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HSBC Trustee Training

Sophia Man | 30 January 2024



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1



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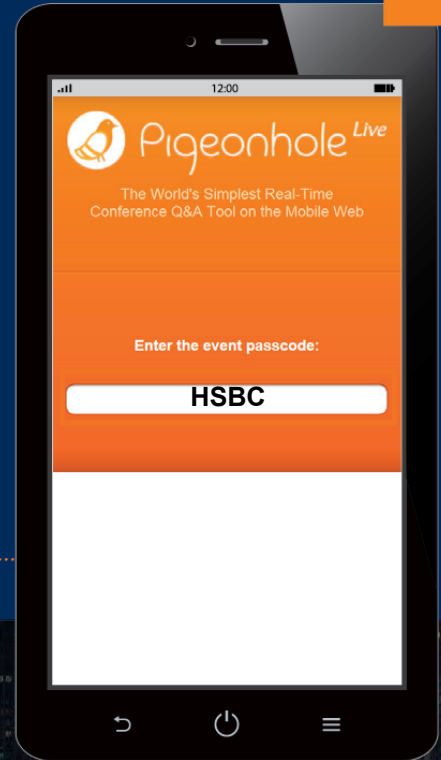
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Agenda






- 1 Trustee duties
- 2 Duties of a trustee under the MPF (Exemption) Regulation
- 3 Liabilities of and remedies against a trustee
- 4 Quiz

An aerial night view of a city skyline, likely Hong Kong, featuring a river, a bridge, and numerous illuminated skyscrapers.

1

Trustee duties

What is a trust?

-  Trust is a relationship whereby someone entrusts his / her assets to someone (i.e., a trustee), and the trustee will look after the assets for the benefit of other persons (i.e., beneficiaries)
-  Trust is not a legal entity
-  It needs to act through the trustee
-  The legal title of the assets of the trust rests with the trustee, while the beneficial ownership rests with the beneficiaries
-  Retirement schemes are mostly in the form of trust, but for an ORSO scheme that operates as a top-up ORSO scheme (i.e., no MPF exemption status), it can be in the form of an insurance policy

Basis for trustee's duties



Trust deed – duties (e.g., "must") vs powers (e.g., "may")




Key legislation


 ORSO

 MPF (Exemption) Regulation



Common law

 A fiduciary relationship arises between a fiduciary and other(s) in circumstances which give rise to a relationship of trust and confidence

 The other(s) are entitled to expect that the fiduciary will act in their best interests, to the exclusion of the fiduciary's own personal interest

Overview of trustee's duties



Act in the interest of beneficiaries – cannot act in trustee's self interest

- If the trustee wishes to amend the trust deed to protect the trustee's position, without any benefit to the beneficiaries
- Cannot profit from the fiduciary position at the expense of the beneficiaries



Avoid conflicts

- Not only between trustee and the beneficiaries
- But also between beneficiaries of one scheme and beneficiaries of the other scheme – cannot favour one over the other



Undivided loyalty

- Distinguishing feature of a fiduciary – but is proscriptive not prescriptive
- Must act in good faith
- Must not (i) make a profit out of his trust, (ii) place himself in a position where his duty and his interest may conflict, or (iii) act for his own benefit or the benefit of a third person without the informed consent of his principal



Overview of trustee's duties



Confidentiality

- Must not use the information from beneficiaries for its own advantage or for the others
- Must also be in line with applicable laws and regulations



Duty of care

- Must exercise the level of care, skill, diligence and prudence that may reasonably be expected of a prudent person acting in a similar capacity and familiar with ORSO
- Non-fiduciary duty



No-conflict rule



Fiduciary must not put itself in a position where its personal interest comes into conflict with the beneficiary's interests



Objective test

whether a reasonable person looking at the relevant circumstances would think that there was a **real sensible possibility of conflict**

No-conflict rule

Strict application of the rule

Inability of the trust to purchase makes no difference to the liability of the fiduciary



Keech v Sandford (1726) Sel Cas Ch 61

- The trustee (T) held a lease of profits of Romford market on trust for the beneficiary
- Prior to its expiry, T applied to renew the lease but was rejected by the lessor, and he proceeded to renew the lease for himself
- T was held to be in breach of his fiduciary duty



"**Fully informed consent**" exception – the fiduciary can fully disclose its own interests and obtain the fully informed consent from the beneficiary, the court, or the settlor / testator (in which case the trust instrument may expressly authorise such a conflict)



No-conflict rule

Strict application of the rule



Courts have held that a fiduciary can breach a "no-conflict" rule even though:

- a. they acted in good faith;
- b. their actions were not detrimental to the beneficiaries or even left the beneficiaries better off than they would have been had the fiduciary done nothing; and
- c. the possibility of conflict between the interest of the fiduciary and beneficiary was remote



Arguments for relaxing the rule:

- Where the beneficiary would not have objected to the trustee's actions or would not have wanted the opportunity himself
- Fiduciary should be able to avoid liability if it acted loyally and in the best interests of the beneficiary

...future possibility of relaxing the rule where the fiduciary acted out of best motives?



