

The role of natural justice and legitimate expectations in trustees' decisions

In the Matter of the Y Trust [2011] JRC 135

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In this case, the Court provided some helpful guidance on its approach to applications by trustees for blessing of their decisions, which included consideration of the role of the principles of natural justice and legitimate expectations in the decision making process and the position where the decision at issue has already been part performed.

The case involved an application by the trustee for a blessing in relation to its decision to distribute the assets of the Trust. The Royal Court accepted that this would be a momentous decision and considered the appropriateness of the distribution that the trustee wished to make and whether sufficient weightings had been given to each of the beneficiaries' interests. The Court blessed the decision, at the same time touching on a number of issues which will be of interest to trustees and their advisers.

The facts

The principal trust asset of the Jersey discretionary trust involved was a property in Surrey (the "Property") which was supplemented by some cash funds and a limited number of other investments. The beneficiaries of the Trust were intended to be the settlor, her issue and their remoter issue (currently made up of her eldest son (A), her youngest son (B), and B's three children and his grandchild).

Rectification

In drafting the Trust an error had been made whereby the class of beneficiaries was restricted to only the children and remoter issue of the settlor "now living". This had the effect of excluding all but one of the grandchildren in addition to the settlor's great-grandchild. At the outset of the hearing an application was made (uncontested) for the Trust to be rectified and the Court had no hesitation in finding that a genuine mistake had been made and that rectification was the only practical remedy.

Operation of the Trust

The settlor had written a letter of wishes, in which she expressed her wish that everything in the Trust should go equally to her two sons and that the Property should never be sold or torn down but should remain for the use of her descendants. Her wishes in respect of the Property were amplified in a subsequent letter of wishes where she also reiterated that she wished her sons to be treated equally.

During her lifetime the settlor had received regular distributions which she had occasionally passed on to her children. Added to this, A had lived for some time, rent free, in the Property.

Following the settlor's death, there was consensus that the retention of the Property, which was in a bad state of repair, was not sustainable. It was therefore sold for £4 million, giving the Trust an overall value of £5 million. A distribution was made to B (who along with his children and grandchild lived in the United States) of US\$ 2.4 million for the purpose of financing a house purchase.

A meeting took place between the protector and the trustee in May 2008, the minutes of which stated that "it was the Trustee's opinion and final decision that the Trust Fund would be split 50% for the benefit of A and 50% for the benefit of [B] and his children." There was also discussion about establishing a US trust for B's children, the idea being that it would receive 25% of the trust fund unless (after taking account of distributions already made to B) that would result in more than 50% going to B and his family, in which case a smaller amount would need to be settled. Copies of the relevant minutes were sent to both A and B.

A subsequently notified the trustee that he did not want any of his notional 50% share to benefit B or his children and that he was considering a strategy to ensure this (possibly by requesting the appointment of new beneficiaries). In

BRIEFING

addition, one of B's children approached the trustee with a view to getting a distribution to enable her to purchase a house for the benefit of her and her daughter.

Subsequently the trustee's thinking in relation to the proposed division of the Trust assets began to change (although A was not told about this until after the relevant decision was made). Ultimately the trustee decided that, instead of a 50/50 split as between A on the one hand and B and his issue on the other, it wished to allocate the funds as to just over 35% to each of the sons, with the balance split between the children and grandchild of B. In A's eyes the effect of this was to take £750,000 out of his share.

A (along with B) was informed of the trustee's decision but took no action for some two months when he then contacted his solicitor. By this point the trustee had proceeded to implement its decision and had already made a £500,000 distribution to B's daughter. An application by B was threatened but was in fact pre-empted by the trustee itself bringing its application to have its decision blessed.

The law

Category two test

Applying the well established principles of *In Re the S Settlement* [2001] JRC 154 (which is authority for the application in Jersey of the principles enunciated in *Public Trustee –v- Cooper* [2001] W.T.L.R 901) the Court accepted that the trustee's decision was a momentous one and that, therefore, the trustee's application fell within the second category of cases described in *Public Trustee -v- Cooper* where the trustee might properly invoke the jurisdiction of the Court. (The Court had raised at an earlier stage of the proceedings a question as to whether it was open to it to sanction a partly performed decision, but none of the parties had sought to argue against its ability to do so.)

Also on the basis of *Re S*, before it could bless the decision, the Court needed to be satisfied that:

1. the trustee had formed the opinion in good faith;
2. the opinion which the trustee formed was one at which a reasonable trustee, properly instructed, could have arrived; and
3. the opinion at which the trustee arrived was not vitiated by any actual or potential conflict of interest which did or may have affected its decision.

The Court, however, acknowledged that there may be further matters beyond the three identified in *Re S* that may be relevant to its decision as to whether or not to bless a trustee's decision. Although not an issue in the case at hand, by way of example of such further matters, the Court referred to the decision of *Briggs J in Jones -v- Firkin Flood* [2008] EWHC 2417 in which it was stated that, where trustees have by their conduct demonstrated a general unfitness to act, the court may feel insufficiently certain about the propriety of a proposed discretionary decision so that it declines to bless it.

