CHANCERY BAR

CHANCERY BAR ASSOCIATION CAYMAN CONFERENCE

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REMOVING TROUBLESOME TRUSTEES

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Introduction

It is often the kneejerk reaction of disgruntled beneficiaries to wish to have trustees removed. In cases of clear breach of trust, that may not be too difficult but in cases which are not so obvious, an application to the court may prove to be frustrating, expensive and ultimately unsuccessful. If removal of the trustees is being considered, then it is important to go through the right thought processes. It may not be necessary to go to Court and every avenue should be explored before an application is made to remove trustees.

Removal outside Court

The first port of call is the trust instrument. Some well drafted modern settlements have powers to remove trustees vested in the person who has power to appoint them (often the settlor while he is alive) and sometimes in the beneficiaries or a class of beneficiaries. If such a power exists then the matter is greatly simplified and a trustee cannot complain of being removed in this way provided that it is done in the manner set out in the Settlement.

A second and often neglected power is that contained (in England and Wales) in section 36 of the Trustee Act 1925 this provides:-

> "**36 Power of appointing new or additional trustees**
>
> (1) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, or is an infant, then, subject to the restrictions imposed by this Act on the number of trustees,-
>
> (a) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or
>
> (b) if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee;
>
> may, by writing, appoint one or more other persons (whether or not being the persons exercising the power) to be a trustee or trustees in the place of the trustee so deceased remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, or being an infant, as aforesaid."

Similar powers are found in many common law jurisdictions:

Cayman - s4 Trust Law (2011 Revision)

Bermuda - s26 Trustee Act 1975

BVI - s36 Trustee Act 1961

Isle of Man - s35 Trustee Act 1961

However it should be noted that the Channel Island jurisdictions do not provide for an equivalent power. Under the Trusts (Guernsey) Law 2007 and the Trusts (Jersey) Law 1984, in the absence of a specific power under the trust instrument a trustee can only be removed by the Court.

The section is of course most commonly used when a trustee wishes to retire. However it might in certain circumstances prove useful where, for example, a trustee has been made bankrupt or has become mentally incapable. A person is "incapable" of acting if he suffers from a mental illness such that he lacks capacity to act as a trustee, although the ground is not just confined to that; a trustee may be incapable by reason of old age and infirmity[1]. If a mentally incapable trustee[2] is also beneficially interested in possession leave must be sought from the Court (the Court of Protection in England and Wales) before the appointment is made.

The major difficulty, and perhaps the why co-trustees or the person in whom the power of appointing new trustees is vested, shy away from using this section is in ascertaining whether one of the grounds is clearly fulfilled. For example, what constitutes unfitness to act? It might be thought that bankruptcy of the trustee would be a clear ground, but some doubt has been

1 *Re Cutler* (1895) 39 SJ 484.

2 Section 4(8) of the Cayman Trust Law refers to a person of "unsound mind"

expressed about that[3]. Problems can also arise where the lack of capacity is disputed. The difficulty is that where a co-trustee appoints a new trustee to act in place of one he has considered to be unfit, he may find that the appointment is challenged on the grounds that section 36 does not apply.

However, in the right case perhaps where it is clear that nobody will seriously challenge the removal of a trustee it should be borne in mind.

Section 36 may assist where the disgruntled beneficiaries are also co-trustees or where a beneficiary has the power to appoint new trustees. The position is more difficult where it is the beneficiaries who are at loggerheads with the trustees. Traditionally the position was that beneficiaries of full and age and capacity, although able to break the trust, could nevertheless not remove problem trustees. To a certain extent this position was remedied in England and Wales by the Trusts of Land and Appointment of Trustees Act 1996 section 19. This section applies where:-

- There is no person nominated for the purpose of appointing new trustees in the instrument creating the trust
- The beneficiaries are of full age and capacity and taken together are absolutely entitled to the trust property
- They give a written direction to the trustee to retire from the trust.

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3 See *Lewin on Trusts* 18th ed para 14-15.

