Alert

Momentous Decisions: Seeking the Court's Blessing

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In the Matter of A Trust (unreported, 17 January 2019)

Tasked with a request to approve a trustee's "momentous decision", in the recent decision of *In the Matter of A Trust*[1] (the "Judgment") the Hon Justice Kawaley took the opportunity to restate the principles applicable to "*Category 2" Public Trustee -v- Cooper*[2] applications. The Judgment also provides useful guidance for both trustees and beneficiaries who are seeking to negotiate proposals for the distribution of assets held in discretionary trusts, which are likely to be the subject of Court blessing applications.

The A Trust

The Judgment concerns an irrevocable discretionary Cayman trust (the "Trust"), settled in 2007 by the father (the "Settlor") of the three defendants in the case (the principal beneficiaries). The Settlor, prior to his death, made clear that his wish was to have all of the Trust assets distributed on his death, to each of his three children in equal shares.

The Trust assets consisted of a network of companies incorporated in various jurisdictions which held various assets, the most valuable assets being several pieces of real estate.

The Trust itself gave broad discretionary powers to the trustees, such that they were under no strict legal obligation to consult with the beneficiaries prior to distributing the assets of the Trust. It also contained a strong anti-Bartlett provision under which the trustees were required to leave the administration of the Trust's underlying companies to the directors. Further, the trustees were entitled to assume due administration without the need (or requirement) to investigate or verify information received in respect of the Trust assets.

The Application

Following the Settlor's death, the Trustee began preparing for the distribution of the Trust assets. Despite there being no obligation to do so, the Trustee consulted with the beneficiaries to ascertain their wishes in respect of the Trustee's proposal to distribute all of the Trust assets. Having completed an initial, but extensive, consultation period in 2014, the Trustee presented the beneficiaries with a distribution proposal. All three of the defendant beneficiaries signed a letter confirming their agreement with the proposal (the "2014 Agreement").

However, in 2016 a dispute arose between the three defendant beneficiaries. Shortly thereafter, in January 2017, the attorneys for the second defendant ("D2") wrote to the Trustee indicating that D2 no longer wished to be bound by the 2014 Agreement, and proposed an alternative method of distribution of the Trust assets. This was unfortunately followed by considerable and hostile to-ing and fro-ing between the Trustee, the first defendant ("D1") and third defendant ("D3"), and D2. Ultimately, in July 2017, the Trustee presented the defendant beneficiaries with a "Final Distribution Proposal", which was met by D2's counter-proposal, but agreed to by D1 and D3.

On the basis that the Trustee had decided to move forward with the Final Distribution Proposal, particularly in light of the strong objections expressed by D2, the Trustee applied to Court seeking the Court's blessing of its momentous decision in respect of the distribution of all of the Trust assets.

[1] (unreported, 17 January 2019)
[2] [2001] W.L.T.R. 901

The Legal Test

Following the decision in *Public Trustee -v- Cooper* the application fell squarely within *Category 2* of the four types of administrative applications typically made by trustees. Namely, an application *"where the issue is a proper exercise of the trustees' powers where 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 and which is within their powers"*.[3]

In the Judgment, Justice Kawaley restated the principles to be considered by the Court when exercising its discretion to bless a Category 2 application. Referring to his own previous judgment in *Re XYZ Trusts*[4], which he delivered as Chief Justice of the Bermuda Court, and the case of *Cotton -v- Earl of Cardigan*[5], among others, Justice Kawaley confirmed that the Court must be satisfied that: 1) the trustee's decision is proper and for the benefit of the beneficiaries; and 2) the exercise of the trustee's discretion is untainted by any collateral purposes.

Further, once it appears to the court that the proposed exercise is within the trustee's powers, the court is simply concerned with limits of rationality and honesty, and will not withhold its blessing merely because it would not itself have exercised the power in the way proposed.

Justice Kawaley confirmed that the evidence required to meet the test will depend on the circumstances of the particular case, but that *"if the court is given sufficient and appropriate material on which to act, it should not withhold consent just in case something better might in the future turn up".*

The Decision

Whilst the Court recognised that the Trustee was not technically legally obligated to consult with the beneficiaries in respect of the management of the Trust's underlying companies and a proposed distribution plan, it was certainly something that most trustees of a discretionary trust would undertake to do, and was in any event regarded as desirable in this particular case given the level of distrust between the beneficiaries. Nevertheless, the fact that a consultation had taken place became part of the evidence before the Court, and therefore, the way in which the Trustee approached the consultation also became relevant. Indeed, much of the focus of D2's arguments was on allegations that the Trustee had not properly considered D2's counter-proposals for the distribution of the Trust assets, or had failed to properly investigate the underlying companies to confirm the valuations used for the purposes of its Final Distribution Plan.

However, the fact that the defendant beneficiaries had agreed to the Trustee's initial distribution proposal, and then subsequently "parted ways", left an impression on the Judge that the disagreements between the beneficiaries, which were the subject of the present blessing application, were *"emotionally driven rather than grounded in principle"*. To add to this, D2's counter proposal had been advanced as an all or nothing package, so that the Trustee was unable to consider various aspects of the proposal in isolation. This only served to enforce the "no more Mr Nice Guy" impression D2 had left on the Court by the evidence submitted in advance of the hearing, even in light of the change of position made by D2's counsel at the hearing itself, which was seemingly made in an attempt to portray D2 *"as the most reasonable man in the world"*. In the end, Justice Kawaley found that the Trustee was right to at least fear that the "to-ing and fro-ing" was likely to continue, and any further proposal made by D2 was subject to change. The Trustee was therefore entitled to reject D2's all or nothing counter-proposal for the distribution of the Trust assets. In the words of Justice Kawaley:

> *"The Trustee was entitled to at least fear that any proposal which [D2] made was likely to be as ephemeral as a fabled Cheshire cat".*

[3] [2001] W.LT.R. 901, at923
[4] [2017] SC (Bda) 111 Civ (12 December 2017)
[5] [2014] EWCA Civ 1312

Ultimately, Justice Kawaley found that there was sufficient evidence before the Court about the Trust assets, and the Trustee's reasons behind the decision to make the Final Distribution Proposal. The judge concluded that the Trustee's proposal was in fact reasonable and untainted by any collateral purpose. The Trustee's decision was not found to be immaterial and its application was therefore granted in substantial terms.

Takeaway

It is clear from the decision in *In the Matter of A Trust* that a beneficiary's objection to a trustee's proposed trust asset distribution plan will not be viewed favourably by the Court where that beneficiary has reneged on previous agreements, and has taken an aggressive stance in negotiating counter-proposals.

Equally, if a trustee has decided to take the leap off the deep end and engage the views of the beneficiaries with respect to the distribution of trust assets, it too must be in a position to provide the Court with sufficient and detailed evidence of the consultation process, to prove that it was undertaken in an even-handed way, so that the Court can properly test the reasonableness of the Trustee's momentous decision.

Conyers acted for D1 and D3 in these proceedings.

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