The factors considered

In this case, the Court was presented with evidence that the trustee had reached its decision after careful consideration and had taken account of US tax advice as well as the circumstances of each individual beneficiary. The trustee had noted the wishes of A to exclude his brother and his children from benefiting from his notional share, which it described as a bit of a "bombshell". A further factor was that A had benefitted from the Trust by living rent free in the Property for a number of years. The trustee had considered not only the benefit already received by each of the settlor's sons but also their individual needs.

Trustees must not fetter themselves

A argued that the trustee had in fact taken a decision to divide the assets on a 50/50 basis that it should not be allowed to resile from. The Court held, however, that despite the fact that the words "final decision" had appeared in the minutes of the May 2008 meeting (which minutes had been provided to the beneficiaries) and that the minutes of a further meeting on March 2009 also referred to an agreed notional 50/50 split, this was merely reflective of the thinking of the trustee and the Protector at those times: this did not purport to and could not fetter the future exercise of the trustee's discretions; nothing had been done that had any legal effect; the division was "notional" only; what A sought to characterise as decisions were nothing more in law than a record of the trustee's thoughts at the time; when it came to decisions to be made in December 2009 the trustee was required to exercise its judgment in the circumstances existing at that time.

Natural justice

The Court confirmed that the rules of natural justice in the traditional sense do not apply to

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BRIEFING

trustees' decisions. The Court quoted from a passage in *Lewin* to the effect that a beneficiary has no general right to a hearing from the trustees, although there may be occasions where trustees would be acting unreasonably if they failed to give a beneficiary an opportunity to persuade them against a particular course and they ought also to take into account any previous indications they have given as to the manner in which they might exercise their powers in the future.

Legitimate expectations

There was some discussion about the extent to which legitimate expectation has a part to play in trust law. Reference was made to the case of *Scott -v- National Trust for Places of Historic Interest or Natural Beauty* (1998) 2 All ER 705 (Walker J) in this regard. Without deciding the point, the Court appeared to be of the view that there might be something in this, but also that the facts would have to be very different from those in the present case before it could apply. The Court noted that the requirements for a substantive legitimate expectation in a public law context were not satisfied in this case (there being no evidence that a representation was made to A that had the character of a contract or that he had relied on to his detriment).

Conclusion

The key issue for the Court was whether the trustee had considered all of the circumstances that existed at the time.

The Court considered that the trustee had properly applied its mind to the exercise of its decision, and even if other trustees or the Court might have exercised the trustee's powers differently, the decision could not be said to be beyond the limits of rationality. That said, the Court made clear its view that the decision making process could have been handled better by the trustee, in particular by discussing its changed thinking with A and his advisers in advance of taking its decision.

The Position in Guernsey

There has also been a fairly recent decision in Guernsey where the *Public Trustee -v- Cooper* jurisdiction has been exercised.

On 29 November 2010 a judgment was handed down concerning the case of *Rothschild Trust Guernsey Limited v Madam Nahed Ojeh and Akram Ojeh* [No 40/2010]. In that case the Royal Court of Guernsey was asked to approve

and ratify the decision of Rothschild Trust (as a co-trustee) of the NAO Settlement to enter into a Settlement Agreement in respect of proceedings before the French courts and also to approve and ratify Rothschild Trust's decision to perform all its obligations under the terms of the Settlement Agreement. The trust deed of the NAO Settlement confers on the trustees the power to settle the proceedings and the trustees had decided that to do so would be in the interests of the trust and the beneficiaries. This case also came within the second category described in *Public Trustee -v- Cooper* referred to above (ie that it was a particularly momentous decision).

In coming to its decision, the Court took account of the questions set out in the judgment of an earlier Guernsey Royal Court decision of *In the Matter of The Mischa Trust* [No 15/2010] (18 March 2010, Royal Court of Guernsey) which also considered (inter alia) the *Public Trustee -v- Cooper* jurisdiction. In answering those questions the Court concluded that:

- i. Rothschild Trust had the power pursuant to the terms of the trust deed and pursuant to section 31(2) of the Trusts (Guernsey) Law, 2007 to make the decision to settle the French proceedings;
- ii. Rothschild Trust had acted in good faith in deciding it was desirable and proper to enter into the Settlement Agreement;
- iii. a reasonable trustee properly instructed could have arrived at the same decision; and
- iv. the decision was not vitiated by any conflicts of interest on the part of Rothschild Trust.

Based on those conclusions the Court was minded to ratify and approve Rothschild Trust's decision to enter into the Settlement Agreement and to perform its obligations thereunder.

Mourant Ozannes in Guernsey acted for the corporate trustee in both cases.

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