At first sight the section looks extremely useful, but there are some problems. First of all, it is unclear because of the restrictive definition of "beneficiary" in the 1996 Act[4], whether it applies to beneficiaries under a discretionary trust. Secondly there is the practical problem of all the beneficiaries acting in concert. Finally for it to work, there must be at least two trustees left and so an appointment of a new trustee or trustees may be necessary, and there must be reasonable arrangements in place for the protection of the trustee (i.e. an indemnity and payment of his fees). It is easy to see how a problem trustee could make life difficult for beneficiaries seeking to operate this section. In any event many jurisdictions lack a similar provision.

Removal by the Court

Where there is no other mechanism available, an application to the Court might prove necessary. A surprising amount of Court time is spent trying to remove trustees and executors. However, in England and Wales, as it is done in chambers in the main, there have traditionally been few reported cases to provide guidance. The reasons for this are perhaps the same as those which were identified by Lord Blackburn in *Letterstedt v Broers* (1884) 9 App Cas 371

> "The reason why there is so little to be found in the books on this subject is probably... if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own counsel to resign, and does so. If, without any reasonable ground, he refused to do so,

4 Section 22(1) "In this Act "beneficiary", in relation to a trust, means any person who under the trust has an interest in property subject to the trust (including a person who has such an interest as a trustee or a personal representative)"

> it seems to their Lordships that the Court might think it proper to remove him; but cases involving the necessity of deciding this, if they ever arise, do so without getting reported."

Recently however there have been a number of cases which do at least provide some illustration of these principles which I mention below.

There is in fact little dispute as to the law which governs the Court's jurisdiction in this area but the difficulty is in its application to a particular set of facts. The general principles were set out by the Privy Council in *Letterstedt v Broers*, approving a passage from *Story's Equity Jurisprudence*:

> "*Story* says, s. 1289, 'But in cases of positive misconduct, Courts of Equity have no difficulty in interposing to remove trustees who have abused their trust; it is not indeed every mistake or neglect of duty, or inaccuracy of conduct of trustees, which will induce Courts of Equity to adopt such a course. But the acts or omissions must be such as to endanger the trust property or to shew a want of honesty, or a want of proper capacity to execute the duties, or a want of reasonable fidelity.'
>
> It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by *Story* is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the Court might consider that in awarding costs, yet if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate."

It should be mentioned that although the decision in *Letterstedt* was framed in terms of the exercise by the Court of its inherent jurisdiction to regulate the proper execution of trusts, the same fundamental principles apply where the Court is exercising a statutory power which

permits it to replace a trustee, such as section 41 of the Trustee Act 1925[5] (section 41 Trusts Law 2011 Revision) or an executor (section 50 Administration of Justice Act 1985).

The main principle on which such jurisdiction should be exercised is therefore the welfare of the beneficiaries and of the trust estate. As *Letterstedt* makes clear, it is not only in cases of misconduct and breach of trust when the Court will remove trustees. A Court will not simply remove trustees because of hostility between them and the beneficiaries *per se.* However, if the breakdown in the relationship is in relation to the administration of the trust, that will justify removal. Lord Blackburn put the matter thus in *Letterstedt* at 389.

> "It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded.

In the Bahamian case of *Viso v Chase Manhattan Corporation* Ltd (1994) Supreme Court of the Bahamas No 1261 of 1992 Osadebay Ag J (quoting *Letterstedt*) suggested some misconduct or mismangement on the part of the trustee must be required. He held that

> *"*... to remove a trustee merely on the basis that the [beneficiaries] are not happy with the way that the trustee has behaved towards them, without proof of any misconduct or mismanagement of the trust assets ... would not be a proper exercise of the court's jurisdiction."

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5 Section 41 Trustee Act 1925 permits the court to appoint a new trustee in substitution for one or more existing trustees. There is not, however, a statutory power (in England and Wales at least) which permits the Court to simply remove a trustee without appointing a replacement. In such circumstances recourse must be had to the inherent jurisdiction as identified in *Letterstedt v Broers*.

