TRUSTEE LIABILITY – THE ROLE OF GOVERNANCE

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INTRODUCTION TO TRUSTEE LIABILITY – THE ROLE OF GOVERNANCE

Being appointed a trustee can be an avenue to a revenue stream; and for many accountants and lawyers it is still a regular part of day-to-day business. While appointment as a trustee raises issues of liability and risk, these risks can be managed through appropriate governance and trust management practices.

Corporate trustees are commonly identified as the solution to the risks associated with personal appointments as a trustee. However, even this practice is not without its own risks and issues.

As demonstrated by recent case law, the relationship between trust governance and trustee liability cannot be underestimated.

It is a fundamental proposition of trust law that trustees act personally. This means that a trustee who incurs liability can put that trustee's personal assets at risk. While this may be able to be addressed in some part through the use of a corporate trustee, the simple adage of "prevention being better than cure" cannot be over-stated in the matter of trustee liability.

While the risk of incurring liability as a trustee cannot ever be completely avoided, this paper will demonstrate how the risks can be substantially minimised through the adoption of appropriate governance.

SOURCES OF TRUSTEE LIABILITY

Trustees can only contract in their own right and it is from this that personal liability as a trustee flows. Liabilities incurred by a trustee in relation to a trust are always the personal liabilities of the trustee: *AMP General Insurance v Macalister Todd Phillips* [2007] 1 NZLR 485 (SC).

Trustees are not insurers of trust property. However, subject to any terms to the contrary in the deed of trust, trustees are required to act with prudence and diligence. See *Re Chapman* [1896] 2 Ch. 763 where Lindley LJ said:

> "[A] trustee is not a surety, nor is he an insurer; he is liable for some wrong done by himself ... Trustees acting honestly, with ordinary prudence or within the limits of their trust, are not liable for mere errors of judgement."

The difficulty that many trustees and their advisers often face is the fact that despite the significant number of trusts in New Zealand, the use and management of trusts (and the attendant risks that can arise) are not well understood. The limits of the trusteeship, or what it is to act with appropriate prudence, or even what comprises honesty in the context of a trusteeship, is not well understood. The fact that trustees can be personally liable for the decisions that flow from ther trusteeship is also poorly appreciated. As noted in *NZHB Holdings Ltd v Bartells* (2005) 5 NZCPR 506:

> "Recent experience in more than one case suggests that the concept of trust is used more often than it is understood. Unlike a company or an incorporated society a "trust" is not a legal person recognised as distinct from the humans who direct their affairs. On the contrary, trustees can contract only in their own right: either they do so and are personally liable to the extent provided by the ordinary law which the agreement may modify or there is no agreement at all. But where parties have gone to the trouble of entering into a documented transaction the courts are reluctant to reach the latter conclusion."

Trustees can also incur unanticipated liability through not fully appreciating the legislative environment they might be acting in. Consider the recent Court of Appeal decision in *Cox v Green Gecko Limited* [2014] NZCA 404 upholding an earlier High Court decision (*Green Gecko Limited v Cox* [2013] NZHC 2034) that Mr Cox, who was acting as a trustee, was an offeror for the purposes of the Securities Act 1978.

Mr Cox, a solicitor, was a trustee for a trust settled by a client. The trust owned shares that were issued in circumstances where a prospectus should have been registered and provided. As a consequence of this failure, the subscriber (who was not an habitual investor) was entitled to seek a refund of the subscription price of $700,000 from the offeror.

As offeror Mr Cox was liable to refund the $700,000 paid to him. The fact that he was a trustee and did not receive the subscription price on his own account did not afford him any limitation of liability. The fact that he did enter into the transaction as a trustee only confirmed his personal liability. As noted by the Court of Appeal at [22] "... a trustee entering into a transaction is personally liable, and there was no provision in the [Securities Act] that limited his liability ... because he was a trustee." This outcome was considered to be in accordance with the policy objective of the Securities Act, which was to protect unsophisticated investors.

Risks can also escalate when a trustee has failed to actively participate in the management of a trust. As confirmed in *Selkirk v McIntyre* [2013] NZHC 575 "Passive trustees have been unsuccessfully seeking the court's assistance since the development of contribution and indemnification as equitable remedies."

