



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

FSD CAUSE NO. 32 OF 2024 (IKJ)

**IN THE MATTER OF THE B TRUST
AND IN THE MATTER OF SECTION 48 OF THE TRUSTS ACT (2021 REVISION) ORDER 85
OF THE GRAND COURT RULES (2023 REVISION)**

IN CHAMBERS

Appearances: Rachael Reynolds KC, Deborah Barker Roye and Chris Vincent of Ogier
(Cayman) LLP for JTC (Cayman) Limited (the “Trustee”)

Before: The Hon. Justice Kawaley

Heard: On the papers

Date of Decision: 28 May 2024

Draft Reasons Circulated: 29 May 2024

Reasons Delivered: 10 June 2024

Trusts law-non-contentious blessing of momentous decision-modernisation of trust structure through creation of new trust-validity of prior distributions-proposed new protector provisions explicitly conferring wide powers of consent-directions granted ‘on the papers’ Trusts Act (2021 Revision), section 48-Grand Court Rules, Order 85

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REASONS FOR DECISION

Background

1. The Trustee by Ex Parte Originating Summons dated 2 February 2024 sought the blessing of a momentous decision, namely the enhancement of the terms of a somewhat convoluted trust instrument through the creation of a new and more streamlined trust instrument. It was primarily supported by the First Affidavit of Michael Halsey (“Halsey 1”). Directions in relation to confidentiality and service were sought and on 19 February 2024 I directed that:
 - (a) an Anonymised Originating Summons could be filed for entry on the public Register;
 - (b) the application papers should be served on the two adult beneficiaries (X and Y), the Protector (Carlos de Serpa Pimentel) and the Attorney General;
 - (c) X should represent their future issue and Y should represent their children and future issue.
2. The Originating Summons when filed was in substance supported by both adult beneficiaries and positively supported by the Protector, who filed evidence of his own. On 3 May 2024 the Trustee’s counsel asked for the matter to be listed for 26 or 27 May 2024, but also that the matter be dealt with on the papers. I confirmed that I would deal with the application on the papers; however the Summons was listed for hearing on 27 May 2024 as a precaution. On 22 May 2024, the Trustee’s counsel filed their Written Submissions and a supplementary Affidavit sworn by attorney Chris Vincent exhibiting a formal letter of support for the substantive relief sought from Y dated 21 May 2024.
3. The application was ultimately straightforward, in large part because it was made by a professional trustee acting in a manifestly professional manner with the positive support of all key interested parties: the Adult Beneficiaries and the professional Protector, a seasoned trust lawyer well known to the Court. However it was entirely appropriate for the Trustee to not only seek the Court’s blessing for a transaction which was momentous. It was also appropriate to obtain declaratory relief in relation to the validity of historic distributions by a predecessor trustee, the basis for which was not clearly documented.

4. On 27 May 2024, when the Originating Summons had initially been listed for hearing, I considered the application and decided it was appropriate to grant the Order sought. I now give brief reasons for my decision on 28 May 2024 to grant an Order in the following principal terms:

*“1. That the Trustee's proposed exercise of its powers under Article Second A(6)(h) of the Trust to appoint the assets of the Trust to a new trust on the terms of the deed set out at Appendix A (the **New Trust**) would be a proper exercise of its powers, and as regards such appointment the Trustee in making such appointment will be deemed to have discharged its duty as trustee of the Trust and the New Trust;*

2. That the former trustees of the Trust had the power to make the distributions made from the Trust.

3. That all historic distributions made from the Trust shall be deemed to have been made in compliance with the terms of the Trust.”

Governing legal principles

5. The governing legal principles were uncontroversial. The Trustee's counsel firstly referred to section 48 of the Trusts Act (2021 Revision):

“Any trustee or personal representative shall be at liberty, without institution of suit, to apply to the Court for an opinion, advice or direction on any question respecting the management or administration of the trust money, ...such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application, or such of them as the Court shall think expedient, and the trustee or personal representative acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards that person's own responsibility, to have discharged that person's duty as such trustee... in the subject matter of the said application.

Provided, that this shall not indemnify any trustee ...in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if such trustee...shall have been found to have committed any fraud, wilful concealment or misrepresentation in obtaining such opinion, advice or direction, and the costs of such application as aforesaid shall be in the discretion of the Court.”

6. As regards how this Court should approach a blessing application such as the present one, where the Trustee was not surrendering its discretion to the Court, the following lucid statement of principles set out by Anthony Smellie CJ (as he then was) in *AA v BB*, FSD 137/2019 (ASCJ), Judgment dated 14 February 2020 (unreported) was commended to the Court:

“4. It was common ground that on an application of this kind, in what is described as a ‘category 2’ case Public Trustee v Cooper application (meaning that the trustee is not surrendering its discretion to the Court but seeks the sanction of the Court for a ‘particularly momentous’ decision), the questions for the Court will normally be as follows:

- (1) Does the trustee have power to enter into the proposed transactions?*
- (2) Is the Court satisfied that the trustee has genuinely formed the view that the proposed transactions are in the interests of the trust and its beneficiaries?*
- (3) Is the Court satisfied that this is a view that a reasonable trustee could properly have arrived at?*
- (4) Has the trustee any conflict of interest, and if so, does the Court consider that the conflict prevents it from approving the trustee's decision?”*

7. Smellie CJ went on in that case to cite with approval and apply the “*rationality standard*” described in what is now *Lewin on Trusts* 20th edition at paragraph 39-05. The Trustee’s counsel also properly referred the Court to paragraph 39-06 of *Lewin*, which I considered had muted significance in the context of the present non-contentious application:

“The Court, however, acts with caution, because the result of giving approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust or even to set it aside as flawed: they are unlikely to have the same advantages of cross examination or disclosure of the trustee's deliberations as they would have in such proceedings. If the Court is left in doubt on the evidence as to the propriety of the trustees' proposal it will withhold its approval (though doing so will not be the same thing as prohibiting the exercise proposed...)”

