

# Life as an Independent Trustee

(seeing the forest from the trees)

Trust Special Interest Group

17 September 2019

# COVISORY

- Specialists in
  - International and Domestic Tax Services
  - Trust Management
  - Succession Planning
  - Structuring
  - Strategic and Business Planning
  - Accounting Services
  - Business Valuation

# Purpose

- Look at practical real life issues of what trustees are facing
- No right answers as a lot is specific to the circumstances
- New Trusts Act will put more pressure on trustees going forward
- Happy to take questions along the way

# Warring Beneficiaries

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- Complex family structure with multiple trusts and underlying entities
- Tension between the two principal family members
- Integrated borrowing and inter-entity loans
- One party taking action to load trustees in some trusts then to call in loans owing to those trusts and him personally
- Only assets are non-liquid properties in underlying entities

# Warring Beneficiaries

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- Additional trustees appointed – are they puppets or acting in the interests of all beneficiaries
- Settlement offers rejected
- What do you do?

# Warring Beneficiaries

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- Apply to Court for directions of removal of other beneficiaries or trustees?
- Alternative dispute resolution (ADR) – new Trusts Act
- Who pays for all of this?
- Who is acting in what capacity?

# A word on Corporate Trustees

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- Trust deed requires trustees to be unanimous but company decisions are only by a majority
- Should the company constitution be amended to require director decisions to be unanimous as well?
- Who can remove the directors?

# Quantum of Distributions

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- Trust has beneficiaries all at different stages of life
- Significant family conflict
- Guidance from settlor is most income should be paid out to beneficiaries in a financial year
- How do you assess beneficiary needs in detail?



# Quantum of Distributions

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- Do you just treat all beneficiaries equally?
- How do you deal with beneficiary expectations of needs if not communicated?
- Factors to take into account – i.e. age of children, what they do with the funds?

# Settlor Control

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- Settlor control and influence is a minefield!
- Various mechanisms used:
  - power to appoint and remove trustees (and then transfer via a will or deed)
  - shareholder of trustee company
  - Prescriptive letters of wishes

# Investment Issues

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- How do you construct an appropriate portfolio for a trust?
- Should you be concerned about trusts that only have one asset, i.e. property?
- Do you employ an independent investment advisor or do the trustees / family control investments and decide?
- Splits between growth and income assets

# Investment Issues

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- How do the needs and wants of beneficiaries impact on the portfolio construction?
- In the current environment what do you invest in?
- Once you are invested how often should you go out to market via a RFP?
- Does it make a difference if investments are held in subsidiaries?

# Disclosure of Information

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- Trusts Act 2019 – be very concerned!
- Positive duty on the trustees telling beneficiaries they are a beneficiary
- How do you identify all the beneficiaries to tell them?
- What information do you provide?

# Disclosure of Information

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- Other parties where information to be disclosed:
  - Foreign trust disclosures
  - CRS
  - FATCA
  - AML

# Disclosure of Information

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- Is it better to be open or closed with beneficiaries?
- Different levels of disclosure for different beneficiaries?
- Frequency of disclosure?
- Format: electronically or formal meeting?

# Collapsing Trust Structures

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- New Trusts Act will likely see a number of trust structures reviewed and potentially unwound as trustees and settlors consider their positions, the need for the trust and the circumstances and location of beneficiaries.
- How to do this in a practical way?
- Resettlement or winding up?



# Collapsing Trust Structures

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- Issues to take in account:
  - Tax issues
  - Overdrawn current accounts
  - Third party creditors
- The wording of the trust deed may also be an issue where it cant be amended or has a wide class of beneficiaries whom you may not want to share information with.

# Underlying Entities

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- How much should trustees get involved in the management of an underlying company as shareholder?
- Do the rules change if a fellow trustee is also the director of the underlying entity

# Underlying Entities

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- Appointor removes a trustee and appoints a new trustee
- This impacts on shareholding in underlying companies
- May also want to change the director(s) in underlying company(ies)
- Director refuses to acknowledge the trustee or director change and register the change at the Companies Office
- Options?

# Practical Issues with KYC

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- Phase 2 of AML
- Do you understand the requirements
- Annual reporting
- What if you do not get KYC documents
- How do you verify source of wealth for long term existing trusts

# Some Tax Issues

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- Different concepts of income:
  - Trust Income
  - Accounting Income
  - Tax Income
- What can be distributed to beneficiaries as income?

# Some Tax Issues

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- Treatment of a beneficiary as settlor
- Dec 2013 – if a beneficiary has been distributed money but left in a current account this does not make them a settlor
- Alternative view: if funds are loaned at less than market interest rates the beneficiary would be a settlor
- Until 31 March 2020 the Commissioner will allow the alternative view

# Some Tax Issues

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- Position on HC 27 now clarified in legislation from 1 April 2020
- If beneficiary is owed an amount will not become a settlor if
  - the trustee pays interest on the amount equal to or greater than the prescribed rate of interest
  - the amount owing at the end of the income year is not more than \$25,000

# Why do we have a Trust and should it be kept?



CREDITOR  
PROTECTION.



INTER GENERATIONAL  
WEALTH TRANSFER.



REST HOME SUBSIDY  
(REALLY?)



# Should you keep your Trust?

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- Trustee liability issues
- Trusts Act changes – disclosure to beneficiaries
- Independent trusteeships – are they still worth it and do you have the time to do it?

# Contact Information

## Parnell Office

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Nigel Smith

+64 9 307 1777

+64 21 377 280

[nigel@covisory.com](mailto:nigel@covisory.com)

## Christchurch Office

Marcus Diprose

+64 9 307 1777

+64 21 424 443

[marcus@covisory.com](mailto:marcus@covisory.com)