

# The Liability of Trustees and Their Protection

When creating a settlement, some people choose as the Trustees, friends or family members; others select professional Trustees such as Mundays LLP; we channel such appointments through our Trust Corporation, Mundays Trustee Services Limited. Some choose a combination. This leaflet aims to advise private Trustees as to their responsibilities and liabilities in accepting the role.

## Liability to Third Parties

Trustees who make contracts with third parties (for example a bank lending money to the trust), are directly liable to them under contract law. The Trustees can recoup the cost from the assets of the trust, where they entered the contract in the proper course of the administration. However, their liability is *not limited* to the extent of the assets of the trust; if the third party claims more than the value of the assets still held by the Trustees, the Trustee will be *personally liable* for the shortfall.

Trustees may also be liable outside the law of contract, for their acts or omissions in administering the trust. For example, a Trustee might libel a third party. Where it can be shown that the Trustee was acting in the reasonable management of the trust, he will be entitled to be indemnified (in other words financially covered) out of the assets of the trust. However, even then, if the claim exceeds the value of those assets then the Trustee will be *personally liable* for the shortfall. Where the Trustee incurred the liability otherwise than in reasonable management of the trust fund, he will *not be entitled* to any such indemnity.

## Liability to Beneficiaries

A Trustee who causes loss to the trust will be *liable to the beneficiaries* for wasting the assets. It is not at all uncommon for private Trustees to make mistakes in an administration, especially if they are not professionally advised, and for the beneficiaries thereby to suffer loss; an obvious example is where a Trustee misinterprets the trust, and makes a payment to a beneficiary which is beyond what the beneficiary is entitled to, so that others suffer.

Much less rarely, Trustees might misappropriate assets from the trust fund, and use them for their own purpose; clearly they will then be *personally liable*, without limit, for the loss suffered by the beneficiaries.

The Trustee Act 2000 has imposed on all Trustees a *statutory duty* to exercise care and skill in the administration of the trust. Professional Trustees will be tested more rigorously than lay Trustees, which (whilst comforting for the lay Trustees) may make beneficiaries uneasy.

The Act imposes particularly onerous responsibility on Trustees, to *review investment performance* and keep agents on their toes, when delegated any of the Trustees' powers

## Liability to Inland Revenue

Trustees are personally responsible for completing self-assessment tax returns during the administration of the trust, and for payment of assessed tax. Delay in lodging returns, or in payment of tax, and especially under-declaration of income or gains, can now lead to significant penalties, which *may not be recoverable* from the assets of the trust fund.

In addition, Trustees have a statutory responsibility to the Inland Revenue to advise them of all circumstances which might lead to the payment of inheritance tax. Failure to account to the Revenue can lead to severe penalties, which fall on the Trustees personally and are *not usually recoverable* from the trust fund.

### **Liability to beneficiaries' creditors**

Trustees may be personally liable to creditors of a bankrupt beneficiary, if they pay the beneficiary direct and cannot recover it from him. Our policy is to make bankruptcy searches against beneficiaries before making capital payments to them, and to make such searches annually in respect of income beneficiaries.

### **Duty to Account**

Trustees are required to keep clear and accurate accounts of their dealings with the trust fund, and beneficiaries are entitled to inspect them. Where a Trustee has no experience of the preparation of accounts, he is under a *duty* to delegate the task to a competent person. Otherwise, the court might intervene and demand an account.

### **Extent of Liability**

The general rule is that a Trustee is responsible only for his own acts or omissions, not for those of his Co-Trustee; but a Trustee can be guilty of "wilful default" where the Trustee is reckless about the conduct of his Co-Trustee, and allows him to cause loss without doing anything about it. The Trustee might thereby also fail in applying the statutory duty of care under the Trustee Act 2000.

It is common for the trust document itself to protect Trustees against their liability for loss to the trust fund, except to the extent that it is caused by the Trustee's individual fraud or dishonesty. It is also common to absolve an individual Trustee from taking proceedings against his Co-Trustee where that Co-Trustee has been guilty of a breach of trust.

### **Relief from Liability**

The court, on application, has power to relieve the Trustee (wholly or partly) from personal liability for any breach of trust or duty, but it is not wise to place over-reliance on this, especially in the light of the Trustee Act 2000.

**For more information or advice  
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