While liability can be limited, this can only be way of agreement between the parties. While many trust deeds include a limitation of liability clause it is not often well appreciated that such a clause only operates to protect the trustee from a claim brought by a beneficiary of the trust and does not protect the trustee from liability incurred to third party creditors. See *Niak & Somerville v Davidson & Macdonald* Master Venning, High Court Dunedin, C.P. 15/98. Also see Court jurisdiction, trading trusts and other issues: review of the law of trusts - fifth issues paper, Chapter 7.

The quid pro quo of liability is a trustee's right to be indemnified for costs properly incurred in the administration of the trust. Accordingly a trustee who has incurred a personal liability can seek indemnification from the trust. This right of indemnity is codified in the Trustee Act 1956.

However, where the trustee has incurred costs or liability through that trustee's breach of trust, the right of indemnity can be lost and the trustee can be personally liable: see *Spencer v Spencer* (2013) 3 NZTR ¶23-014 where the trustees were found to have acted dishonestly and accordingly had no right of indemnity from the trust fund.

Where there is more than one trustee, each trustee is potentially entitled to an indemnity from the trust. This means that even if one trustee has lost the right of indemnity due to that trustee's breach of trust, another trustee's right may remain intact. Of course, where a trust has no assets to meet a trustee's personal liability, any right of indemnity may well prove to be pyrrhic.

The recovery pursuant to an indemnity is essentially a matter of reimbursement. That is the trustee discharges costs, expenses and even liabilities and then recovers them from the trust property. This is not to suggest that a trustee must always meet these expenses; in practice trustees routinely make payments out of funds readily available from the trust. Of course, all such payments have to be justified on the indemnification principle. The consequence of this general principle is that it is the beneficiaries who are meeting the trustee's expenses. It follows that it is critical that there be a check on those expenses and costs incurred by a trustee.

The fundamental principle here is that only expenses that are "properly incurred" are the subject of a trustee's indemnity. The direct consequence of this principle is that improperly incurred expenses fall upon a trustee personally. In that sense, a trustee is always at risk when he or she incurs expenses.

CASE LAW UPDATE

Some recent cases highlight incidents of trustee liability. The consistent theme in these cases is a lack of appropriate governance or understanding the extent to which a trustee can incur liability.

Commonly a trust has more than one trustee. However, it is not well appreciated that the intention of some trustees can be imputed to others. Even where unanimity is required, as is more commonly the case, trustees cannot avoid making decisions or else consider the consequences of their actions and then plead ignorance to avoid liability. This is demonstrated in a recent TRA decision *Trustees of the B Trust v CIR* [2013] NZTR 05. The B Trust had been established on standard terms. The trustees were the settlors and their solicitor who was later replaced with a trustee company. Over a 12-year the trustees bought and sold 11 properties. Beneficiaries of the Trust lived in most properties for a few months. The last property purchased by the Trust was occupied by beneficiaries for approximately 2 1/2 years. In total the beneficiaries lived in 18 properties over the same period due to renting properties when houses were being built. Importantly, when the matter was heard by the TRA the independent trustee was not able to assist with reasons for the different transactions:

"[59] Ms X told the Authority that Mr and Mrs B would come to her office with a signed agreement for sale and purchase. The loan agreements were negotiated by Mr and Mrs B and the loan documents were sent by the Bank directly to her firm. She was not consulted by Mr and Mrs B prior to entering into any of the transactions. It was Ms X's evidence that when they came in Mr and Mrs B never gave any explanation as to why they were selling the particular property. Likewise she never enquired as to their intentions with regard to the section being purchased."

...

[62] It was Ms X's evidence that the Trust had been set up as a family trust to own the Bs' family home. She stated that as a firm, she and her partners would not involve themselves in a trading trust. This was because of the tax liability and because they weren't prepared to be involved in a trust that they weren't actively managing on a day to day basis. Ms X described her involvement as being confined in respect of each property, to transacting the sale and purchase and preparing appropriate resolutions to ratify the actions taken and documents executed by Mr and Mrs B purportedly on behalf of the Trust."

There was no complete minute book or history of trust resolutions. After hearing evidence the TRA found that the properties were acquired for the purpose of intention of sale. The TRA also held that the Trust was in the business of erecting buildings and that the residential land exemption did not apply. The TRA found that the Trust was deemed to be registered for GST and accordingly the Trust was also liable for GST. As a result the trustees, including the independent professional trustee were jointly and severally liable for income tax, GST and the resultant shortfall penalties.

