

Family trustees risk being left exposed

ALL TRUSTEES are the guardians of the trust assets and have a duty to manage these assets in the best interests of the beneficiaries, as outlined in the trust deed.

The Trust Property Control Act ("the act") clearly stipulates the duties of trustees. Section 9(1) of the Act states that a trustee shall, in the performance of their duties and exercise of their powers, act with the "care, diligence and skill" which can reasonably be expected of a person who manages the affairs of another person.

All trustees owe a fiduciary duty to the beneficiaries of the trust and may not act in a way that violates this duty or is outside the parameters of the trust deed.

A fiduciary duty is an onerous, legal obligation (a duty of loyalty and care) of a person managing property or money belonging to another person to act in the best interests of such a person.

All trustees must act jointly in respect of trust matters, as they share a common fiduciary obligation towards the fulfilment of the objects of the trust (Hoosen v Deedat case of 1999).

Can trustees be held personally liable?

If trustees' actions (alone or with other trustees) contravene either the provisions of the act or the trust deed, they could find themselves personally liable for losses suffered by the trust.

The courts will enquire what any person who takes care of people's affairs would have done under similar circumstances. A court will ignore that the trustee, for example, was a family member and was, therefore, deemed to be acting within the family's best

interests.

In the *Tijmstra v Blunt-Mackenzie* case of 2002, it was held that a trustee may be removed from office, even if they acted bona fide (without an intention to deceive).

It was argued that a trustee's office should be terminated by the court if they permitted maladministration of the trust by the other trustees without acting on it.

It was further argued that mala fides (acting in bad faith) and misconduct are not necessary requirements for the removal of a trustee.

Are you excluded from trustee decisions?

Many trustees are unaware of the requirement for trustees to act jointly and often abuse the majority decision provision stipulated in the trust deed.

As a trustee, if you are unsure of whether decisions are made with your knowledge and involvement or you are aware that you are excluded from the decision-making process, it is important to take action before you are held personally liable for your inaction.

The onus will be on you to prove that you have at all times acted with the required care, diligence, and skill.

Wrongful action of another trustee

A co-trustee who was not involved in a breach of trust may still be liable for any wrongful action of another trustee in a situation where the "innocent" trustee's ignorance and/or inactivity is causally connected to the

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damage incurred.

For example, where the "innocent" trustee is aware of a breach of trust by co-trustees but does not report it, or where the "innocent" trustee improperly allows trust funds to remain in the sole control of co-trustees. An excuse that one has not actively participated in trust matters is, therefore, not a valid defence.

Joint liability

Trustees may be jointly and severally liable for damages caused by them. This means that damages may be recovered from a single trustee, more than one trustee, or all the trustees. Trustees are not automatically jointly and severally liable for the actions of another trustee.

For a trustee to be held liable for another trustee's actions, there has to be fault, such as negligence, which could include one or more of the following:

- The trustee left a matter in the hands of another trustee with no further

involvement.

- The trustee is aware of a breach by another and allows that; or
- A trustee allows another trustee complete control of trust assets.

Does a beneficiary's consent let you off the hook?

Even if a trustee claims that the beneficiaries were fully aware of and approved their actions, it will not be sufficient to absolve a trustee from a breach of their duties.

A beneficiary is not in a position to consent to or condone a trustee's action if that action amounts to a failure to act with the required degree of "care, diligence and skill" as required in the act, or if a trustee acts in breach of their duties in terms of the common law and the trust deed. Nobody can consent to or condone an action that contravenes a duty imposed by law – not even a beneficiary!

Can a trust deed exempt a trustee from liability?

Any provision in a trust deed that exempts a trustee from liability for negligence or which exempts an "innocent" trustee from the wrongdoing of a co-trustee "shall be void" (Section 9(2) of the act).

An indemnity clause in the trust deed that exempts trustees from liability for breach of trust is, therefore, void and does not exempt a trustee from actions involving ordinary or gross negligence or intentional wrongdoing.

The independent trustee

may be covered, not you

Due to the onerous duties on trustees, independent trustees often take out professional indemnity insurance – which is designed for professionals who provide advice or deliver a service to their clients – and which protects against legal costs and claims for damages by third parties (such as beneficiaries and creditors) that may arise out of an act, omission, or breach of professional duty conducted during the course of their business.

However, no insurance exists for the family trustees, which leaves these trustees exposed; not only to their own wrongdoing but also to that of their co-trustees. The independent trustee should therefore be carefully chosen by the family.

The family trustees should also obtain evidence from the independent trustee that they have proper professional indemnity insurance in place, as often professionals (incorrectly) assume their normal cover for their professions automatically includes cover for trust services. If proper cover is not in place, it will expose the family trustee to undue risk.

Conclusion

Any person must, therefore, be active, alert, and diligent when acting as a trustee in respect of trust affairs, especially the family trustees who often blindly rely on others.

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