No-conflict rule

Situations involving purchase of trust property or the beneficiary's interest

Two rules have been developed to resolve the conflicts that may arise in such situations



Self-dealing rule

A trustee may not sell trust property to oneself

Any such transaction will be rendered voidable at the option of a beneficiary, however fair the transaction



Fair-dealing rule

Applies where a trustee purchases a beneficiary's interest or a property over which the fiduciary does not also control

Such transaction will not be voidable as of right by the beneficiary and will not be set aside if the trustee has behaved fairly



No-profit rule

A fiduciary must not profit from its position as a fiduciary without the fully informed prior consent of the beneficiary.

- Must account to the beneficiary for any such profits obtained



Overlaps with no-conflict rule in application

- Both rules applied by the courts to the same factual situation in *Keech v Sandford* – profit was made out of the fiduciary's position



Court will not demand strict proof of a conflict – profiting from a fiduciary position is very likely to involve a conflict of interest and duty

- Prohibition on secret profits has been applied strictly
- Secret profits – unauthorised payment obtained by the fiduciary as a result of the fiduciary position
 - E.g., bribes and secret commissions, engaging in other remunerative employment using own position as trustee, or using trust property to own benefit



Undivided loyalty

A fiduciary owes undivided loyalty to its beneficiaries and must act in the best interests of the beneficiaries **as a whole**

- Sometimes subsumed under the "no-conflict" rule as a conflict between duty owed to Beneficiary A and duty owed to Beneficiary B
- Serve each beneficiary as loyally as if he were its only beneficiary



Potential conflict

- Disclose the potential conflicts of interest
- Obtain informed consent
- Consenting party must be aware of all material facts
- Not a duty to proactively make full disclosure and seek consent, but a duty to **not** act with potentially conflicting duties
- But must still act in good faith in the interests of each beneficiary



Actual conflict and cannot fulfil duty to one beneficiary without failing the other

- Must cease to act for at least one beneficiary (or preferably all)



Duty of confidentiality



With respect to confidential information obtained in the capacity as a fiduciary

- I.e., all trust-related information (incl. personal things about beneficiaries that come to the trustee's knowledge while administering the trust)



Must only use information obtained in confidence from the beneficiary for the benefit of the beneficiary

- Otherwise, must obtain fully informed consent from the beneficiary



Approved disclosure must also be in line with applicable laws and regulations

- Section 77 ORSO – prohibit transfer or disclosure unless transfer or disclosure is for ORSO purposes
- PDPO



Continuing duty – survives termination of trust or retainer



Remedy – injunction to restrain the release or misuse of confidential information

- If one can show that a threatened act by another would amount to a breach of confidence, the prima facie position is that an injunction will be granted, unless there are exceptional factors

Duty of care



Non-fiduciary duty – developed in the courts of equity and similar to tortious duty of care



When managing trust affairs, must take all precautions that an ordinary prudent man of business would take in managing similar affairs of their own

- Not what they would do if they only had themselves to consider, but if they had a moral obligation to provide for others



Objective test

- Not a defence - that the trustee was doing its incompetent best; faith; honesty; sincerity



Trust corporations and professional trustees – may have increased standard as they hold themselves out as having specialised skills and experience, for which they will be remunerated

- Not a defence – acting on professional advice
- "If, under the best advice he could procure, he acts wrongly, it is his misfortune; but **public policy requires that the trustee, rather than the beneficiary, should be the person to suffer**" (**Doyle v. Blake (1804) 2 Sch & Lef 231**)

A nighttime aerial view of a dense city skyline, likely Hong Kong, with numerous skyscrapers and lights reflecting on the water. The image is dark, with the city lights providing the primary illumination.