The risk of trustees not acting in concert is further demonstrated in *Selkirk v McIntyre* [2013] NZHC 575. Mr Selkirk and Mr McIntyre were the trustees of a GST-registered trust. Unbeknownst to Mr Selkirk, who was the trust's independent trustee, when a commercial property was sold, his co-trustee did not pay the GST that was owing to Inland Revenue. Over time the GST debt grew significantly due to the addition of penalties and use of money interest. Eventually settlement was reached between Mr Selkirk and Inland Revenue. Mr Selkirk then sought to be fully indemnified by his co-trustee on the basis that he had had less involvement with the trust. This was not met with judicial sympathy, the High Court noting that (my paraphrasing) "Passive trustees have been seeking relief from the courts, on the basis of their lesser culpability, for over 200 years".

Mr Selkirk was entitled to a proportionate share of the expense he incurred in settling the GST debt from his co-trustee. However, that was the extent of his right of recovery in the circumstances of the case.

Costs of litigation are also an increasingly live issue in court proceedings. Many trustees unnecessarily incur costs for which they can face personal liability for simply failing to act appropriately when confronted with legitimate information requests. See *Dean v Moyle* [2013] NZHC

3032 where the residuary beneficiaries' requests to a trustee for information regarded the investment of farm proceeds were ignored or deflected for a period of over 7 years. While the information was ultimately provided, this was only after proceedings were initiated.

In *Dean v Moyle* the High Court found that the trustees' costs of more than $20,000 would have been avoided if the investment advisor trustee had responded to information requests; and that the information requested was "information to which he had ready access and to which the applicants were clearly entitled". In failing to provide the information requested the trustee failed to meet his obligation to provide full and accurate information about the trust's capital. For this reason the costs were not reasonably incurred in execution of the trustees' duties. However, as the information requests were only made to the investment advisor trustee, and for the reasons noted above, the court ordered that the investment advisor trustee be solely liable to meet the estate's costs in respect of the application.

Acting appropriately as a trustee can be somewhat more complicated where a trustee is also a beneficiary where the blurring of beneficiary expectations and trustee liabilities can leave a trustee vulnerable to findings that the trustee has not executed the role of trustee at the required level. The issues that can arise are canvassed in *Smith v Penney* [2013] NZHC 2988 where following the relationship breakdown of the personal relationship of two of the trustees, Court proceedings were initiated by the independent trustee requiring amongst other things that Mr Penney account for the trust funds. Mr Penney resisted involvement in the proceedings and persistently refused to execute his duties as a trustee, the Court noting at [41] that "... [Mr Penney] has put himself in a position where there is an irreconcilable conflict between his personal interests and those of the trust and its beneficiaries." Mr Penney was found to be in contempt of court. He was also found personally liable for costs on an indemnity basis in earlier proceedings: *Smith v Penney* [2013] NZHC 1981.

Tozer v Tozer [2014] NZHC 1759 is another example of the risks to all trustees that can arise where a trustee fails to remain impartial to beneficiaries. The claims of breach in *Tozer & Ors v Tozer and Bode* were couched as claims that:

- the trustees failed to preserve the trust property, a residential property
- the trustees failed to act impartially between beneficiaries, and
- the beneficiary trustee profited from his trusteeship and misappropriated trust property

The case proceeded by way of formal proof when the trustees, Mr Tozer who was also a beneficiary of the trust and Mr Bode a retired solicitor failed to file a statement of defence. Judgment was awarded in full against each of the trustees personally together with costs.

HOW TRUSTEE LIABILITY CAN BE ADDRESSED OR MITIGATED THROUGH APPROPRIATE GOVERNANCE

The clear theme from the cases discussed is the failure of many trustees to actively manage trusts, or even to appreciate the need to do so. The fundamentals of good trust governance are simple.

As a starting point a proper and sensible acquaintance should be made with the duties owed by a trustee. These include the duty to:

- know and adhere to the terms of the trust
- familiarisation with the trust's assets
- act in the best interests of the beneficiaries
- act impartially as between beneficiaries
- appropriately exercise any trustee discretions
- not act with improper motives
- not profit from the trusteeship (unless permitted by the terms of the trust, or with the consent of the beneficiaries)
- act with due diligence and prudence
- seek advice

- not to delegate except where expressly permitted
- act unanimously unless the deed of trust provides otherwise
- account to beneficiaries, and
- pay the trust's debts. To the extent that any trustee incurs a debt, the trustee is personally liable unless that liability has been limited or excluded.

