

Ogier's team of expert lawyers has a pedigree in local and cross-border trust dispute resolution, and we count as our clients a large number of the leading institutional and independent trustees, or fiduciary businesses.

Duties of trustees under BVI law

The duties of a trustee arise from two primary sources, the trust instrument and common law trust principles. With that said, certain documentary record keeping obligations of a trustee, such as keeping accounts, have been put on statutory footing.

Under a trust instrument, a trustee's duties may be provided and specifically tailored. For instance, a trustee is forbidden from taking profit or remuneration unless provided for by the trust instrument. However, while a trust instrument does provide a degree of flexibility in this regard, duties arising from basic trust principles cannot be omitted. For example, basic trust principle duties include the following:

- Trustees must preserve and safeguard trust assets, they are legally obligated to manage trust assets for and to the benefit of beneficiaries, which includes keeping accurate accounts and informing a beneficiary of their interest in the trust assets
- Trustees must not act fraudulently towards beneficiaries, they are a fiduciary and are to act in good faith
- Trust assets must be segregated from a trustee's personal assets

The standard which a trustee must perform their duties is that of an ordinary and prudent business person. Professional corporate trustees operate in the jurisdiction and are likely to be held to a higher standard of care reflecting their professional skill and experience.

Breach of Trust claim - remedies and limitation

Where a trustee has failed to discharge their duties and such failure has caused loss to the trust, beneficiaries can seek a wide range of remedies against a trustee, but monetary compensation is

the most common. The court has the discretion to excuse a trustee from personal liability if it is established that they acted fairly and reasonably in the circumstances. It is also important to consider the terms of the trust instrument in each case as trustee liability may be expressly excluded in the absence of dishonesty and / or fraud.

Other remedies available to a beneficiary include seeking an account, the removal of a trustee, or relief against a third party who may be liable by reason of dishonest assistance or knowing receipt of trust property.

Claims brought according to a breach of a trust deed must be made within 12 years from the date of the breach of the obligation. However, any other claim against a trustee for breach of trust or to recover trust assets must be made within six years from the date on which the breach or cause of action arose.

There is no limitation period for a claim arising from (i) any fraud or fraudulent breach of trust to which a trustee was party or aware or (ii) the recovery of trust property (or proceeds of the same) converted to the trustee's personal use.

BVI Court assistance

Advice, opinion or directions from the court

Under the Trustees' Relief Act 1877 (**Trustees' Relief Act**), a trustee may apply to the court to seek advice, an opinion or directions from the court in respect of the management or administration of trust property.

In regards to a dispute about the interpretation of a trust instrument, and upon an application under the Trustees' Relief Act, the court will seek to determine the presumed intention of the settlor based upon the trust instrument's construction.

Such an application may also be made, not for interpretation, but to seek the court's blessing in relation to a significant decision. For example, a trustee will often seek court approval before commencing litigation in their capacity as a trustee.

While the trustee will be deemed to have discharged their duties on the issue raised by an application under the Trustee's Relief Act, it does not indemnify a trustee if they have acted dishonestly, fraudulently or have misled the Court.

Additionally, the Trustee (Amendment) Act 2021 introduced a provision which enables a trustee, a beneficiary or any person authorised under a trust instrument, to make an application to the court to vary any provision of the trust where such an order would be expedient in the circumstances. This provision was introduced with prospective effect.

Replace or appoint a trustee

The court's assistance may also be sought to replace or appoint a trustee by way of an application to the court. Such applications may be made by a beneficiary of a trust or the trustee under the Trustee Act 1961. For instance, upon an application under section 42 of the Trustee Act 1961, the court may appoint a new trustee in substitution of or in addition to an existing trustee, or where there is no existing trustee, if it is inexpedient, difficult or impracticable to do so without the assistance of the court. Interestingly, the Trustee Act 1961 does not specify who may make such an application but, if not made by a beneficiary or trustee, it will take good evidence to establish an applicant's interest and the authenticity of the same.

Disclosure of information to beneficiaries

As indicated above, trustees are obligated to inform beneficiaries of legal age and with a fixed interest of their rights in relation to trust assets and to maintain accounts and records in respect of trust assets. While a beneficiary does not have a statutory right to information, the trustee's duty to inform a beneficiary of their rights allows a beneficiary to hold a trustee accountable.

Accordingly, the general starting position is that beneficiaries are entitled to trust documents and to request accounts in respect of trust assets. However, a distinction must be made between requests or disclosure of information in contentious and non-contentious situations. In the later circumstance, the contemporary approach appears to be that a balance is to be struck between disclosure of information and permitting trustees to document the reasoning behind their decisions and to take account all relevant factors which may otherwise be inhibited if all documents were to be shared. For instance, the minutes of a trustees' meeting may not need to be disclosed. Disclosure to a beneficiary may be declined where their interest is too remote or where there are real concerns about the purpose for which the information is sought. The circumstances of each case must be considered.

