

## Trustee troubleshooting: Dealing with trust deeds that are no longer fit for purpose

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### A Cayman Islands perspective

It is often acknowledged that, like fine wine, some things get better with age. However, the same is not always true of trust deeds – particularly those that may have been drafted using a mechanical typewriter or require service of notices by Telex. While families grow and evolve, legislation is regularly revised and expanded upon, and technology continues to develop at an incredibly fast pace, trusts often remain unchanged. As a result, the basic documentation on which hugely valuable structures rest can quickly seem archaic. It is true that mechanisms to vary, reform, and resettlement trust deeds may sometimes be found within trust deeds themselves, or otherwise in statute, but commonly, implementing changes to older structures can be a cumbersome task.

### Problematic deeds

An unfortunate number of deeds governing older trusts which now require modernisation can, on closer inspection, contain some very serious drafting deficiencies. While some of the challenges can be overcome with careful thinking and a considered approach, the seriousness of the omission of key provisions in trust deeds is often overlooked until it is too late. Some of the issues that both advisors and trustees should take care to look out for are summarised below.

Problem with the trust deed	Effect
Missing trustee charging provision	In the absence of this provision the trustee cannot automatically have its fees paid from the trust fund.
No trustee exoneration provision	Without a trustee exoneration provision the trustee will be at greater risk of personal liability than is market standard and could be held liable for all losses to the trust fund; not just those losses which have arisen due to the trustee's gross negligence or fraud.
Missing "anti-Bartlett" provision	An anti-Bartlett provision excludes the duty of a trustee to supervise or intervene in the business of underlying companies in which the trustee holds shares. Without such a clause the trustee's duties are much more onerous (and its potential liability much more extensive).
Missing amendment provisions	Without these provisions the trustee cannot easily amend the trust and may require the assistance of the courts.

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<b>Missing governing law clause</b>	Commonly overlooked, the absence of a governing law clause can cause a variety of issues. Without such a clause in a trust deed with assets or family members located in multiple countries it can be difficult to determine with certainty which jurisdiction's laws apply. A detailed analysis of conflict of laws principles and specialist legal advice from multiple jurisdictions may be required to resolve the point.
<b>Limited or obscurely worded appointment provisions</b>	Poorly drafted appointment provisions can also make it difficult to restructure the trust and, in particularly problematic cases, the assistance of the courts may be required in order to clarify the powers conferred by the trust deed.
<b>Insufficient administrative and investment powers</b>	If the trust deed does not expressly provide for sufficient administrative and investment powers the trustee may be restricted in its administration of the trust and it may not be possible to hold certain assets (i.e. wasting or speculative assets).
<b>Outdated definitions of the beneficial class</b>	Due to scientific advances, as well as societal and legal changes, certain definitions may no longer be fit for purpose and may have unintended consequences (e.g. surrogacy can cause issues, as the child will be treated for legal purposes at birth as the child of the surrogate mother and may therefore fall outside of the beneficial class of the trust).

If a trustee finds itself already lumbered with a deficient trust deed it may be able to address the problems by way of amendment or variation; provided, of course, that it has sufficient powers to do so under the trust deed. However, a trustee's powers must be exercised for the benefit of the beneficiaries. Therefore, if the desired amendment is solely for the benefit of the trustees or designed only to protect them from liability (for instance to introduce trustee charging provisions or exculpation clauses) there is potentially a question as to whether it would be valid.

If there is no power of amendment within the trust deed, it may still be possible to achieve a creative and satisfactory resolution of the issues without applying to the court for assistance. However, this will only be the case where all beneficiaries of the trust (who must be of age and have capacity) have expressly consented to the amendment. If there are minor, unborn, unascertained or incapacitated beneficiaries it will be necessary for the Grand Court of the Cayman Islands to approve the variation or revocation of the trust deed on their behalf under section 72 of the Trusts Act (Revised). For the Grand Court to grant such approval, the variation or revocation must not be to the detriment of these individuals.

Additionally, section 63 of the Trusts Act (Revised) allows the Grand Court to introduce new trustee management and administration powers in the trust deed, if this is deemed to be in the best interests of the beneficial class as a whole. However, it should be noted that this power cannot be used to vary the dispositive provisions of the trust.

More broadly, the Grand Court has an inherent jurisdiction to introduce trustee remuneration provisions<sup>1</sup>, although a court sanctioned remuneration provision may not be as generous as the trustee's standard commercial terms. Less clear is whether the Grand Court can step in where standard trustee protection provisions are missing from the trust deed. Potentially, one could justify an application for relief on the grounds that amendments of this kind are in the beneficiaries' interest, as the absence of such provisions could hamper the proper administration of the trust.

### Dealing with deficient deeds

Antiquated trust deeds can cause serious headaches for all parties; not least the trustees. Commonly, problems of the kind set out above are only identified once an urgent issue has arisen, and the key provision that would normally assist is found to be missing. However, a crisis can be averted if: (i) a trustee is forewarned and forearmed as to potential deficiencies; and (ii) stakeholders in the trust structure are committed to ensuring that the trust documentation evolves alongside society, the law, and the needs of the underlying family.

### Possible solutions for trustees of Cayman Islands trusts

Before agreeing to take on the trusteeship of a new trust (particularly an aging one), the proposed trustee should always carefully review the terms of the trust deed with the provisions outlined above front of mind. If there are issues with any of the provisions within, or obvious omissions from, the trust deed these should be raised with the existing trustee and preferably resolved before the appointment takes effect.

<sup>1</sup> *In the matter of Caledonian Securities Limited (in official liquidation)* [2016] 1 CILR 309

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