Appropriate governance then requires that any trustee is adequately informed of the duties and obligations as a trustee, and that any appointment of trustee is accepted on the basis of this disclosure and appreciation. Communication between trustees on a suitably regular basis is also an essential facet of good trust governance. If all of the trustees remain informed about the management of the trust, the scope for unanticipated debts or risks to arise is significantly reduced.

Good record keeping is also fundamental to good trust governance. A common theme in trust cases before the courts is the absence of appropriate records. See *Hansard v Hansard* [2013] NZHC 1692 where Ellis J notes that "... both the trustees of [the trust] were as lax about recording its decisions as they and the trustees of [the other trust] were about formally documenting significant transactions." Also see *Spence v Lynch* [2013] NZHC 1478 where Priestley J notes that "Startlingly no one took any steps to prepare annual accounts and balance sheets for the trust"; and "... formality and record-keeping were hardly particular features of the operation of the [Trust]." (*Stokes v Insight Legal Trustee Company Limited* [2012] NZHC 1822).

Another importance facet of good trust governance is the ability for trustees to address and deal with conflict. An important aspect of successful trust governance can be being able to demonstrate that the trustees are not always in agreement and how this is addressed. This has been referred to as "push back"; and where there is no evidence that, for example, a professional trustee only ever accedes to the wishes of a settlor or some other controlling influence, inferences can be drawn as to the bona fides of the trust in question. See *KA No 4 Trustee Limited and KA No 3 Trustee Limited v The Financial Markets Authority* [2012] NZCA 370.

All trustees must play an equally active role in the management of a trust. While many tasks can be appropriately delegated amongst the trustees there is no place for "active" or "passive" trustees. Such denominations are not recognised at trust law. Neither is the concept of a titular trustee who has nothing to gain from the appointment (see *Black & Ors v Giltech Precision Castings* (2004) Limited [2012] NZHC 2117).

There is no place in good trust governance for a trustee, whether or not a professional trustee to be "mindlessly rubber [stamping] the wishes of its co-trustees": *Black & Ors v Giltech Precision Castings* (2004) Limited [2012] NZHC 2117.

At the commencement of any trust relationship a sensible and honest appraisal should be made of the true costs of operating and managing the proposed trust. The relationship between remuneration and risk has not been adequately explored. However, there is a certain logic to the idea of a correlation between adequate remuneration and the adoption of more appropriate practices, such that risk can be better managed.

THE USE OF CORPORATE TRUSTEES TO MINIMISE LIABILITY

It is perhaps unsurprising that the use of corporate trustees is a common response to personal liability by both layperson and professional trustees. However, the use of corporate trustees is not without risk both to the trust for which it might act, and its directors.

The use of assetless trustee companies has also come under some criticism in particular regarding risk to the creditors of the trading business and protection of beneficiary's interests. "... the fruit of this union of the law of limited liability companies and trust law" has been described "as a commercial monstrosity.": HAJ Ford "Trading Trusts and Creditors' Rights" 13 Melb UL Rev 1 at 1. Regardless of this criticism the use of corporate trustees in New Zealand has grown.

As a director cannot have recourse to the trust's assets to meet any liability that flows from the appointment as a director it is important for the director of a trustee company to establish what actions relate to the office of director, and what relate to the actions carried out as a trustee. The significance of this dichotomy is that liability that accrues to the director is personal and any costs that flow from that liability cannot be recovered from the trust as a matter of right.

Regardless of the lack of a direct duty of care from director to beneficiary there is limited potential for beneficiaries to bring suit, referred to as a dog-leg claim, against directors. The basis for such a claim is the fact that the director of a corporate trustee owes a duty of care to the company.

