

Brexit meets trust law - part 2: if Boris was a trustee would he resign or wait to be pushed out of office?

25 SEPTEMBER 2019

CATEGORY:
ARTICLE



The UK Supreme Court has now ruled that the effect of Boris Johnson exercising his power to prorogue, or suspend, Parliament in the manner he purported to do was to undermine Parliament's supremacy and its ability to do its job at an important time for the UK.

That this particular prorogation is unlawful and of no effect is now clear, but does this mean Boris should no longer be Prime Minister?

There are those who have called for Boris to resign. Others have called for the opposition to table a vote of no confidence in him to facilitate his removal.

If Boris were treated like a trustee who had been found to have used their powers improperly (see [Brexit meets trust law part 1:](#)) he could resign. A trustee in this position could (indeed usually should) resign utilising resignation provisions in the terms of his particular trust or by invoking powers provided by the Trustee Act 1925. Alternatively, like a vote of no confidence, his beneficiaries could come together to collapse the trust and potentially re-establish a trust with a new trustee (although this would require a consensus rather than a majority of votes).

Interestingly, if Boris were a trustee there would be also be a third option: the court would have power to remove him from office. This additional option would be flanked by the potential for financial consequences for him personally if he made the wrong choice between resigning or waiting to be pushed.

The court's jurisdiction to remove errant trustees is based on the impact their continued administration of the trust could have on the welfare of their beneficiaries as a whole, based on the evidence of their past conduct.

Wrongdoing is neither necessary nor sufficient for removal, but is an important factor. Minor, technical, breaches by a receptive and well-meaning trustee are unlikely to be enough to persuade the court to remove that trustee. Particularly egregious wrongdoing would usually be very persuasive. In trust terms that might be dishonesty, an improper use of power or treating the trust property as the trustee's own.

Aside from the significant reputational considerations, the benefit to Boris, if he were treated like a trustee, of being open to resigning is that this would avoid the turbulence and costs of a contested court process.

So if Boris were a trustee, the court could now be brought in to decide whether or not he should be removed from office. Were he to fight his removal and lose he would almost certainly be ordered to pay the other side's legal costs out of his own pocket and would be prevented from taking his own costs out of public funds, ie the trust fund.

Indeed, treated like a trustee, the Supreme Court on Tuesday would almost certainly have ordered Boris to pay Gina Miller's legal costs of the prorogation proceedings out of his own pocket and prohibited him from taking his own costs from the country's coffers. The spectre of further financial consequences from subsequent proceedings to remove him would be a very real risk.

If he were a trustee he might well wish to ask the court himself whether he should stay or go. The court would generally welcome this approach if it is not a clear cut case. But such a course of action is unlikely to protect the trustee from having to meet costs personally if the situation is clearly one where the trustee should simply resign.

As a trustee Boris' decision about whether to stay or go would not only need to take into account the outcome of the Supreme Court's decision on Tuesday regarding his previous conduct, but interestingly, also what is in the best interests of the nation, his beneficiaries. A trustee has to consider the benefit of his beneficiaries as a whole so, by analogy, this would not mean the best interests of the 52% who voted for Brexit nor the

48% who voted to remain, but the 100%, including those that didn't vote.

If politicians were treated as trustees of our state, and the Prime Minister's duties to the people were at least as onerous as those of a trustee to his beneficiaries, might the Attorney General be advising him to resign? And might there be more riding on his decision to stay or go than career aspirations?

Authors

Richard Walker

ASSOCIATE | LONDON

Trust, estate and inheritance disputes

 +44 20 7597 6024

 richard.walker@withersworldwide.com

Dawn Goodman

PARTNER | LONDON

Trust, estate and inheritance disputes

 +44 20 7597 6014

 dawn.goodman@withersworldwide.com