Whilst a court will not remove a trustee without cause, the decision in *Viso* may have put the test rather high. In another Bahamian case, that of *De Mercado v Cititrust (Bahamas) Ltd* (1986) Supreme Court, The Bahamas, No 1252 of 1986, Georges CJ removed a corporate trustee. Although he found that allegations of incompetence and breach of trust made against the trustee had not been made out, he was satisfied that the trustee had been unresponsive in his dealings with the income beneficiaries and that the relationship between them had deteriorated to the extent that the interests of the beneficiaries were likely to be adversely affected.

Likewise in the Ontario pension case of *Bathgate v National Hockey League Pension Society* (1994) 110 DLR (4^{th}) 609 the Court of Appeal held that an act of misconduct or dishonesty was not required before a court could replace a trustee and that such intervention was required where the continued administration of the trust with due regard for the interests of the beneficiaries had become impossible or improbable.

A submission in the English case of *Jones v Firkin-Flood* [2008] EWHC 2417 (Ch) that trustees should not be removed otherwise than for deliberate default was held by Briggs J to be contrary to authority and was rejected. The Judge there considered that the trustees had been unfit and had never properly understood their duties and he removed a solicitor trustee whom he considered partial to one of the beneficiaries and who had not coached the other lay trustees in their duties properly.

A conflict of interest will also clearly justify the Court in removing trustees[6].

Even where a breach of trust can be established, it does not follow that removal is then automatic. Thus in the New Zealand case of *Kain v Hutton* [2007] NZCA 199 the New Zealand Court of Appeal held:

> "Merely showing breaches of trust would not necessarily be sufficient to justify removal of trustees. This would depend on the gravity and nature of the breaches and the particular circumstances of the trust and the trustees, including the level of culpability of the trustees... To allow trustees to be removed for relatively inconsequential mistakes would be to usurp the settlor's wishes in entrusting the assets to the trustees. In the same way, mere incompatibility between trustees and beneficiaries is not enough... Any incompatibility must be at such a level that the proper administration of the trust is seriously adversely affected and it has become difficult for a trustee to act in the interests of the beneficiary."

In England that has been something of a flurry of reported decision on the removal of trustees and executors in the past few years. One of the leading cases relates to the estate of Agnes Carvel, the widow of US ice cream magnate Thomas Carvel. In *Thomas and Agnes Carvel Foundation v Carvel* [2008] Ch 395 the executrix had purported to sue the estate of the deceased in her personal capacity and had entered judgment against it for £8M. The Court removed her as an executrix and appointed a judicial trustee of the estate. For various technical reasons the statutory power being used in that case was section 1 of the Judicial Trustees Act 1896. Nonetheless at para [44] Lewison J indicated that the principles for the

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6 *Monty Financial Services v Delmo* [1966] 1 VR 65; *Hunter v Hunter* [1938] NZLR 520.

removal of trustees as explained by Lord Blackburn in *Letterstedt* were equally applicable to the removal of personal representatives. Lewison J summarised the test at para [46] thus:

> "The overriding concern is, therefore, whether the trusts are being properly executed; or as [Lord Blackburn] put it in a later passage "the welfare of the beneficiaries"

Kershaw v Micklethwaite [2010] EWHC 506 (Ch) involved the administration of a mother's estate by her two daughters and an accountant. One of the beneficiaries of the estate, the deceased's son Mr Kershaw, asked the court to remove all three executors on the basis that the executors had failed to value the assets of the estate properly for the purposes of the IHT return; had failed to update Mr Kershaw and keep him informed of the progress of the administration of the estate; had failed properly to identify the assets of the estate; there was a potential conflict of interest in that the will gave Mrs Micklethwaite and Mrs Barlow the power to appropriate certain real property in satisfaction of their interests in the estate (but did not give the same power in satisfaction of Mr. Kershaw's interest); there was a breakdown in relations between the executors and Mr. Kershaw and he lacked confidence in their competence.