The right to performance of this duty has been claimed to be an asset of the trust and accordingly, where a director is alleged to have failed in this duty, there is an argument that the trust's beneficiaries can enforce performance of the director's duty where the trustee company will not or has not done so. If such a claim was successful a director could become liable for the corporate trustee's breach of trust. Reported decisions regarding dog-leg claims are rare and to date none have been successful in New Zealand: *McNulty v McNulty* [2011] NZHC 1173. In the Australian decision of *Young v Murphy* (1994) 12 ACLC 558 the Supreme Court of Victoria rejected the proposition that a director's duty of care was a trust asset. However, in the English case of *HR v JAPT* [1997] PLR 99 the English High court refused to grant an application to strike out a dog leg claim. Moreover, the Law Commission's preferred approach paper has proposed personal liability for the directors of trustee companies (Review of the Law of Trusts – Preferred approach, November 2012). In the Review of the Law of Trusts – a Trusts Act for New Zealand, August 2013, the Law Commission advised a separate review of corporate trustees.

Regardless of the future possibilities regarding director liability it is important to appreciate that at present the provisions of the Companies Act 1993 apply to corporate trustees without modification. If a director does incur liability, say for breaching the director's obligations under the Companies Act (for example trading recklessly), rights of indemnity from the trust will not ordinarily be available. Consider the case of *Vance v Lamb* (2008) 2 NZTR ¶18-024 where a trustee company was appointed to address concerns about personal liabilities the natural person trustees might otherwise have incurred. The director, Mrs Lamb, was found to have failed in her duty to act in the best interests of the company, by failing to ensure that the company fulfilled its duty as trustee, breaching the duty owed under s 131 of the Companies Act (the duty to act in good faith and in the best interests of a company).

The structure of a corporate trustee also requires consideration to ensure an appropriate shareholding and suitable cohesion with the terms of the deed of trust. Matters to take into consideration in this regard include:

- should the shareholding be joint?
- if there are independent shareholdings, does each natural person shareholder make provision for the shares in the trustee company in that person's will?
- does the trustee company's constitution adequately reflect that the company may not hold any assets on its own behalf?
- does the constitution need to be amended to ensure that the mechanism for appointing directors is not inconsistent with any powers of appointment in the deed of trust?
- does the deed of trust provide that a corporate trustee cannot be controlled by the settlor or a beneficiary?
- are any remuneration clauses in the deed of trust drafted sufficiently wide to allow payment to the director of a corporate trustee if this is contemplated?
- who will be responsible for the administration of the corporate trustee? What mechanism will be put in place to confirm that the annual return has been filed?
- does the corporate trustee need and Inland Revenue number? If so, is it appropriate that the company be treated as non-active?

Where a corporate trustee is being utilised it is also important to consider whether multiple trustee appointments are appropriate. The risks of multiple appointments were highlighted in the case of

Newmarket Trustees Limited (in liquidation): *Commissioner of Inland Revenue v Newmarket Trustee Limited* [2012] NZCA 351. Also see *Black & Ors v Giltech Precision Castings* (2004) Limited. However, despite this case many lawyers and accountants still offer trustee services through a single uncapitalised company.

It is perhaps noteworthy that although Newmarket Trustees Limited is in liquidation it is still a shareholder of a large number of companies and real properties evidencing the practical issues dealing with a liquidated corporate trustee.

Where a trustee company accepts multiple appointments, and is either un-capitalised or does not carry insurance cover it is useful to consider whether clients ought to be informed of this fact and that clear advice is given regarding who will meet the cost of the trustee company's retirement and the appointment of a new trustee in the event of the trustee company's liquidation.

When the practice of using a single trustee company is discussed, the cost of incorporating and managing a new trustee company for each trust is often cited as the reason. However, if this cost is truly significant, the question must be asked, what is the cost of not incorporating dedicated trustee companies? What information should clients be given about the risks of a trustee company with multiple appointments? This raises serious the possibility of disclosure issues that should be considered.

A dedicated trustee company does entail expense. There is the cost of incorporation, the annual Companies Office return and possibly a tax return. However, these costs can be addressed in two ways. Firstly, if those costs are considered significant the question must be asked – are there sufficient funds to properly administer the trust at all? Secondly, the dedicated corporate structure means that in the event that a change of control is required – instead of the cost of retirement and appointment of a new trustee and the related transfers and conveyancing, all that is required, is a change of director, and in some circumstances shareholder. The cost of which is nominal.

