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COVID-19 crisis and its impact on trustees and beneficiaries

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5. COVID-19 crisis and its impact on trustees and beneficiaries

Yip Man¹⁵⁰

Introduction

The COVID-19 pandemic has been described by Prime Minister Lee Hsien Loong as the “crisis of our generation”. We have to swiftly adjust to a new “normal” characterised by safety measures, travel restrictions, economic downturn and uncertainties in the days ahead. What is the new “normal” for trustees and beneficiaries? How should they respond to the legal and practical uncertainties in these challenging times? This commentary discusses two categories of uncertainties for trustees and beneficiaries: (1) uncertainty relating to trust investments; and (2) uncertainty relating to day-to-day administration.

Uncertainty relating to trust investments

Whether in good times or bad times, a trustee must act prudently and in accordance with their statutory and common law duties in respect of their exercise of the power of investment. However, in bad times such as the current economic climate, many investments may become risky to undertake and the performance of existing investments may turn out to be poor, yielding lower returns or even losses to the trust estate. This can potentially expose the trustees to breach of trust claims initiated by the beneficiaries, even though a bad investment outcome by itself does not establish a breach of trust. Trustees should carefully review investment performance and strategy, consider whether to vary the investment portfolio and where an investment manager has been appointed, to review the investment policy and activities. Doing proper research and seeking advice before entering into an investment decision would be crucial, as is the recording of the full reasons and the prudent decision-making process for undertaking high-risk investments. Unless directed by the trust deed, a more conservative investment strategy is to be preferred in such challenging times. Other than ensuring the proper discharge of one’s duties, a trustee would be well-advised to communicate with the beneficiaries, so as to manage their expectations on investment returns during this period. Two specific examples of lower investment returns are highlighted below.

First, for non-residential real properties held on trust that have been leased to Small and Medium Enterprises (SMEs), trustees should take note that the COVID-19 (Temporary Measures)

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(Amendment) Act 2020 provides an enhanced rental relief framework for SMEs.¹⁵¹ In essence, an eligible SME tenant can receive up to 4 months' waiver of rent for commercial properties and 2 months' waiver of rent for industrial/office properties. The scheme envisages co-sharing of rental obligations between the Government, the landlord and the tenant. The first two months of rental relief for SME tenants of commercial properties (or the first month for SME tenants of industrial/office properties) would be covered by property tax rebate and governmental cash grants which the landlord is mandated by law to pass on to the tenant through a two-month rental waiver (or a one-month waiver for the latter group). For tenants who have been substantially affected by COVID-19,¹⁵² they are entitled to additional rental relief (2 months' waiver of base rental for commercial properties and 1 month's waiver of base rental for industrial/office properties) which is to be borne by the landlord. Where this additional rental relief entitlement is triggered, this would result in lower rental income for the trust. To avoid unnecessary misunderstanding and tense relations, this information must be communicated to beneficiaries clearly and timeously.

Second, many trusts hold controlling shareholding in companies. These companies may be badly hit by the global pandemic, thereby resulting in the depreciation of share value and affecting dividend distribution. At common law, the trustee has the *Bartlett* duty to supervise and intervene in corporate management. However, many trust deeds modify the *Bartlett* duty through anti-*Bartlett* clauses – these are provisions that generally excuse the trustees from their *Bartlett* duty, save in very extreme circumstances, such as where the trustee has actual knowledge of dishonesty. Trustees should review the terms of the trust deed carefully to determine their precise scope of duties and seek advice on the validity of duty modification clauses. In the recent case of *Zhang Hong Li v DBS Bank (Hong Kong) Ltd* [2019] HKCFA 45, the Hong Kong Court of Final Appeal, on applying Jersey law, upheld the validity of an extreme form of anti-*Bartlett* provision that: did not require the trustee to supervise and interfere with corporate management, unless the trustee has actual knowledge of dishonesty; did not require the trustee to obtain information regarding corporate affairs or to verify the accuracy of the information it received; allowed the trustee to simply assume that the corporate affairs were being carried out competently. Trustees should not assume that the decision will necessarily be followed in other jurisdictions. Further, the wording of anti-*Bartlett* provisions differ: the specific clause in *Zhang v DBS* was very exceptional. Finally, trustees should take note that they may come by information relating to underlying corporate affairs through news channels which may trigger their duty to intervene.

¹⁵¹ For more details on the rental relief framework, see Ministry of Law Singapore, 'New Rental Relief Framework for SMEs' (3 June 2020) <<https://www.mlaw.gov.sg/news/press-releases/new-rental-relief-framework-for-smes>>.

¹⁵² For eligibility criteria for additional rental relief, see Ministry of Law Singapore, 'Introduction' <<https://www.mlaw.gov.sg/covid19-relief/rental-relief-framework-for-smes#eligibility>>.

In anticipation of potential breach of trust litigation, trustees should also review the trust deed to see if it contains any exemption clauses and consider the validity and scope of operation of these clauses.

Uncertainty relating to day-to-day administration

Even though Singapore has exited from the circuit breaker and is now in Phase 2 of reopening, individuals may be put on quarantine or stay-home orders, hospitalized for medical treatment, or even stranded overseas. Further, large-scale gatherings are still prohibited. As such, in-person meetings may be difficult or even impossible to carry out. Alternative arrangements for meetings of unitholders of relevant unit trusts and business trusts have been made through legislation (COVID-19 (Temporary Measures) (Alternative Arrangements for Meetings for Companies, Variable Capital Companies, Business Trusts, Unit Trusts and Debenture Holders) Order 2020). Trustees of other types of trusts which are not covered by legislation will need to consider alternative arrangements, if meetings are necessary and cannot be postponed.

But it is not just about meetings. If a serious illness befalls a trustee, he may become incapacitated to act. As a matter of general principle, trustees are to act unanimously. As such, it would be prudent for trustees to make plans for such contingencies. Pursuant to s 27 of the Trustees Act, individual trustees may execute powers of attorney for the delegation of their functions. The maximum period of delegation permitted under s 27 is 18 months, although the power of attorney may prescribe for a shorter period. The trustee who has delegated his functions remains liable for the acts and defaults of the donee.

If any event of incapacity (or even death) is to strike a trustee unexpectedly and no power of attorney has been put in place, the remaining trustees may need to consider appointing a replacement trustee. They should first look to the trust deed to determine which person has the power of appointment and in what circumstances the appointment may be made. Where the trust deed does not provide for the power of appointment in the circumstances which the remaining trustees find themselves, they will have to consider an appointment made pursuant to s 37 or s 42 of the Trustees Act.