2

Duties of a trustee under the MPF (Exemption) Regulation

Duties of a trustee under the MPF (Exemption) Regulation



Trustees and investment manager to exercise appropriate care, skill, diligence and prudence with respect to the administration of a scheme

The trustees and investment manager of a scheme shall perform the following duties with respect to the administration of the scheme—



a

the duty to exercise a level of care, skill, diligence and prudence that may reasonably be expected of a prudent person who is acting in similar capacity and who is familiar with -









- i. in the case of a trustee, the administration, management and maintenance of an ORSO registered scheme;
- ii. in the case of an investment manager, managing the investment of the assets of an ORSO registered scheme;



b

in the case of a trustee, the duty to use all relevant knowledge and skill, in the administration, management and maintenance of the scheme, that the trustee may reasonably be expected to have in consequence of his business or occupation;

Duties of a trustee under the MPF (Exemption) Regulation

-   in the case of an investment manager, the duty to use all relevant knowledge and skill, in managing the investment of the assets of the scheme, that the manager may reasonably be expected to have in consequence of his business or occupation;
-   the duty to ensure that the assets of the scheme are invested in different investments so as to minimize the risk of losses of those assets, unless in particular circumstances it is prudent not to do so;
-   the duty to act in the interest of the scheme members and not in the trustee's or investment manager's, as the case may be, own interest;
-   the duty to act in accordance with the governing rules of the scheme.

A nighttime aerial view of a dense city skyline, likely Hong Kong, with numerous skyscrapers illuminated and their lights reflecting on the water in the foreground. The scene is dark, with the city lights providing the primary illumination.

3

Liabilities of and remedies against a trustee

Liabilities of a trustee



Trustees jointly and severally liable

All the trustees will be liable regardless of whether any one of the trustee participated in or even knew about the breach



Indemnity/exoneration provisions in the trust deed won't help

Trustees cannot be exonerated or indemnified for fraud, misfeasance or breach of trust (ORSO requirement)



Remedies

- Equitable remedies, e.g., require the trustee to do something or refrain from breaching obligations
- Regulatory concerns

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4

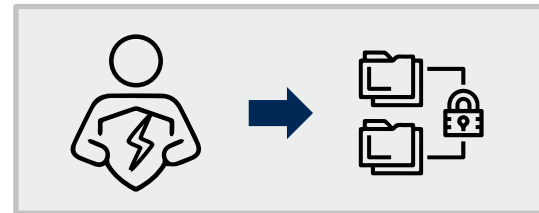
Quiz



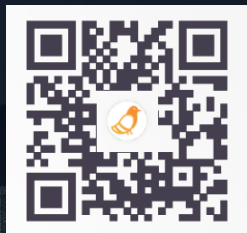
Question 1



Which **ONE** of the following is **NOT** correct in relation to trustee's duty of confidentiality?



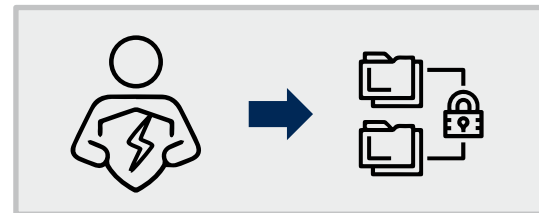
- a** The trustee should not use the information obtained in confidence from the beneficiary for its own advantage.
- b** The duty of confidentiality comes to an end after the termination of the fiduciary relationship.
- c** The duty of confidentiality may extend to personal things about beneficiaries that may come to the knowledge of the trustee.
- d** The fiduciary must obtain informed consent from the beneficiary before disclosing any confidential information during the course of the fiduciary relationship.



Question 1





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- a** The trustee should not use the information obtained in confidence from the beneficiary for its own advantage.
- b** The duty of confidentiality comes to an end after the termination of the fiduciary relationship.
- c** The duty of confidentiality may extend to personal things about beneficiaries that may come to the knowledge of the trustee.
- d** The fiduciary must obtain informed consent from the beneficiary before disclosing any confidential information during the course of the fiduciary relationship.

Question 1



-  Continuing nature of the duty of confidentiality – Even though a fiduciary relationship may come to an end with the termination of the trust or retainer, the duty of confidentiality survives such termination.
-  If one wishes to use or disclose confidential information obtained during the course of the fiduciary relationship, one must seek informed consent from the beneficiary.

Question 2



Tom (trustee) is told by the trust's financial adviser of an opportunity to purchase some shares in Company A. He informs his fellow trustees of this opportunity but they appear uninterested. Tom then asks the other trustees whether he can make the investment himself, to which they consent.

Tom purchases the shares, and two months later, sells the shares when they have doubled in value.

Has Tom breached the no-conflict rule?

- ☐ a Yes
- ☐ b No



Question 2



Tom (trustee) is told by the trust's financial adviser of an opportunity to purchase some shares in Company A. He informs his fellow trustees of this opportunity but they appear uninterested. Tom then asks the other trustees whether he can make the investment himself, to which they consent.

Tom purchases the shares, and two months later, sells the shares when they have doubled in value.

Has Tom breached the no-conflict rule?

