



## **When should Retiring Trustees seek a Contractual Indemnity**

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Dispute Resolution partner, Stephen King, considers the issues surrounding retiring trustees seeking a contractual indemnity.

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### **Personal Liability**

Unlike a company, a trust is not a legal entity and therefore the trustee or trustees act for the trust in their personal capacity. Consequently, they are personally liable for a number of liabilities such as those arising under contracts into which they enter and torts in respect of acts or omissions on their part in connection with the administration of trust property and tax. Provided they have acted within the terms of the trust instrument, they are entitled to meet liabilities that they incur as trustees from the trust assets.

### **Equitable Lien**

When a trustee retires, his personal liability continues for any liabilities incurred during the period of his trusteeship. However, practical problems arise because following retirement he no longer holds trust property from which to meet those liabilities and, moreover, the trust property may have been distributed to the beneficiaries or the trust itself may have been terminated. Trust law deals with these problems by creating an equitable lien, which gives the trustee an equitable interest in the trust property. The retired trustee is entitled to ask the current trustees to meet such liabilities from trust assets or to reimburse him if he has already met them himself. If the trust property has been distributed or the trust has been terminated, the trustee may claim personally against the beneficiaries to meet liabilities properly incurred. The equitable lien does not protect the trustee against liabilities to beneficiaries for a breach of trust.

### **Contractual Indemnity**

Despite the existence of an equitable lien, retiring trustees may also seek to protect themselves in other ways, for example by retaining assets to meet new liabilities or creating a "ring-fenced" fund on which they could draw. Before asking for an express indemnity, the retiring trustees should therefore consider what liabilities might arise after they retire and what type of protection they need against those potential liabilities. In complex trusts where there are assets in several jurisdictions or there is either a real prospect of adversarial proceedings or proceedings have already been commenced, particularly if those proceedings are brought by the beneficiaries, a trustee would be wise to seek further protection by way of a contractual indemnity. They may ask to supplement the lien with a contractual indemnity for a number of reasons:-

- 1 The new trustees might be, or might become, resident in a foreign jurisdiction that does not recognise an equitable lien but may enforce a contractual indemnity.
- 2 There may be tax consequences if the retiring trustees protect themselves by retaining significant assets in the United Kingdom.
- 3 The retiring trustees may have previously given contractual indemnities to former trustees and therefore seek similar protection from the new trustees.
- 4 The liabilities of the trust may simply not be known due to the size, complexity and geographical location (including jurisdictions with high political risk) of the trust assets.
- 5 Should there be a difficult relationship between the trustees and beneficiaries, for example where a beneficiary seeks the removal of a trustee under Section 19 Trusts of Land and Appointment of Trustees Act 1996, then a trustee is entitled to effective arrangements having been made for the protection of his rights in connection with the trust. This would almost certainly be by way of a contractual indemnity agreed between the parties.

Modern trust instruments usually confer an express power upon the new trustees to give indemnities; in the absence of that express power, the new trustees could give an indemnity that is enforceable as a matter of contract law. However, the terms of any indemnity should not normally go beyond providing the protection against liabilities to which the outgoing trustee would have been entitled had he remained trustee. In other words, the outgoing trustee should not be put in a better position than if he had remained as trustee, particularly as against claims by the beneficiaries for breaches of trust. Unsurprisingly, it is common for the outgoing trustee to seek maximum protection for himself and therefore look for the widest indemnities possible, while the incoming trustee has a duty to preserve the trust assets for the beneficiaries and therefore will seek to limit the scope of the indemnities, thus giving rise to a source of potential conflict between the two parties.

Chris Sly and Stephen King were instructed by the retiring trustee of the Estate of the late Badri Patarkatsishvili in claims brought by the Russian oligarch Boris Berezovsky.

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