In The Supreme Court of Bermuda

CIVIL JURISDICTION
2017: 317

IN THE MATTER OF THE A TRUSTS

REASONS FOR DECISION

(in Camera)[1]

Trustees' application for approval of momentous decision- nature and scope of Court's approval jurisdiction- approach to expert evidence-relevance of alleged conflicts of interest to approval application

Date of hearing: May 7, 8, 9, 2018
Date of Decision: May 10, 2018
Date of Reasons: May 17 2018

Mr Nicholas Le Poidevin QC of counsel and Mr Alex Potts QC, Kennedys Chudleigh Ltd., for the Plaintiffs/Trustees

Mr Frank Hinks QC of counsel and Mr Keith Robinson, Carey Olsen, for the 1st Defendant

Mr Robert Miles QC of counsel and Ms Nicole Tovey, Taylor's, for the 2nd Defendant and the 8th-10th Defendants

Mr Nikki Singla QC of counsel and Mr Justin Williams, Williams, for the 3rd-5th Defendants

Mr Jonathan Hilliard QC of counsel and Mr Steven White, Appleby (Bermuda) Limited, for the 6th Defendant

Mr Simon Taube QC of counsel and Ms Lilla Zuill, Zuill & Co (Harneys), for the 7th Defendant

Mr Tom Leech QC of counsel and Mr Paul Harshaw, Canterbury Law Limited, for the 11th - 13th Defendants

[1] This is an edited version of a fuller confidential judgment circulated to the parties

Introductory

1. By an Originating Summons issued on September 13, 2017 and amended on February 16, 2018, the Trustees sought approval for their decision to permit a company they controlled to make a substantial investment.

2. On May 10, 2018, I decided to grant the approval sought. These are the legal principles which informed that decision.

Legal findings: the Court's function

3. The governing principles were essentially common ground. There was to my mind no serious doubt that the Trustees possessed the power to make the relevant decisions which, involving substantial sums, were clearly momentous. The application was clearly a Category (2) case as explained in *Public Trustee-v- Cooper* [2001] 1 WTLR 901 (Hart J). Any objections to the existence of the power were in my judgment only comprehensible as objections to the appropriateness of exercising the power in the factual circumstances of the present case.

4. In *Re ABC Trusts* [2014] Bda LR 117, this Court observed:

> "*7…the Bermudian Courts have entertained 'category two' applications for many years. A prominent instance, relied upon by the Trustees' counsel, is Norma Wade-Miller's judgment approving the compromise of contentious trust litigation in Re Thyssen-Bornemisza Continuity Trust [2002] Bda LR 8. In that case, Wade-Miller J accepted the invitation of the trustees' counsel to approach the application for approval by reference to the following four questions:*
>
> > *i. 'do the Trustees have the power to enter into the proposed compromise?';*
> >
> > *ii. 'is the Court satisfied that the Trustees have genuinely formed the view that the compromise is in the interest of the …Trust and its beneficiaries?';*
> >
> > *iii. 'is the Court satisfied that this is a view at which a reasonable body of trustees could properly have arrived at?';*
> >
> > *iv. 'does the Court consider that any of the individual Trustees have any actual or potential conflict of interests and, if so, does it consider*

> *that this conflict of interests prevents the Court from approving the unanimous decision of the Trustees to compromise the litigation?'* "

5. Mr Le Poidevin QC for the Trustees submitted that issue was only seriously joined by beneficiaries opposing the application on the third of these questions. It followed that, it not being for the Court to form its own view of the merits of the decisions for which approval was sought, those opposing the application had to satisfy the Court that the impugned decisions were irrational. This was setting a very high bar indeed. Mr Singla QC for D3-D5 submitted that to the previously recognised four questions which arise on this sort of application the following "additional" question should be added:

> "*Whether it can be said that in reaching its decision to implement the proposal the trustee has taken into account irrelevant, improper or irrational factors or whether it has reached a decision that no reasonable body of trustees properly directing themselves could have reached.*"

6. This formulation was supported by the *dicta* of Scott –V C (as he then was) in *Edge-v-Pension Ombudsman* [1998] Ch 512 at 534. Mr Hilliard QC for the supporting D6 agreed that the Court had to decide whether or not the Trustees had reached a decision which no reasonable trustee would have reached. However in his Skeleton Argument, addressing the closely connected question of how the Court should approach the evidence, he submitted:

> "*...the ultimate question is whether the Trustees have asked themselves the right questions, and taken necessary professional advice.*"

