decision-making carefully in internal trustee minutes.
- Ensure all necessary legal and tax advice is obtained to prevent ineffective appointments and adverse tax liabilities; more generally, get local advice in early course in respect of any attack on the trust.
- Consider carefully to whom duties are owed, the trustee's potential exposure to liability, and the long-term impact of a position to be taken in connection with any external dialogue with all parties, and monitor and address beneficiaries' needs and sensitivities appropriately.
- Avoid submitting to the jurisdiction of a foreign court without first obtaining directions from the Grand Court and/or *Beddoe* relief. Take professional advice about whether any other steps need to be taken locally to protect the position of the trustee or the beneficiaries in light of the foreign proceedings.
- Do not disclose confidential information to any party unless the rights of that party to the information have been ascertained, consent has been obtained, or compelled to do so by local court order.