In *Tchenguiz v Rawlinson & Hunter Trustee SA* BVIHCM2017/0026, a named beneficiary of a trust made an application for an order that the trustee deliver up documents relating to claims made by the trustee in various liquidations. In considering the application, the court confirmed the legal position as follows:

- The court has the inherent jurisdiction to order disclosure of documents to the beneficiaries of a trust
- A beneficiary has the right to seek disclosure, but not a right to disclosure
- A beneficiary can seek disclosure only in their capacity as a beneficiary
- The beneficiary must demonstrate why it is appropriate for the court to exercise its discretion

- The court's power is to be exercised to enable the beneficiary to hold the trustee to account for their stewardship of the trust
- The court may have to balance the interests of beneficiaries, the trustee and third parties
- The fact that documents may disclose a claim against the trustee is not a ground for non-disclosure
- The court will have to form a discretionary judgment on at least the following matters:
 - Whether a discretionary object or a beneficiary with a remote interest should be granted relief at all
 - What classes of documents should be disclosed, completely or in redacted form
 - What safeguards should be imposed to limit the use of disclosed documents, such as undertakings to the court, inspection or otherwise

In *Tchenguiz*, the court granted the beneficiary's application subject to certain undertakings restricting use of the documents.

Enforcing foreign judgments against trustees or trust assets

Recognition of foreign money judgments is relatively straightforward. Foreign money judgments from certain jurisdictions^[1], if certain criteria are met, will be recognised on a reciprocal basis under statute. Outside of those jurisdictions, common law rules apply. Generally, non-money foreign judgments are not enforceable at common law and fresh proceedings in the BVI may be commenced and estoppel may be claimed in relation to litigated issues and determined facts under the foreign judgment.

However, the court retains the power to decide whether to order a remedy and the form of such remedy. In this regard, the court has recognised an English non-money judgment which found a New Zealand corporate trustee of a New Zealand governed trust held trust assets on bare trust and ordered the rectification of the register of members of a BVI entity forming part of the trust assets.

Asset tracing and constructive trust claims

The BVI Court has extensive experience with asset tracing cases and recognises constructive trust claims in accordance with English law principles. In terms of trust related litigation, such issues may arise in the circumstances where a trustee has, without authority or power, disposed of

property or entered transactions for the purpose of personal gain. In *Khan & Ors v Gany Holdings (PTC) SA* BVIHCMAP 2014/0018 the Court of Appeal found that the defendant trustee appointed assets to a beneficiary acting on a false or mistaken belief that the assets forming the trust had a negligible value. The Court of Appeal ordered the recipient beneficiary to account for all assets received as a result of the impugned appointment.

With respect to constructive trust claims for asset tracing purposes, several cases have arisen involving BVI companies alleged to have knowingly received assets derived from unlawful sources, such as bribes or secret commissions. Recent examples include:

- *JSC MCC Eurochem & Anr v Livingston Properties Equities Inc & Ors* BVIHC(COM)2015/0097, wherein Eurochem commenced proceedings to recover secret commissions received by two former senior executives of the company through BVI companies. Eurochem brought claims against the BVI companies based on knowing receipt. Eurochem alleged that the recipients of the bribes were liable to account as constructive trustees.
- In *Nissan Motor Co., Ltd & Anr v Carlos Ghosn & Ors* BVIHCM2019/0121, Nissan alleged that Mr Ghosn, the former CEO, diverted the company's money for his own benefit to a BVI company, Beauty Yachts PTY Ltd . Nissan claimed, *inter alia*, that the Beauty Yachts held sums diverted by Mr Ghosn on constructive trust as a knowing recipient.

How Ogier can help

Our Dispute Resolution attorneys have a particularly strong track record, having successfully acted in many of the complex, high value headline international trust disputes and private client litigation matters in recent years British Virgin Islands, Cayman, Guernsey and Jersey trust law.

Our trusts disputes specialists work seamlessly with our non-contentious private client lawyers, and form part of Ogier's Trusts Advisory Group alongside corporate lawyers to offer support from all three disciplines.

To learn more about our services and about the key features of other jurisdictions, visit our [Trust Disputes](#) page.

[1] England and Wales, Northern Ireland, Scotland, the Bahamas, Barbados, Bermuda, Belize, Grenada, Guyana, Jamaica, New South Wales (Australia), Nigeria, St Lucia, St Vincent and Trinidad and Tobago.