7. Properly analysed, there is no real distinction between the third question approved by this Court in *Re ABC Trusts* and the "additional" question proposed by Mr Singla QC. The latter is simply an expanded articulation of the former. The question *"is the Court satisfied that this is a view at which a reasonable body of trustees could <u>properly</u> have arrived at?*" necessarily requires regard to whether a proper decision-making process occurred. Reasonable trustees would not take into account irrelevant, improper or irrational factors, and would only be informed by considerations which are relevant to their decision. This more fully articulated test was adopted by Blackburne J in *Merchant Navy Ratings Pension Fund Trustees Ltd.-v-Chambers & Ors* [2001] PLR 137 at [7]. The latter "*threshold test*" for approving a category 2 decision was approved by Asplin J in *Pollock-v-Reed* [2015] EWHC 3685 (at paragraph 129) in a passage to which Mr Singla QC referred:

"*It is whether in reaching its decision the trustee has taken into account irrelevant, improper or irrational factors, or whether it has reached a decision that no reasonable body of trustees properly directing themselves could have reached.*"

8. Accordingly I accepted the submission of Mr Singla QC that this Court was required, as part of the process of deciding whether or not the decisions would have been reached by a reasonable body of trustees, to have regard to whether or not the Trustees had taken into account irrelevant, improper or irrational factors.

9. For completeness, I should record that I summarily rejected what Mr Le Poidevin QC aptly described as the "extraordinary" submission that any approval granted to the Trustees by this Court should not preclude any subsequent breach of trust claim by the beneficiaries.

Legal findings: the approach to the expert evidence

10. Central to the disposition of the Amended Originating Summons was the legal question of how the Court should approach the expert evidence. The Trustees relied on the approach articulated by Vos LJ in *Cotton and another-v-Earl of Cardigan and others* [2014] EWCA Civ 1312, for one overarching principle and a second subsidiary point. The broader point of principle was the straightforward proposition that unless the Court had deliberately embarked upon a fact-finding exercise involving oral evidence and cross-examination, an approval application based on a documentary record alone was not the appropriate form of proceeding for resolving disputes between competing expert witnesses. Vos LJ stated:

"*78. This aspect of the argument raised in sharp focus the procedure that is adopted when trustees seek the approval of the court to a momentous transaction. The procedure is intended to be quick and accessible. The question was raised as to what ought to happen when issues of contested fact are raised that the CPR Part 8 procedure is not well adapted to resolve. As it turns out, in this case, it does not ultimately seem to me that such issues were central to the court's determination. But one can imagine cases where they would be. In such a case, the court can always order that the issues of fact are tried under the Part 7 procedure, or anyway after disclosure and oral evidence. I do not, however, think that such a situation would frequently arise, because the trustees are not asking the court to find facts. They are asking the court to decide whether they have presented sufficient evidence to satisfy it that the trustees have fulfilled their duties to their beneficiaries in*

deciding upon the transaction in question, and have formed a view which, in all the circumstances, reasonable trustees could properly have formed. This is a very different exercise from the situation, after the event, where a beneficiary is seeking to prove that the trustees have failed in their duties by selling, for example, at an undervalue." [Emphasis added]

11. I agree. In the present case the opposing beneficiaries did not invite the Court at the directions stage to try any contested issues of fact or expert opinion. This Court's central task in considering the competing expert opinions placed before the Court was whether or not the Trustees had established that it was reasonable for them to accept the advice which they received. The essential merits of the competing views were not for this Court to assess and decide. I was also assisted by Mr Taube QC's reference to the following passage from the decision of the Jersey Court of Appeal in *Re Otto Poon Trust, Kan-v-HSBC* [2015] JCA 109 (George Bompas JA, Sir Hugh Bennett P and David Doyle JA concurring) :

"*17…we consider that it is both unnecessary and undesirable to introduce a separate requirement for a trustee to prove in all cases precisely what it has done in giving scrutiny to the matter under scrutiny…*

18. When the court is to give approval for a momentous decision the court needs to be satisfied as to the rationality of the decision; the lengths to which the court must go in examining the process by which the trustee arrived at the decision must depend upon the particular decision. In some cases the decision may be a difficult and doubtful one, requiring fine judgment in the face of competing considerations; in others the decision may be obvious. In the former cases the quality of the decision-making process will be more important than the latter…."

12. A narrower point upon which the Trustees' counsel relied was based on the following observations of Vos LJ earlier in the same judgment:

"*72… In my judgment, the trustees were entitled to take this advice…And I do not accept that the trustees were obliged to second-guess the professional view of the experts they had instructed to market the property and to obtain the best price available in the circumstances.*"

13. Mr Singla QC made the expansive submission that the present case was not a *Cotton* case, seeking (it appeared to me) to undermine the pertinence of both of the two passages cited above. However he rightly focussed his attack on the relevance of the narrower proposition. In my judgment the broader proposition supported by *Cotton,*

that the Court is not required to find facts unless it embarks upon a proper fact-finding exercise, is a statement of general principle which is not coloured by the factual context of that case.

