

UPDATE

Caution cuts both ways when blessing momentous decisions of trustees

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The judgment *In the matter of the A Trust*, which was delivered by the Grand Court of the Cayman Islands (Kawaley J) on 17 January 2019, has reaffirmed the principles which apply when the court is asked to bless a decision of trustees that is considered to be momentous, whilst sending a timely reminder that the court has a supervisory jurisdiction that needs to be exercised appropriately.

Background

The settlor established a discretionary trust (the **Trust**) to facilitate a more efficient distribution of his assets after his death and to avoid the potential for a contested administration of his estate. The primary beneficiaries of the Trust were his three children. Before his death, the settlor had expressed the wish that the trust assets, which were primarily comprised of real estate, should be distributed equally among his children.

The settlor conferred broad discretionary powers of appointment upon the trustee, such that it was not required to obtain the consent of the beneficiaries in relation to how the Trust was to be administered. The trustee nonetheless considered it necessary to consult with the beneficiaries in the decision-making process in an attempt to be open and transparent.

In 2014, the trustee and the three children agreed on the way in which the Trust assets were to be distributed. However, in early 2016, one of the children withdrew his consent from the 2014 agreement and indicated that he would only consent to the Trust assets being sold on the open market.

As the trustee and the children were unable to reach a consensus as to how the Trust assets should be distributed, the trustee sought the court's approval to enter into a final distribution proposal (the **Final Distribution Proposal**), which rejected the second defendant's counter offer and largely incorporated the terms of the 2014 agreement. Alternatively, it sought directions as to how the Trust fund should be administered.

At the hearing, the court readily acknowledged that the matter fell within a "*Category 2*" *Public Trustee v Cooper [2001] W.T.L.R 901* case.

The first and third defendants largely agreed with the trustee's Final Distribution Proposal, but it was opposed by the second defendant on the following grounds:

- (a) the trustee had failed, without providing any reason, to give any consideration to the second defendant's distribution proposal;
- (b) there was insufficient evidence as to the identification and value of the trust assets;
- (c) the trustee's approach towards valuing the Trust assets was unsatisfactory; and
- (d) the trustee's reasons for producing the Final Distribution Proposal were unsound.

The question was whether the Final Distribution Proposal was one which a reasonable trustee might decide to implement. The court considered that the second defendant assumed a heavy burden in seeking to persuade the court that the Final Distribution Proposal was in whole or in part an irrational one.

In response to the second defendant's contentions, the trustee argued that it was of the opinion that a universal agreement among the defendants was impossible to achieve and the court's approval of the Final Distribution Proposal was the only likely way to resolve the matter.

Judgment

The court acknowledged that where there is no surrender of discretion by a trustee, the court's function is to ensure that the proposed exercise of the trustee's powers is lawful and does not infringe its duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors. It cited with approval the English Court of Appeal judgment in *Cotton v Earl of Cardigan* [2014] EWCA Civ 1312 (per Vos LJ), where the court held that the critical question was whether *the opinion of the trustees was one which a reasonable body of trustees properly instructed as to the meaning of the relevant clause could properly have arrived at.*

As for its supervisory jurisdiction, as stated in *Cotton v Earl of Cardigan*, this had to be approached with caution: the court was *not a rubber stamp* and must be cautious to ensure that the trustees are justified in reaching their decision, but that did not mean placing *insurmountable hurdles* in their way.

The court also sent a timely reminder that full and frank disclosure of all information relevant to the trustee's decision was required before the court would be willing to give its blessing. That duty was not *in any way diminished* by the fact the court's supervisory jurisdiction was being exercised. The court accepted, as stated by the English High Court in *Tamlin v Edgar* [2011] EWHC 3949 (Ch), that trustees must satisfy the court that they *properly considered their proposals to be for the benefit of the advances or appointees* and they must demonstrate that the exercise of their discretion is *untainted by any collateral purpose.*

Applying these principles, and having examined all of the evidence placed before it, the court rejected the second defendant's contentions and was prepared to approve the trustee's Final Distribution Proposal on the basis that the approach adopted by the trustee to the second defendant's counter-offer fell within the range of decisions which a reasonable trustee could pursue in the circumstances. However, during the hearing the second defendant adopted a new position in relation to how the Trust assets might be distributed – in light of that, the court gave the Trustee liberty to implement the Final Distribution Proposal with some modification.

Comment

The judgment provided an opportunity for the court to restate and apply the principles applicable to *blessing* applications where there has been no surrender of the trustee's discretion. Although the decision confirmed well established and often applied principles, it is a useful illustration of the onerous nature of the court's task in considering these applications, in particular given the degree of care required when considering challenges to a trustee's exercise of its powers.

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