It was argued that the test for removing executors was not as stringent as the test for removing a trustee because an executor is only involved in gathering in a person's estate and distributing it in accordance with the will whereas a trustee may have important discretionary powers. Newey J rejected this argument and followed Lewison J's decision in *Thomas and Agnes Carvel Foundation v Carvel* that the relevant test for the removal of an executor is the same as that for

the removal of a trustee, namely that in deciding whether to remove an executor or trustee the court will only do so if it is in the interest of the proper administration of the estate or trust and would promote the welfare of the beneficiaries.

Newey J also rejected the argument that mere hostility could be a justification for the removal of an executor without more. Nevertheless hostility would be a factor to be taken into account by the court in deciding whether to remove an executor where hostility is obstructing the administration of the estate, or sometimes even in cases where it might obstruct the administration of the estate. He further concluded that the fact that the trustee's functions were of a "simple character" weighed against removal in that particular case. Likewise, the choice made by the testator in selecting an executor was a relevant factor for the court to take into account, at least on the basis that the testator could "be expected to have had knowledge of characters, attitudes and relationships involved which a court will lack". It was held that there was nothing in the first three allegations listed above that would justify removal of the executors. Furthermore it was held that the conflict of interest was not of the sisters' own making but had been placed upon them by the testatrix and that such conflicts often arose where family members are executors.

In *Alkin v Raymond* the testator appointed his friends Mr Raymond and Mr Whelan to be his executors and trustees. Mr Whelan was particularly well known to the testator as they had

engaged in property development together: the testator put up the capital and Mr Whelan provided building services through his company. The Deceased's estate established a nil-rate-band discretionary trust for the benefit of his wife, daughter and two granddaughters and then left his residue to pay the income to his widow for life remainder on discretionary trusts for his daughter and granddaughters with overriding powers over his widow's life interest in their favour.

Mrs Alkin and Mrs Price sought Mr Whelan and Mr Raymond's removal as executors on a number of grounds:

(a) very little income had been paid to Mrs Alkin in respect of her interest;

(b) the executors had dealt inappropriately with reporting lifetime gifts to HMRC;

(c) the executors, and in particular Mr Whelan, had dealt with Mrs Price in an inappropriate and disrespectful manner by suggesting, among other things, she have cosmetic surgery and by sending her lingerie as a Christmas present.

(d) the executors had paid Mr Whelan's company a substantial sum (£163,000) in respect of an invoice backdated to Mr Alkin's lifetime but rendered after his death that Mrs Price contended was not due

AG Bompas QC sitting as a deputy judge of the Chancery Division held that the criterion for the removal of Mr. Whelan and Mr. Raymond as executors and trustees was the same. The court should exercise its discretion to remove them if this would promote the trust being properly

executed and they should be guided by the welfare of the beneficiaries. Hostility alone was insufficient to provoke the court into exercising that discretion but it was a factor to be taken into account – in particular where it is grounded in the manner in which the trust or estate has been administered and where it has been caused wholly or partly by substantial overcharges against the trust or estate.

The Court held that little income had arisen for the benefit of Mrs. Alkin and that in any event her care was not jeopardised as she was a woman of independent means. Mr. Bompas QC found that there was nothing in Mrs Price's allegations of disrespectful conduct and that she did not find them "embarrassing and frustrating" on the basis of her gracious thanks for the present. The totality of the allegations was described by the deputy judge as "desperately unattractive".

It was further held that the executors had failed properly to attribute lifetime gifts from the testator to Mrs Price. In particular they attributed to her a £40,000 gift of "cash in a bag" that Mr Whelan thought he had seen during the testator's lifetime but which had not surfaced after death. Nevertheless the executors then put HMRC on notice of the alleged gift and other supposed gifts which they clearly knew she had not received. Although the foregoing would not have been enough for the deputy judge to conclude that Mr Whelan and Mr Raymond should be removed, the fact that Mr. Whelan submitted a wholly unjustified (and apparently unjustifiable and backdated) invoice in connection with the building joint venture he was

engaged in with the testator that Mr Raymond was prepared to pay without scrutiny, was sufficient for the executors' removal.

A very recent decision in which the Court declined to remove a personal representative is that of Sales J in *Re Savile Deceased; National Westminster Bank v Lucas* [2014] EWHC 653 a case concerning the estate of the now notorious Jimmy Savile. Mr Savile had died in October 2011 and had left a will appointing the Natwest Bank as his executor. The bank had placed the statutory notice advertising for claims against the estate under section 27 Administration of Estates Act 1925. Such a notice protects a personal representative who has distributed the estate against claims made by creditors that subsequently come to light. However it does not provide protection if the claim is notified prior to the distribution of the estate. In October 2012 a television programme was broadcast making claims that Savile had engaged in numerous acts of sexual abuse, and a media furore over the following days made clear that claims against the estate were likely.

A number of issues came before Sales J, one of which was whether the bank should be removed as Mr Savile's executor. Declining to do so he held at para [80] :

> "I consider that it would not be appropriate for the court to take the further step of removing the Bank as executor unless there is a real risk that the Bank will not act fairly and conscientiously in that office or if the Bank cannot be expected to continue to carry out the administration of the estate in an effective and proper manner."

He rejected a number of criticisms made of the Bank. It was alleged (*inter alia*) that it had shown unacceptable and improper hostility to the residuary beneficiary. The judge rejected this, and held that the Bank had made proper and reasonable judgments about the best way to administer the estate, having regard to the interests of all those who may prove to have an entitlement under it. He stated:

> "There are many contexts in which trustees or those in equivalent positions, such as personal representatives of a deceased person, have to make judgments which involve striking a balance between different competing interests and which may thus adversely affect some persons claiming under the trust or in respect of the estate of the deceased. It is to be expected that in such cases there will often be an element of friction between the trustee or personal representative and those disappointed by their decisions. This is not in itself a good ground to remove the trustee or personal representative from their office."

Removal of Protectors

A related issue which may also need to be considered are the circumstances under which a Court can remove a protector from office. Whilst uncommon in England, protectors are, of course, a common feature of offshore trusts.

The nature of a protector's obligations will depend entirely on the limits prescribed by the trust instrument. The protector may simply have right to be consulted, or notified of a trustee's dispositive decisions, or his powers and duties may be more substantial; such as the approval of trustees' remuneration, or reviewing the administration of the trust. In some cases, a protector may have control over a trustee's dispositive powers and be able to veto the exercise of a power of appointment.

Given their often extensive powers, concerns can arise about how protectors can be controlled. The key issue appears to be whether the trust protector owes fiduciary duties to the beneficiary, such that the Court is able to invoke its inherent jurisdiction to secure the good administration of the trust and the welfare of the beneficiaries.

Cases where protectors have been removed from office include:

In Cayman there is *Re The Circle Trust* [2006] CILR 323. In this case Henderson J drew upon authorities from the Isle of Man *Rawcliffe v Steele* [1993-95] Manx LR 426 and Jersey *Re Freiburg Trust* [2004] JRC 056. He held at para [23]

> "I am satisfied that the settlor's intent was that the protector (if any) is to assume a fiduciary role. He is intended to exercise his powers for the good of, and only for the good of, the beneficiaries as a whole. He is a fiduciary in the classic sense. I am also satisfied that this court has an inherent jurisdiction to remove the protector upon good cause being shown, and to appoint another in his stead. Both of these conclusions are supported by the decisions in *Rawcliffe v Steele* and *Re Freiburg Trust.* As I indicated earlier, a deed of settlement may be so constructed as to show clearly that a protector is not to have fiduciary obligations and may act purely for his own benefit. The deed under consideration here contains no hint of this. The nature and extent of the authority conferred upon the protector, together with the provisions exempting him from liability for negligence and providing for indemnification and remuneration for his time, demonstrate that this settlor intended the protector to act in a fiduciary capacity."

There have been a number of Jersey cases in which protectors have been removed by the Court such as *Re Freiburg* [2004] JRC 056 where it was held:

> "The Court must have power to police the activities of any fiduciary…who was thwarting the execution of a trust or who was otherwise unfit to exercise the functions entrusted to him by the trust instrument".

In *Re VR Family Trust* [2009] JRC 109, the trust instrument included a declaration that "no power is vested in the Protector in a fiduciary capacity". The Court held at [28] that:

> "The significance of [the clause] declaring that the powers vested in the Protector are not held in a fiduciary capacity would simply mean that he is not under an obligation to consider from time to time whether or not to exercise them. If he does exercise them, then they have to be exercised for the benefit of one or more of the beneficiaries".

In that case the Court removed a protector who was asserting a claim against trust assets. The Court made clear that the rules against conflicts of interest applied equally to protectors as they did to trustees.

Most recently, again in Jersey, in *Re the A Trust* [2012] JRC 169 the Royal Court removed a protector. In its judgment the court made clear that the jurisdiction to remove a protector flowed from the fiduciary nature of the office and that the guiding principles for the exercise of the jurisdiction were akin to those applicable to the removal of a trustee.

In the Isle of Man *Re Papadimitriou* [2004] WTLR 1141 Deemster Cain accepted that the principles laid down in *Letterstedt* would apply to protectors. However he indicated that he thought that the court would only act to remove a protector in exceptional circumstances.

Tactics

Deciding when matters have got to the stage where an application to Court to remove a trustee is appropriate can be difficult. If there has been a significant breach of trust, then the Court will almost always remove. If, however, there is merely a disagreement between the beneficiaries and the trustees, the Court may be reluctant to do so. Few removal applications result in a contest, and it may be surprising that some of the above cases reached trial. Trustees, particularly professional trustees faced with an application to remove them often agree to retire, and negotiate indemnities which they would not get if they were to fight removal. Certainly faced with an application by all or the majority of the beneficiaries for them to go, the sensible trustee will negotiate their retirement on favourable terms rather than fight the application.

The costs of such applications are of course within the discretion of the Court. If there has been a breach of trust or fault on the part of the trustees, then it will be relatively straightforward to get an order for costs against the trustees. In other cases, where the trustees are not perhaps at fault it may be harder to obtain an adverse costs order unless it can be shown that they should not have opposed the application. There is a moot question as to whether trustees can fund their defence of the removal application from the fund pending final determination. They certainly cannot obtain a *Beddoe* order and the better view would seem to be they cannot. In *Alkin* an order was obtained forcing the trustees to repay the costs which they had taken out of

the fund with interest. They were also ordered to pay half the costs personally without any recourse to the fund.

Some thought has to be given as to who the new trustee will be. Where beneficiaries are at loggerheads, the job can be something of a poisoned chalice. Also, if a professional trustee is going to be appointed it must be ensured that the trust instrument makes provision for their remuneration and there is enough liquidity in the trust fund to pay their costs.

In England and Wales the Court can in cases where matters have deteriorated to such an extent that some control by the Court would be a good idea appoint a judicial trustee. In general it will not do so unless the administration of the trust has broken down[7], although this route was adopted in *Carvel* for other technical reasons. This is, in a sense, a half way house between a full administration order (which is rarely made nowadays) and simply appointing new trustees and leaving them to their own devices. A judicial trustee, who is often simply an appropriate individual but may be the Official Solicitor, can apply to the Court for directions and should obtain the sanction of the Court for any major decisions. He may obtain non-contentious directions from the assigned Master informally by letter, without the need for a Part 23 application (unless the court directs otherwise). Once his office is over he can then

7 *Re Chisholm* (1893) 43 SJ 43; *Re Ratcliffe* [1898] 2 Ch 352.

apply to the Court for his discharge. However, the judicial trustee nevertheless has all the usual powers of a trustee which he can exercise .

Conclusion

The moral of the story is always to seek a way to have trustees removed outside Court where possible; either by using the trust instrument or a relevant statutory power permitting this (such as or s4 of the Trust Law) or by negotiating their retirement.

Applications to remove, particularly if they are to be contested are not for the faint hearted but sometimes it is the only way in which to solve an intractable problem.

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