The practical reality is that that corporate trustees will continue to incur liability in the same way as natural person trustees. This is in fact why corporate trustees are generally utilised. *In CMS Trustees Limited v C E V R* [2014] NZHC 1428 a corporate trustee the trustee was found to have acted in breach of its trustee obligation. The facts of this case can be summarised as follows:

- a corporate trustee operated by a law firm acts for hundreds of trusts
- the settlor/trustee of one of those trusts, which was settled during the settlor's marriage separates from his wife
- the wife is a beneficiary of the trust but not a trustee
- the corporate trustee and the settlor trustee set about transferring the trust's wealth to a trust the settlor's wife is not a beneficiary of
- the wife files proceedings and is ultimately successful
- significant costs are awarded against the trustees some of which are awarded personally against the settlor trustee and the corporate trustee (that is the judgment limits the amount the trustees are indemnified by the trust)
- the corporate trustee then (unsuccessfully) appeals the costs award
- costs to the corporate trustee mount
- the corporate trustee also acts for a large number of other trusts

Following the release of the judgment the corporate trustee's shareholders appoint a liquidator. The question to consider is the position of the other trusts for whom the trustee acted prior to its liquidation.

Professional trustees who act through corporate trustee also need to establish whether professional indemnity cover that applies to the professional personally will still apply of the professional acts as a director of a trustee company.

This was highlighted in the decision in *Principal Finance Limited v Halse* [2013] NZHC 1723 where the Court held that the director of a company was not covered by a professional indemnity policy in respect of allegations of breaches of duty as a director.

When considering the use of corporate trustees to minimise liability, the recent decision in *Rosebud Corporate Trustee Limited v Bublitz* [2014] NZHC 2018 provides what can only be described as a "how not to" utilise corporate trustees to minimise liability. The plaintiff *Rosebud Corporate Trustee Limited* (Rosebud) had sought to recover a sum of money owing by the defendants pursuant to a buyout agreement. One of the defenses, which was made out, was that the trust Rosebud was trustee for (the Rosebud Trust) was a sham and that accordingly Rosebud had no standing to bring the proceedings.

While allegations of sham are not uncommon they are rarely successful. What the case highlights is that where a corporate trustee is utilised the same standards of trusteeship and governance that apply to a natural person trustee also apply in the context of a corporate trustee.

The background and relevant facts can be summarised as follows:

- Mr Nielsen, a property developer was bankrupted in 2009 on account of judgment against him for in excess of $13m.
- While bankrupt Mr Nielsen instructed his advisors to incorporate Rosebud. Once incorporated Rosebud settled the Rosebud Trust, which was a blind trust. The true "beneficiaries" (Mr Nielsen and his wife) were appointed separately to avoid being named to in the trust deed
- Mr Nielsen then entered into a business venture (despite his bankruptcy). Funds from this flowed to the Rosebud Trust and out to Mr Nielsen and his wife
- The new business interest was assigned to the Rosebud Trust. However, payment flows continued to be made directly to Mrs Nielsen. The basis for the payment flows was unclear and these were variously claimed as advances, drawings, distributions and consulting fees
- There was no oversight or management by Rosebud
- Mr Nielsen's financial demands and difficult trading led to tension between the business partners; and ultimately a buyout was negotiated whereupon the Rosebud would sell the Rosebud Trust's interests in the business to the joint venture parties. Matters deteriorated.
- With a single exception no evidence could be given of situations where a director or Rosebud refused a request or direction from Mr Nielsen.
- Mrs Nielsen was appointed a director of Rosebud in 2012. However, as stated in the judgment, she was not treated by anyone as a "proper" director. She had little or no knowledge of the accounts she signed for the Rosebud Trust. She was not consulted over serious matters. She was found by the court to be in the thrall of Mr Nielsen.
- Although Rosebud Trust was registered for tax purposes with Inland Revenue, it had no bank account for some time. When a bank account was opened, it went into debit because nothing was paid into it, not even the initial $10 settlement.
- Payments from the business venture were paid directly to Mrs Nielsen, and not via the Rosebud Trust, notwithstanding that those payments were generated by a business venture the trustee of the Rosebut trust purportedly owned
- Almost complete absence of any resolutions passed by the trustee on any of the key issues, and
- No proper financial accounts were kept.

While corporate trustees can provide a practical shield from risk, the ill-considered interpolation of a corporate trustee can amplify defects in the management of a trust.

In conclusion, regardless of whether a trustee acts personally, or a trustee company acts as a trustee, it is essential that the trustee is aware of the relevant legislative environment and that fundamentals of good governance are embraced to ensure both the validity of the trust, and the protection (as far as is practicably possible) of the trustee from liability.