



# **SPEAKMAN LAW**

## **Trusts Act 2019**

### **A Guide to Modernising your Trust**

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## 1. Overview

- The advantages offered by trusts are far reduced from what they used to be. For many, there is no longer any need for a trust at all. I encourage you to assess whether your trust is still needed and whether the need for its retention outweighs the steps involved in modernising it to fit with the new Trusts Act.
- The door has been opened for trust busting. Though creditors and ex-spouses might only bust open a trust in exceptional cases, it is advisable to test the effectiveness of your trust to cover a challenge.
- The Trusts Act 2019 imposes obligations on trustees that include the obligation to disclose trust information to the beneficiaries. If you choose to retain your trust, I recommend amend the trust deed so as to limit the disclosure obligation to immediate family members or other intended recipients.
- We recommend you exclude some or all of the default duties imposed by the Trusts Act. This is particularly important to ensure limited liability is not lost by reason of gross negligence in failing to meet those duties.
- Other drafting changes in order to fit with the new Trusts Act include excluding the life of the trust, amending the trustee limitation clause, inserting an anti-Bartlett clause and dispute resolution procedures.

## 2. Beneficiaries Rights to Information

From 30 January 2021, trustees will be under a presumption to write to all beneficiaries to notify them of “basic trust information”. This comprises the fact that the person is a beneficiary, who the trustee is, the trustee’s contact details and details of changes in trustees. To overcome this presumption, the trust deed should classify primary and secondary beneficiaries and record the settlor’s intention that information is to be provided only to the primary beneficiaries.

## 3. Advisor Responsibilities

It is incumbent upon trust advisors to:

- (a) Alert the settlor to any modification or exclusion of a default duty (section 39); and
- (b) Alert the settlor to the existence of a liability exclusion or indemnity clause in the trust deed (section 43).

The obligation in section 39 is to ensure that the settlor is aware of the meaning and effect of the modification or exclusion. Advisors must be able to demonstrate that these matters have been explained, and on what basis the advisor believes the settlor is aware of their effect. Explanation should extend to the limitation of a liability clause, the point being that if trustees are not under a duty to the beneficiaries, the trust is not valid. Failure to advise could make the advisor liable for consequential loss.

#### 4. **Modifying Default Duties**

##### Section 29 – General duty of care

This requires trustees to exercise care and skill in carrying on their duties. Trustees acting in the course of their business or profession exercise a higher skill set, commensurate to their business or profession. If it is intended to afford trustees absolute discretion in how they go about their decision-making, this duty must be modified. Removal of the duty of care is, whenever, not advised as it is a base expectation of the trustee.

##### Section 31 – Exercising power for own benefit

Trust deeds need to procure the ability for trustees to participate in decisions which benefit them personally. One possibility is to require a conflicted trustee to absent himself/herself from the decision but a better solution is to include all trustees in decision-making but ensure there is at least one trustee who is not conflicted in the decision. A provision to that effect demands that the section 31 duty is overridden. Similarly, if the trust deed contains a provision permitting a trustee to act as director of a company in which the trust holds the shares, the deed must specify that this modifies section 31.

##### Section 32 – Considering exercise of power

Basic principles demand that a trustee actively manage the trust and its investments. This does not sit well with trust ownership of companies where the desire and intention is that the directors manage the company. In those situations, an anti-Bartlett clause may release trustees from any obligation to interfere with the management of the company. The effectiveness of such a clause has recently been upheld

by the Hong Kong Courts in the *DBS Bank* case. Inclusion of such a clause will require the trust deed to state that it modifies the duty in section 32.

##### Section 33 – Duty not to fetter trustees' decisions

Some trust deeds may wish to specify protocols by which trustees must act, for example investment choices. Such protocols must be carefully constructed in order that they do not breach the duty in section 33 by which trustees have the discretion to administer the trust. Where a trust deed includes provisions governing the resolution of disputes (e.g. appointment of a mediator), pursuant to which trustees agree to distribute assets in accordance with the resolution, the trust deed will need to specify this constitutes a modification to section 33.

##### Section 35 – Duty of impartiality

While this duty requires that trustees treat all beneficiaries fairly, it does not require that all beneficiaries profit equally. Good practice is for the settlor to record his/her intentions as to priority of distributions, however a clause to that effect is a modification of the duty in section 35 and should be expressed as such. A memorandum of wishes is no longer sufficient.

##### Section 36 – Duty not to profit

A trustee's entitlement to remuneration must be included in the deed and stated as a modification to the duty in section 36 and the duty in section 37 to act for no reward.

### Section 38 – Duty to act unanimously

Generally, it is best that trustees must act unanimously. If there is a change to this, it needs to be specified in the trust deed as a modification of the duty in section 38.

### Duty to invest prudently

Contrary intention clauses have been commonly included in trust deeds, to negate the provisions of sections 13B and 13C of the Trustee Act 1956. Under the Trusts Act 2019, it may be best to specify investment principles and objectives by which the trustees are to invest the trust fund and express this as a modification of the duty in section 30 to invest prudently.

#### **5. Limitation of Liability**

A trustee cannot be absolved from dishonesty, wilful misconduct or gross negligence (sections 40 and 41).

#### **6. Duration**

From 30 January 2021, a trust will be permitted to endure for 125 years. Existing trusts may or may not be able to be extended, depending on whether the trust deed contains a restriction against deferring the vesting day. A resettled trust cannot span a period greater than the predecessor trust.

#### **7. Benefit of Independent Trustee**

The circumstances in *Clayton v Clayton* in which Mrs effectively busted open Mr Clayton's trust make it advisable to retain an independent trustee at all times and to require

that decisions in which the other trustees are conflicted require approval of the independent trustee.

#### **8. Anti-Bartlett clauses**

An example of such a clause is:

“The trustees shall not be bound or required to interfere in the management or conduct of the affairs or business of any company in which the Trust Fund may be invested.”

These are highly recommended but note that a supervisory duty, established by the *Citico* case, remains.

#### **9. Carson v Lane & Bain**

Mr Carson had left behind an estate of \$17 million and chose not to provide for his adult children nor his grandchildren, having become detached from his children following a broken marriage. He left \$500,000 to a niece, a further \$500,000 and a house to a stepson. The residue of his estate was bequeathed to a family trust. His children, along with others were discretionary beneficiaries of the trust.

While it appears Mr Carson had intended to transfer assets to his trust, he had not done so. Those assets remained in his personal name and this meant that the children had a claim against the estate under the Family Protection Act. Mr Carson had expressed in his memorandum of wishes that he did not wish the children to receive anything and were not to be notified of his death.

Were the trustees and executors under a duty to follow the instructions given by Mr Carson in his memorandum of

wishes? Or were they obliged to notify potential claimants of his death?

One of the children learnt of Mr Carson's death and which absolved the trustees from determining this one way or the other, as was followed by all four children bringing a claim. They were successful to the extent that Mr Carson had failed to make proper provisions for the maintenance and support of the children. The Court did not re-write the Will however; the children received awards of \$1.25 million each, resulting in the majority of Mr Carsons' estate going where he intended and not to his children.

Was provision for the children by way of the trust sufficient?

This assumes Mr Carson had transferred his assets to the trust. On one argument, the answer is no because it would offer the children no certainty of a distribution. On the other, the independence of the trustees is sufficient. The Court concluded this question must be considered in the particular circumstances, which likely means the Court would strive for the same result under the Family Protection Act.