Merits of application

Overview

8. The B Trust was created by a Deed of Advancement dated 31 December 2012, being supplemental to a 15 January 1982 Trust Agreement. The Trustee considered, with the agreement of X and Y and the Protector, that the Trust structure would benefit in terms of overall efficiency if the following features of the existing structure were modified:
- (a) the Management Committee appeared unnecessary and its investment functions seemed duplicative of functions now provided a professional investment adviser. One of the adult beneficiaries was able to take over its advisory philanthropic role;
 - (b) the dispositive provisions of the Trust were complicated and somewhat unclear (prompting the request for declaratory relief in relation to historic distributions). They required simplifying and clarifying; and
 - (c) (a point which I considered legally noteworthy but which was not emphasised by the Trustee), the proposed new Trust deed would explicitly confer wide powers of consent on the Protector.
9. The B Trust expressly empowered the Trustee to transfer any trust property to a new trust with a corresponding perpetuity period, provided at least one of the existing beneficiaries would benefit under the new trust. These requirements would be met by the proposed new trust.

The Management Committee

10. At the directions stage, I saw no need to require service of the application on the Management Committee. Rumblings of discontent were advanced on their behalf in correspondence from Conyers dated, principally, 4 January 2022 and 15 June 2023. They asked to be joined to any proceedings seeking to bless the proposed restructuring. Ogier responded on 10 July 2023 indicating they saw no legal basis for the Committee to intervene. I agreed with the Trustee's view that the Committee had no standing to contest the views of the adult beneficiaries and independent professional Protector as to where the best interests of the beneficiaries lay.

11. The costs savings benefit of dispensing with the Committee were both clear and entirely rational and it was unsurprising that those most interested agreed with this aspect of the restructuring proposal. It was nonetheless understandable that the Management Committee should be disappointed at losing not just a source of remuneration but also a role entrusted to them by the late Grantor many years ago of participating in the administration of the Trust.

The Declaratory relief/the dispositive provisions

12. The dispositive provisions were complicated and, in at least one respect, ambiguously expressed. The Trustee adopted a very logical yet practical approach to analysing historic distributions in relation to which it was not possible to ascertain what process of deliberation the former trustee had undertaken. It was impossible for me to avoid the strong suspicion that the dispositive provisions were so cumbersome, that the former trustee felt it easier and more efficient to make distributions which appeared proper than to engage in the onerous task of justifying strict compliance with the provisions. Nonetheless, the Trustee concluded:

- (a) payments made to another discretionary trust of which X and Y were discretionary beneficiaries which arguably ought to have been made to them directly were validly made, because X and Y agreed that the payments were made for their benefit;
- (b) it was unclear whether other payments were mandatory or discretionary, and the basis on which five distributions were made was unclear. The former trustee was no longer in operation so clarification could not be obtained. Having regard to the broad discretion to make distributions out of capital and income, and the agreement of X and Y that the distributions could validly have been made, the relevant payments could fairly be regarded as having been validly made;
- (c) the Trustee reviewed all other payments made since the establishment of the Trust and, adopting the same approach, concluded they were valid.

13. I accordingly considered it appropriate to grant the declaratory relief sought. It followed, that I considered the decision to simplify the dispositive provisions to be a rational one.

The proposed new “wide” Protector consent provisions

14. The scope of a protector’s power of consent, whether wide and unfettered or narrow (being limited to blocking irrational or unlawful decisions) has been controversial of late: see e.g. *Re the X Trusts*

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[2023] CA (Bda) 4 Civ. The proposed new trust deed contains what appears to be an elegant example of how such uncertainties can be circumnavigated through clearer language. Unsurprisingly, it has emerged in a context where the beneficiaries are all of the same general mind. The critical clause provides:

“Where a power may only be exercised with the Protector’s consent, such consent may be given or withheld in the Protector’s discretion notwithstanding that the proposed exercise of power by the Trustees is an exercise of power which a reasonable body of properly formed trustees is entitled to take.”

Summary

15. The Protector’s Affidavit confirmed his review of the application and consultation with the adult beneficiaries since 2021. He avers:

“16. To conclude I have no objection to and am generally supportive of the Trustee’s Application and the orders sought by the Trustee, which I believe to be in the best interests of the beneficiaries, should the Court be minded to grant the relief sought.”

Conclusion

16. For these reasons, on 28 May 2024, I granted the directions sought by the Trustee in relation to the proposed restructuring of the B Trust.



**THE HONOURABLE JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT**