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Dealings by Trustees with Third Parties

This note highlights the importance of trustees properly identifying themselves when dealing with third parties and steps third parties can take to protect their interests.

Introduction

In the past, English law dictated that, as a rule, a trustee acting on behalf of a trust binds his personal estate subject to a right of indemnity against the trust property for debts properly incurred on behalf of the trust. This placed a trustee's personal estate at risk should the trust property be insufficient to satisfy debts owing to third parties.

The present context

This risk has been mitigated under the Trusts (Guernsey) Law, 2007 ("Trusts Law") which officially recognised the two potential capacities a person could act in within the context of trusts; namely in their personal or representative capacity as trustee.

Where a party identifies himself as a trustee acting on behalf of a trust or the relevant third party is otherwise aware that he is acting as a trustee, the trustee's personal estate is protected against liability. In such a case, liability for any debts incurred on behalf of the trust extends only to the trust property.

However, the Trusts Law provides that if the trustee fails to inform a third party who is otherwise unaware that the trustee is acting in his representative capacity, then the trustee will incur personal liability to the third party. In this case, the trustee has a right of indemnity against the trust property provided the trustee has not acted in breach of his duties.

The problem

There are still cases noted where trustees have ultimately had their personal estates used to satisfy debts to third parties, which were otherwise properly incurred on behalf of the trusts they represented.

Despite the protection afforded to trustees and the relative ease of securing them, cases still frequently brought before the Court suggests that more can be done to reduce doubt as to whether a party was acting in his representative capacity as trustee.

What is a trustee to do?

Apart from understanding his fiduciary duties and powers under the trust deed, a trustee can protect his personal estate by always confirming in writing that he is acting in his capacity as trustee and ensuring that all contracts with third parties, especially those that have a non-Guernsey element which might be enforced in another jurisdiction, include a limited recourse clause based on the provisions of the Trusts Law.

What about third parties?

In addition to proper due diligence and knowing your client, a third party can protect his interests by reviewing the trust deeds to establish what his recourse is in the event of default and obtaining security from the settlor or principal beneficiary.

Conclusion

Legal advice at the time of contracting will help remove the doubts that give rise to costly disputes and ensure steps are taken to otherwise protect the relevant trustee or third party's interests in the event of default.

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