



Practical considerations for Trustees

April 2020

The profound impact which the current pandemic has had on all aspects of life cannot be understated. This, of course, includes the global economic downturn; in some quarters it has been compared to, or indeed said to be likely to eclipse, the Great Depression.

The spectacular collapse in global stock markets is also likely to have another effect, which is unlikely to crystallise for some time: disgruntled beneficiaries and settlors with reserved powers laying the blame with trustees for the significant depletion in the value of a trust's assets, particularly where the trust's portfolio is focussed on investment in equities. Claims for relief in the form of damages and/or the reconstitution of the trust fund will follow.

It is no secret that litigation is an inevitable consequence of a global recession; the fall-out from the global financial crisis in 2008 is a paradigm example. Indeed, there is trusts litigation which continues afoot in various jurisdictions as a consequence of that crisis. One notable recent example is what has colloquially become known as the [DBS Bank case](#), where the Hong Kong Court of Final Appeal confirmed only last November that anti-Bartlett clauses in trust deeds remained relevant.

So what are the lessons learnt from 2008? There was a particular issue which became somewhat of a sticking point for some claimants in post-2008 proceedings, including where damages were claimed for gross negligence and/or breach of duty as trustee: causation. That is, how was the trustee negligent for failing to preserve the value of a trust's portfolio in circumstances where no one predicted the global financial crisis? And importantly, what steps should the trustee have taken to avoid such losses that it did not take? In some very significant trusts litigation, proceedings were dismissed because there was an inherent failure by disgruntled beneficiaries to persuade the courts that a trustee's conduct was causative of loss.

For trustees, however, this does not mean they are insulated from such claims because no one could have anticipated our current predicament, or indeed the concomitant collapse in the global economy. Now, more than ever, is an appropriate time for trustees to consider the following:

- **Trustee minutes/resolutions** - Are these up-to-date? Do they adequately record a review of investment portfolio reports, a consideration of the recommendations made where investment decisions have been delegated, the current parlous state of the financial markets globally and the trustee's decision to agree with the recommendations proposed, or to seek alternatives? The same applies for board minutes and resolutions for underlying investment companies within a trust structure.
- **Anti-Bartlett clauses** - what do they say and how comprehensive are they? Do they afford a trustee adequate protection and are they consistent with the investment framework e.g. the terms of the investment management agreement.
- **Communication** – a key focus for trustees has always been strong client relationships. Now, more than ever, is an

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appropriate time to contact clients to discuss the current crisis, understand their concerns and to discuss what steps should be implemented to insulate the trust's assets from further loss. This is crucial given a trustee's duty to preserve and enhance the value of the trust fund. Documenting those concerns and the strategy which has been agreed for the ongoing administration of a trust is equally important.

Reviewing current work practices and implementing additional measures where appropriate, might be the difference if a trustee is faced with a breach of trust claim. Such measures will not necessarily protect a trustee from prospective claims, but contemporaneous documents which record the measures they have taken in the face of unprecedented times might prove to be key when defending such claims. Case dismissed.

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