14. On the other hand the same does not apply to Vos LJ's narrower observation that the trustees in that case were not "*obliged to second-guess the professional view of the experts*". This was a finding of mixed law and fact based on the distinctive circumstances of the *Cotton* case, which involved the mechanics for the sale of '*Tottenham House*' where the substantive decision to sell was agreed. I accept that there is judicial support for the proposition that the 'no need to second-guess' principle is of general application: Asplin J, *Pollock-v-Reed* [2015] EWHC 3685 (Ch) at paragraph 130. The present transaction involved not simply multiple expert opinions on various aspects of the substantive merits of what was a contentious business decision. It also involved competing expert opinions relied upon by those opposed to the transaction. The present context in my judgment did not justify the Trustees simply following its own experts and not 'second-guessing' them.

15. Mr Miles QC formally adopted no position on the application, but proceeded to present an incisive critique of the transaction in a beguilingly objective manner. He rightly submitted that the Court was required to ensure that the Trustees had fairly considered both their own experts' advice and the reports of the experts retained by the opposing beneficiaries. He also rightly submitted that the (non-expert) views of the opposing beneficiaries would be of little assistance to the Court. I accordingly found that it was for the Trustees to satisfy the Court not merely that they had followed advice, but further that, in light of all the expert material before them and the Court, it was reasonable for them to rely on such advice.

Legal findings: the relevance of conflict of interest to the Court's approval jurisdiction

16. Mr Le Poidevin QC submitted that if, which was disputed, any conflicts of interest existed between the various roles played by the directors who approved the transactions, this was a reason to seek the Court's approval for the transaction, not an automatic basis for withholding approval. Hart J addressed this topic in *Public Trustee-v-Cooper* [2001] WTLR 901. Firstly (at 932), he identified the governing principle as being aptly expressed by Lord Herschell in *Bray-v-Ford* (1896) AC 41, 51-52:

> "*It is an inflexible rule of a court of equity that a person in a fiduciary position…is not, unless otherwise expressly provided…allowed to put himself in a position where his interest and duty conflict*…"

17. Secondly (at 933-934), Hart J identified three scenarios in which a conflict of interest problem might present itself to a court:

> "*In some areas of our law the existence of conflicts of this kind is recognised and managed by a variety of devices, ranging from requiring the affected person to declare his interest to requiring him to abstain from participation in the relevant decision-making process. In the law of private (i.e. non-charitable) trusts, where unanimity of decision making is required, such devices are difficult to transplant. The beneficiary is entitled to the decision of all his trustees but, at the same time, he is entitled to require that the decision is made independently of any private interest or competing duty of any of the trustees. Where a trustee has such a private interest or competing duty, there are, as it seems to me, three possible ways in which the conflict can, in theory, successfully be managed. One is for the trustee concerned to resign. This will not always provide a practical or sensible solution. The trustee concerned may represent an important source of information or advice to his co-trustees or have a significant relationship to some or all of the beneficiaries such that his or her departure as a trustee will be potentially harmful to the interests of the trust estate or its beneficiaries.*
>
> *Secondly, the nature of the conflict may be so pervasive throughout the trustee body that they, as a body, have no alternative but to surrender their discretion to the court.*
>
> *Thirdly, the trustees may honestly and reasonably believe that, notwithstanding a conflict affecting one or more of their number, they are nevertheless able fairly and reasonably to take the decision. In this third case, it will usually be prudent, if time allows, for the trustees to allow their proposed exercise of discretion to be scrutinised in advance by the court, in proceedings in which any opposing beneficial interests are properly represented, and for them not to proceed unless and until the court has authorised them to do so. If they do not do so, they run the risk of having to justify the exercise of their discretion in subsequent hostile litigation and then satisfy the court that their decision was not only one which any reasonable body of trustees might have taken but was also one that had not in fact been influenced by the conflict.*"

18. Hart J then described his task in resolving the conflict issues before him (dual roles and a financial interest in a company in which the trust invested) in the following manner:

> "*I turn, therefore, to the question of whether such conflicts of interest as existed at the material time were such as either to invalidate the decision reached on 20th October by the Public Trustee and Mr. Chadburn or were*

such as to cause the court sufficiently serious concern for it to decline to authorise them to implement their decision."

19. Mr Singla QC accordingly submitted:

> "*36. The applicable test does not require* [us] *to establish definitively that conflicts actually influenced the proposed acquisition. The summary procedure that is normally followed in Public Trustee v Cooper applications makes it effectively impossible for a beneficiary to definitively prove that conflicts have influenced the transaction. It is sufficient,* [we] *submit, to establish a basis for the existence of a 'sufficiently serious concern' for the court to decline its authorization in the absence of a satisfactory answer by the Plaintiffs.*"

Conclusion

20. The Court was guided by the above principles in disposing of the approval application.

Dated this 17th day of May, 2018 _____

IAN RC KAWALEY CJ