The Offshore Tax Planning Review

DUTIES AND RESPONSIBILITIES OF OFFSHORE TRUSTEES

Peter Lawson[1]

All trustees must be alert and ready to take the initiative but non-resident trustees of trusts established by UK resident or domiciled settlors need to be especially vigilant in certain respects. It is often the case that local lawyers or accountants or, more probably, the local trustee company of an international or local bank offer trustee services to their clients as part of their everyday business. It follows that there is a general tendency for such trustees to be strongly influenced by the wishes of the settlor in relation to investments and the exercise of other discretions conferred by the trust instrument. Indeed, it is often understood, if not expressly stated, that the trustee will normally follow the wishes of the settlor where the trustee has a discretionary power.

But what if the settlor is dead or the trustee receives no instructions or expression of wishes? The trustee cannot afford to sit back and do nothing.

To take a simple case, suppose that a settlor transfers a large sum of money into a settlement and indicates that he will let the trustees know his wishes about investment. The trustees put the money on deposit with a bank. Over a period of years they hear nothing from the settlor as to his wishes and take no steps to invest the money. Is this a breach of trust?

Offshore jurisdictions which recognise trusts generally follow English case law as persuasive authority, although some of them have Trustee Acts which do not precisely follow English statutory provisions. For the purposes of this article, therefore, it will be assumed that English decisions would be strongly persuasive in the particular offshore jurisdiction on any particular question. In the circumstances simply described above there can be little doubt that the trustees would have been negligent not to have taken steps on their own initiative to obtain investment advice and invest the money. The extent to which the trustees would be liable to replace the consequent loss to the trust fund is a different matter. Evidence would be required as to the rate of return which a prudent trustee would

---

[1] Peter H Lawson, Consultant, Wilsons, Steynings House, Chapel Place, Fisherton Street, Salisbury, Wiltshire SP2 7RJ.
Tel: (01722) 412412 Fax: (01722) 411500.

have been able to obtain over the period in question and to compare this with the rate of return actually achieved and this would be a matter for expert evidence from a stockbroker or from a fund manager.

A case where a trustee failed to take any, or any sufficient, action to change investments is *Nestle v National Westminster Bank plc* [1994] 1 All ER 118. In this case the Bank trustee failed over a period of 40 years to obtain legal advice on the meaning of the investment clause in a Will and failed to review the investments regularly. Despite these failures the plaintiff, who was the ultimate capital beneficiary, failed in her claim that the Bank were in breach of trust because she could not prove that there had been any loss. If such evidence could have been produced the Bank would have been liable for "losses" in the widest sense including any failure to make profits that would otherwise have been made.

A leading case of a failure by a corporate trustee to take the initiative is *Bartlett v Barclays Bank Trust Co Ltd* [1980] 1 All ER 139. The Bank trustee controlled a family company which owned properties in London. At the material time the trustee was not represented on the Board of the company nor was any beneficiary or member of the family on the Board. The company invested in a property development project which proved disastrous and the company sustained a large loss. Because the Board did not provide the trustee with, and the Bank did not insist on receiving, a regular flow of information on the company's activities and the Bank was content to receive any such information on the development project as was dispensed at the Annual General Meeting, it was unaware of the hazardous nature of the project and did not intervene to stop the company from embarking on it, or require the Board to accept an offer made half-way through the project to buy out its share at little or no loss.

The Court held that it was a trustee's duty to conduct trust business with the care that a reasonably prudent businessman would extend to his own affairs, and in the case of a private company in which he was a majority shareholder a prudent businessman would not be content to receive only such information on that company's activities as was disclosed at Annual General Meetings. Moreover, a professional corporate trustee such as a Bank owed a higher duty of care and was held liable for loss caused to the trust by neglect to exercise the special care and skill which it professed to have. The Bank was under a duty as a trustee to ensure that it received an adequate flow of information from the Board on the company's activities and to try to enable it to make use of the information to protect the beneficiary's interest by preventing the project from being commenced and later from becoming the financial disaster it did. The Bank was therefore in breach of trust. The loss to the trust fund would not have occurred if the Bank had intervened to prevent the company's participation in the project, as it ought to have done. Therefore, the Bank's breach of trust caused the loss and it was liable for that loss.

It will frequently be the case that offshore trustees hold shares in private companies, often very significant holdings. As shareholders they will receive the annual accounts, but how often do they raise questions on the accounts or enquire about the prospects of the company's business; and for that matter how often do they question the absence or level of dividends, and how often are they represented at the company's Annual General Meeting?

In the light of the *Bartlett* case, there is no doubt that there are significant dangers in trustees failing to remain alert or to take the initiative in a company in which they are not represented on the Board. Wrongful omissions, just as much as wrongful acts, may be breaches of trust.

It needs to be added that trustees should not expect to shelter successfully behind clauses in the trust document which purport to excuse them from responsibility. A common form of trustee indemnity clause reads:

> "In the execution of the trusts and powers hereof no Trustee shall be liable for any loss to the Trust Fund arising in consequence of the failure depreciation or loss of any investment made in good faith or by reason of any mistake or omission made in good faith or of any other matter or thing except wilful and individual fraud and wrongdoing on the part of the Trustee who is sought to be made liable."

In England the Court would be unlikely to permit a trustee to rely on that clause and there are a number of ways in which it could do so. One would be to argue that the clause relates to acts and not omissions. Secondly, in *Knox v Mackinnon* (1888) 131 R App Cas 753 the House of Lords held that a clause which purported to limit the liability of trustees for breach of trust only protected trustees who committed error in the exercise of their trust but did not protect them when they acted in plain violation of duty. Thirdly, it is possible that the local jurisdiction has a statutory provision which limits any purported exemption of the trustees from liability. For example, Article 25(9) of the Trusts (Jersey) Law (as amended) provides that:

> "9. Nothing in the terms of a trust shall relieve, release or exonerate a trustee from liability for breach of trust arising from his own fraud wilful misconduct or gross negligence."

It also needs to be borne in mind that it was held in the *Bartlett* case that a professional trustee, which must include a corporate trustee owned by professional people, is under a duty to display a higher standard of care than that which should be expected from an ordinary prudent man of business who does not profess to have such a skill.