

UPDATE

Grand Court commends trustee's 'text book' approach to deliberations

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In an unreported judgment delivered by the Hon. Chief Justice Smellie on 14 February 2020 (the **Judgment**), in the matter of AA v. BB & Colin Shaw (as amicus curiae)¹ (the **Proceedings**), the Grand Court of the Cayman Islands restated the test for 'category 2' Public Trustee v Cooper² applications and commended the trustee's approach to its duty of deliberation when considering how to exercise its discretionary dispositive powers.

Background – fast facts

- The Proceedings concerned a discretionary trust (the **Trust**) governed by the laws of the Cayman Islands, but administered out of Guernsey.
- The settlor of the Trust (the **Settlor**) was the patriarch of a Middle Eastern Arab Muslim family. The 'very substantial' Trust fund was derived entirely from his personal wealth. He was a devout Muslim and was educated in and familiar with Shari'a / Islamic successional laws, which dictated that his wife and children (the **Heirs**) were the heirs to his estate upon his death.³
- The class of beneficiaries of the Trust (the **Beneficial Class**) was fairly wide, and included (i) the Settlor himself (named as the 'Primary Beneficiary'), (ii) the Heirs, (iii) the remoter issue of the Settlor, (iv) the 'spouses widows and widowers' of each of the Settlor, his children and remoter issue, and (v) anyone else that was properly added (which never occurred).
- Despite the wide Beneficial Class, it was the Settlor's unwavering wish from the time the Trust was established that, after his death, the Trust fund should be distributed to his Heirs in accordance with Islamic succession laws. These wishes were stated in four 'letters of wishes' prepared by or on behalf of the Settlor and in oral statements made by the Settlor on two occasions prior to his death.
- Following the Settlor's death, the Trustee proposed that it should, in accordance with the Settlor's wishes, liquidate and distribute the entire Trust Fund to the Heirs, to the exclusion of all others within the Beneficial Class, and to thereafter terminate the Trust (the **Proposed Course of Action**).

The Application

The Trustee applied to the Grand Court under section 48 of the *Trusts Law* and/or the court's inherent jurisdiction, for the court's approval (or 'blessing') of the Proposed Course of Action (the **Application**).⁴ It was common ground between the parties that the Proposed Course of Action was a 'momentous' decision,

¹ FSD Cause No. 137 of 2019 (ASCI). The Proceedings were subject to a 'confidentiality order' made by the Grand Court on 7 August 2019.

² [2001] WTLR 901.

³ It is because of such succession laws that, whilst it is possible for a Muslim person to leave a will, the practice is not very common.

⁴ The effect of the court giving its blessing is that persons falling within the Beneficial Class would not be able to later complain that the Proposed Course of Action was a breach of trust, provided that the Trustee had given full and frank disclosure when making the Application.

involving as it did the liquidation and distribution of the entire Trust fund, and that the Application was accordingly a 'category 2' Public Trustee v Cooper application.⁵ The questions for the court to consider were therefore:

- (1) Does the Trustee have power to enter into the Proposed Course of Action?
- (2) Is the court satisfied that the Trustee has genuinely formed the view that the Proposed Course of Action is in the interests of the Trust and its beneficiaries?
- (3) Is the court satisfied that this is a view a reasonable trustee could properly have arrived at?
- (4) Does the Trustee have any conflict of interest, and, if so, does the conflict prevent the court from approving the Trustee's decision?

There was no issue between the parties in relation to questions (1), (2) and (4). The hearing of the Application therefore focussed on question (3), namely whether the Proposed Course of Action was a decision a reasonable trustee could have properly arrived at. In this regard, it was also common ground between the parties that, in considering question (3), the court's function, once it was satisfied that the Proposed Course of Action was within the Trustee's powers⁶, was to apply the 'rationality standard', namely:

'...to see that the proposed exercise of the trustees' powers...does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate, that the proposed exercise of their powers is untainted by any collateral purpose such as might amount to a fraud on a power.'⁷

The duty of adequate deliberation

At paragraphs [33] to [35] of the Judgment, the Chief Justice provides a helpful commentary on a trustee's duty of inquiry for the reasonable exercise of its discretionary powers. In short:

- The framework for the inquiry can be set by the three questions posed by Lord Walker in the famous English trust case of *Pitt v Holt*⁸ for determining whether a purported exercise of a trustee's power of appointment or disposition is valid:
 - (i) Does the way in which the power has been exercised go beyond the scope of the power ('*excessive execution*')?
 - (ii) Has there been an error in failing to give proper consideration to matters that are relevant to the making of the decision that is within the scope of the power ('*inadequate deliberation*')?
 - (iii) Has the decision been made for an improper purpose because the purpose is not one for which the power was conferred ('*fraud on the power*')?
- The issue that arises from question (ii), being the only question that was engaged on this Application⁹, is 'whether the Trustee has given **adequate deliberation** to the circumstances and interests of the entire beneficiary class and in that manner, has arrived at an objectively reasonable determination'¹⁰ (emphasis added).
- The duty of adequate deliberation thus requires the Trustee to consider the range of persons or categories of persons that fall within the Beneficial Class and to consider the ramifications of the

⁵ Section 48 of the *Trusts Law* is routinely used by trustees of Cayman Islands trusts to seek the court's blessing of proposed distributions of trust property and, more generally, to engage the *Public Trustee v Cooper* jurisdiction: recent examples (in addition to the Judgment) include *In the Matter of A Trust* Unreported, 17 January 2019 and *In the Matter of a Settlement known as the B Trust* Unreported, 19 August 2019.

⁶ As noted above, this was not an issue in this case. In particular, clause 7(d) of the trust instrument enabled the Trustee to pay or apply the Trust fund to or for the benefit of some members of the Beneficial Class to the exclusion of the other members.

⁷ Judgment, at [6], citing *Lewin on Trusts* (19th ed.) at 27-079 to 27-080.

⁸ [2013] 2 AC 108, at 135 G-H [60]-[61].

⁹ As noted above, it was common ground between the parties that the Trustee had the power to take the Proposed Course of Action. It was also not disputed that the Trustee, in doing so, would be acting for a proper purpose in seeking to honour the wishes of the Settlor.

¹⁰ Judgment at [34].

Proposed Course of Action for the entire Beneficial Class, both individually and as a whole, and to thereafter consider the appropriateness of any individual appointments/grants proposed to be made.¹¹

- It also involves taking into account the Settlor's wishes as to who in the Beneficial Class should benefit, which the Trustee is bound to do.¹²

The Chief Justice thus described that the main issue to be determined by him on the Application was:

'...whether the Trustee, in the exercise of its discretionary powers to distribute the assets and wind up the trust, is obliged to inquire into and consider the circumstances of each and every member of the wider class of beneficiaries with a view to benefitting them or whether it could – in keeping with the afore-stated 'rationality test' and compliant with the wishes of the Settlor – reasonably decide to benefit only those beneficiaries who are also his heirs under Islamic law.'

The Trustee's 'text book' approach to its deliberations

The Chief Justice commended the Trustee's 'text book' approach to its duty of deliberation, which included the following.

- Considering the Settlor's wishes. In addition to the letters of wishes and the oral statements made by the Settlor prior to his death, the Trustee also undertook an inquiry into the circumstances surrounding the creation of the Trust and the drafting of the Trust instrument in order to determine if there was any specific reason why the Beneficial Class was significantly wider than, and seemingly in contradiction to, the Settlor's wishes. Evidence was given by the First Defendant, who had been directly involved (with the Settlor) in giving instructions and taking advice on the drafting of the Trust.¹³ The Trustee also met with the advisor that had first proposed the possibility of a Cayman trust structure to the Settlor and the First Defendant, which ultimately led to the establishment of the Trust, and put into evidence a note of this meeting. This evidence was clear that the Settlor was a devout Muslim who had lived his life according to Islamic Shari'a law, and that it had always been his intention that, after his death, the Trust fund should be distributed to his Heirs in accordance with Islamic succession laws.

Further, the court was satisfied that it was 'within the bounds of rationality' for the Trustee to have concluded that the wide ambit of the Beneficial Class was designed with flexibility in mind, and that this should not be constructed as contradicting the Settlor's wishes as expressed when establishing the Trust and throughout his lifetime.

