

Trustee Decision-Making and the Role of the Court: 'Blessing' Applications

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Introduction

Trustees are often expected to make important decisions in relation to trusts. In relation to particularly momentous decisions, it is usually appropriate for a trustee to obtain the court's approval, by way of a 'blessing' application, before taking steps to act upon such decisions.

This Guide provides an overview of 'blessing' applications and how and when a trustee may obtain the court's assistance.

Public Trustee v Cooper: an overview

The role of the court in supervising the administration of a trust is fundamental to the trust concept. A key aspect of this supervisory jurisdiction is the role of the court in approving the exercise of powers vested in the trustee. The circumstances in which the court considers the exercise of such powers were analysed in an unreported but well-known English law decision of *Public Trustee v Cooper*.¹ The principles outlined in that decision have been applied by the courts in offshore jurisdictions.

There are four categories of *Public Trustee v Cooper* application. In each type of application, the trustee may seek the court's approval of a singular or multiple decisions.

- (i) **Whether the proposed action is within the trustee's powers** – the trustee seeks approval that a certain action is within the trustee's powers. This application focuses solely on the proper interpretation of the trust documents or statute or both.
- (ii) **Blessing a momentous decision** – there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved.
- (iii) **Surrender of discretion** – the trustee asks the court to make a decision on its behalf. This may occur when the trustee is deadlocked in its decision-making or cannot properly take the decision due to a conflict of interest.
- (iv) **Attack on exercise of trustee's powers** – the trustee seeks an order approving a decision it has already taken, after the decision is attacked as being either outside its powers or an improper exercise of its powers.

Applications under category (ii): Blessing a momentous decision

The second category of application outlined above, which is the subject of this note, is the type seen most.

The starting point is the trustee's decision. The trustees need to ensure that the exercise of the power in question is lawful and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; that the proposed transaction is for

¹ [2001] WTLR 90

the benefit of beneficiaries or the trust estate; and that the proposed exercise of their powers is untainted by any conflict of interest. The trustees then, in applying to court, must place before it evidence of their decision making, and their confirmation that they intend, subject to the approval of the court, to act on their decision. Beneficiaries and other interested parties are notified of the application and have the opportunity to make representations to the court about the application and whether they agree with the orders sought. Typically, proceedings in relation to these types of application are heard in private and any public judgments are anonymised.

In making a blessing application, the trustee is not asking the court to make the decision for it. Indeed, the court will not decide to bless a momentous decision on the basis of whether or not it would have reached the same decision, rather it will consider the way in which the trustee has reached its decision. This is described further below.

The effect of an order that blesses a trustee's momentous decision is that beneficiaries and other notified parties cannot seek to unravel the decision in the future. The order will also usually protect the trustees from an allegation that the decision was a breach of trust. The trustees, however, are protected, only if they have made full disclosure to the court of relevant matters.

What is a 'momentous' decision?

A momentous decision is one which will be of significant consequence to the trust. Although there is little formal guidance provided by the court, decisions that could, depending on the context, be considered 'momentous' include, but are not limited to, the sale or disposal of a major trust asset, the removal of a beneficiary, the payment of trust moneys to a spouse to fund their divorce settlement, the refusal to submit to the jurisdiction of a foreign court or provide information to parties to foreign divorce proceedings between the settlor and their spouse, or the ultimate 'winding up' of a trust. The relevant context and, in particular, the existence or likelihood of contention within the trust will be material to the trustees' decision to apply to court. It will always be prudent for a trustee to consider the position of, and engage with, each of the beneficiaries on the proposed course of action, including the likely position of the minor and unborn beneficiaries who are unable to put their views to the trustee.

The legal test

The court's function, assuming that the court is not being asked to make the decision for the trustee, is a limited one. Once it appears that the proposed exercise is within the terms of the trustee's power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed. Therefore, when deciding whether or not to grant the application, the court will consider the questions outlined below:

- (i) Is the trustee making the proposed decision in good faith?
- (ii) Is the trustee's decision one that a reasonable and properly informed trustee could make in the circumstances?
- (iii) Is the court satisfied that the opinion at which the trustee has arrived has not been impaired by an actual or potential conflict of interest which has or might have affected the decision?

The court may only grant the application if the answer to each question set out above is yes. Whether to grant the application is always a matter of the court's discretion.

If the application is granted, the trustee may proceed with the decision with the comfort that it has been sanctioned by the court. If the decision is not blessed, this does not prevent the trustee from taking the decision but it will not have the protection associated with the court's approval as described above.

Guidance for trustees

Although the role of the court is a limited one, and the court should not substitute its own view; this is not a mere rubber-stamping exercise. The evidential burden is on the trustee to satisfy the court as to the matters outlined above. This involves demonstrating that it has properly considered its proposed action, often by providing the court with detailed minutes of meetings preceding the proposed decision as well as copies of all relevant material that it considered in relation to its decision.

Trustees facing significant decisions should consider obtaining professional advice at an early stage. Depending on the nature and complexity of the decision, this could include legal, accountancy and tax advice.

The trustee has a 'duty of full and frank disclosure' to the court, meaning that it must bring to the court's attention all relevant information, including information that does not support the trustee's position.

This is particularly important where the trustee has a potential or actual conflict of interest, for example where it stands to benefit from the proposed decision. This might be the case where the trustee's outstanding fees would be paid from the proceeds of sale of a trust asset. The existence of a conflict of interest will not necessarily prevent a blessing application from being successful, but the trustee must be in a position to demonstrate that the decision has not been impaired by the conflict. It is essential therefore to ensure when making the application that there are no unresolved questions which the trustee cannot answer or explain to the court.

Contacts

A full list of contacts in our International Trusts & Private Client team who specialise in this area can be found [here](#).