- a** Yes
- b** No



Question 2



- The rule in *Keech v Sandford* (1726) Sel Cas Ch 61 is applied strictly in that the inability of the trust to purchase makes no difference to the liability of the fiduciary.
- Tom has put himself in a position where his own interests conflicted with the interests of the trust.
- Tom has also profited from knowledge and information obtained from his position as a fiduciary.
- To retain profits gained from the shares, Tom should have obtained fully informed consent from the beneficiary or the court (not the other trustees).

Question 3A

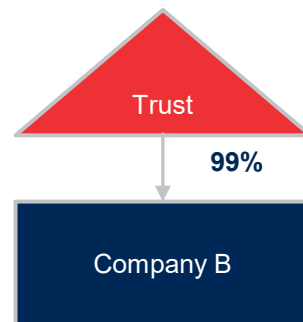


The trust holds a 99% shareholding in Company B. Recently, it transpired that Company B had entered into a speculative property development project resulting in significant losses.

Assuming there is no exclusion or limitation of the trustee's duty in the trust deed, the beneficiary confronts Lisa (trustee) for breaching her duty of care. Lisa argues that she has fulfilled her duty of care by regularly reviewing the annual reports and accounts and other information on the affairs of Company B received at the AGM.

Will Lisa's argument be successful?

- ☐ a Yes
- ☐ b No



Question 3A

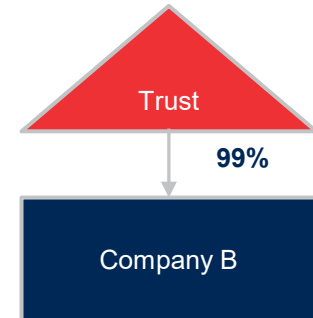


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Assuming there is no exclusion or limitation of the trustee's duty in the trust deed, the beneficiary confronts Lisa (trustee) for breaching her duty of care. Lisa argues that she has fulfilled her duty of care by regularly reviewing the annual reports and accounts and other information on the affairs of Company B received at the AGM.

Will Lisa's argument be successful?

- ☐ a Yes
- ☐ b No



Question 3A



In *Bartlett v Barclays Bank Trust Co Limited No 1* [1980] 2 WLR 430, the Court discussed what a prudent man of business would do where he has a controlling shareholding, and thus what a trustee would be expected to do if this shareholding were part of the trust assets.



A prudent man of business would not content himself with the receipt of such information on the affairs of the company as a shareholder ordinarily receives at annual general meetings. Since he has the power to do so, he should go further and inquire sufficient information to enable him to decide whether or not to intervene.



Lisa should have:

- taken appropriate action if there were facts suggesting that the company's affairs were not being conducted as they should be; and
- used the additional powers she had by virtue of the controlling interest to ensure that she had sufficient information to make a responsible decision.

Question 3B



Lisa checks the trust deed and notices the following clause which she believes would exclude her duty to inquire into and supervise the management of Company B:

"the trustee shall not be under any duty nor shall they be bound to interfere in the business of any company".

Is Lisa correct?

- a** Yes. This clause remains effective to exclude the trustee's high-level supervisory duty to inquire into the management of Company.
- b** No. The terms of the trust deed cannot exempt a trustee's liability.



Question 3B



Lisa checks the trust deed and notices the following clause which she believes would exclude her duty to inquire into and supervise the management of Company B:

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- a** Yes. This clause remains effective to exclude the trustee's high-level supervisory duty to inquire into the management of Company.
- b** No. The terms of the trust deed cannot exempt a trustee's liability.



Question 4



In breach of the self-dealing rule, Peter (trustee) has sold trust property to himself at undervalue.

Anna (beneficiary) finds out and believes that as of right, she is entitled to reverse the transaction by rescinding it.

Is Anna correct?

a Yes

b No



Question 4



In breach of the self-dealing rule, Peter (trustee) has sold trust property to himself at undervalue.

Anna (beneficiary) finds out and believes that as of right, she is entitled to reverse the transaction by rescinding it.

Is Anna correct?




a Yes

b No



Question 4



-  Rescission is an equitable remedy, which is awarded at the discretion of the court.
-  An equitable remedy can be refused on the grounds of delay, waiver or acquiescence or other inequitable conduct.
-  Note also that rescission is only available where both sides of the transaction can be undone.
 - In Anna's case, where rescission has become impossible owing to the intervention of third party rights, e.g., if Peter has resold the property to a *bona fide purchaser*, Anna can instead claim the proceeds of the resale.

Questions



An aerial night photograph of a city skyline, likely Hong Kong, featuring a river, a bridge, and numerous illuminated skyscrapers.

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