- Making enquiries into the size and composition of the Beneficial Class. This included (i) obtaining personal information forms from the Heirs, (ii) reviewing such publicly available information on the Settlor and his family as the Trustee could find, (iii) meeting with the Heirs individually to confirm the details of the members of their respective families, and (iv) compiling detailed statements of the members of each Heir's own family. From these enquiries, the Trustee was able to determine that the beneficial class was 'very substantial', that nearly half were minors¹⁴, and that a very significant number of them were not Heirs.

The court accepted that it would have been impracticable and inappropriate for the Trustee to make further enquiries into the individual financial circumstances and wishes of all those falling within the Beneficial Class, and that doing so would risk putting the Trustee in an invidious position.¹⁵ Smellie CJ also accepted the First Defendant's evidence that the wider Beneficial Class believed, in accordance with their religious obligations, that the Trust fund should be distributed to the Heirs in accordance with Islamic succession laws and that, from a cultural perspective, it would have been inappropriate for the Trustee to insist on detailed financial information from all of them.

¹¹ Judgment at [35], citing *Lewin* and 30-032 at *In Re Manisty's Settlement* [1974] Ch. 17.

¹² Judgment at [35], citing *Lewin* at 29-162 to 29-163 and *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26; [2003] 2 A.C. 709.

¹³ The First Defendant had been appointed to represent the Heirs under a Power of Attorney by the local Shari'a court in the Settlor's home country, and represented the Heirs in the Proceedings.

¹⁴ The minor beneficiaries were represented in the Proceedings by Colin Shaw as *amicus curiae*.

¹⁵ The Trustee's evidence was that such enquiries would have been regarded by the Heirs as an affront and would have been damaging to the relationship.

The court was accordingly satisfied, in light of the Trustee's 'text book' enquiries and the evidence it had provided in support of the Application that the Proposed Course of Action was a decision a reasonable trustee could have properly arrived at.

The court therefore granted the Application and 'blessed' the Trustee's Proposed Course of Action.

Comment

The Judgment provides a useful restatement of the questions that will be considered by the court on a 'category 2' Public Trustee v Cooper application, and the principles to which trustees must apply their minds when considering an exercise of a discretionary dispositive power, in particular the duty of adequate deliberation.

In this case, the Settlor's wishes, when considered in the context of the Trust as a whole, were the paramount consideration for the Trustee, and cultural and religious considerations assisted the Trustee in determining the scope of the enquiries that needed to be undertaken in order for it to discharge its duty of adequate deliberation.

It is important for trustees to remember, however, that whilst they are bound to consider a settlor's wishes, they are not bound to follow them. A trustee must always exercise its discretion independently, taking into account all relevant factors and ignoring irrelevant ones. The factors that will be 'relevant' and 'irrelevant' will inevitably be fact-specific and will vary from case-to-case. However, a settlor's wishes will of course often be a material consideration and one which will typically be given great weight by trustees when making decisions.

It should also be noted that it remains best practice for trustees to consult with their beneficiaries in order to ascertain their wishes, needs and financial and other circumstances, as part of the trustee's decision-making process. The Trustee in this case was able to reasonably limit its enquiries in this regard as a result of religious and cultural factors that will not be relevant to many discretionary trusts. Importantly, the court was satisfied that the operation of Islamic succession laws meant that the Settlor's remoter descendants would ultimately benefit from the Proposed Course of Action in any event by way of inheritances passed down to them upon the death of the Heirs. Whilst, therefore, there will occasionally be exceptional circumstances such as there were in this case, the default starting point is that trustees should be encouraged to have full and frank discussions with their beneficiaries in order to obtain from them any information that may be relevant to the trustee's decision.

The Trustee here was correct for compiling as much information about the Beneficial Class as it reasonably could in the circumstances. Perhaps most critically of all, however, was that the Trustee was thorough in its deliberations and enquiries, and in recording them clearly throughout, which led the court to the almost inevitable conclusion that the Trustee had satisfied its duty of adequate deliberation in this case.

This Judgment accordingly highlights the importance of well-reasoned and well-documented evidence to support a trustee's decision: a 'text book' approach indeed.

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