Is that your final answer? When a trustee can change its mind

Insights - 15/09/2011

Is that your final answer? When a trustee can change its mind

The Royal Court was recently asked to sanction a trustee's decision to distribute the assets of a discretionary trust in a manner that was inconsistent with previous indications that the trustee had given to the beneficiaries[1]. In particular, the Court analysed the ability of trustees to make distributions that are fundamentally different from decisions previously described as being "final" and whether beneficiaries need to be consulted if a trustee anticipates changing its mind in this way.

The main asset of the discretionary Jersey law trust was a property in Surrey, England. The beneficiaries of the trust were the settlor's sons A (aged 61) and B (aged 59), B's children aged 32, 18 and 15 and B's grandchild aged 14. A was single and had no children. In the settlor's letter of wishes she expressed the wish that everything be shared equally between her two sons A and B.

Following the settlor's death, the Surrey property was sold. The sale proceeds were added to the trust, giving a total asset value of £5.3M. A distribution of £1.9M was made to B to purchase a house for himself. The trustee then decided how to apportion the remaining £3.4M of assets held in the trust.

The trustee met with the protector. The trustee recorded that it was its "final decision" that the trust assets would be split 50% for the benefit of A and 50% for the benefit of B and his children. B's share was to include the amount already distributed to him for his house purchase. The protector agreed that this was a fair apportionment of the trust assets. Copies of the minutes of this meeting were sent to both A and B. The trustee confirmed to A that it had notionally split the trust assets into two parts, one portion for A's benefit and the other portion for B and his family.

Meanwhile B was in regular email contact with the trustee, repeatedly requesting a rebalancing of

the proposed distribution in B's favour. Without consulting A, the trustees subsequently met and reconsidered their earlier decision. Taking account of A's modest lifestyle and lack of dependents, the trustee allocated a further £1.5M to B's children and grandchild, leaving A with only £1.9M of the trust assets (about 35%).

A consequently contacted the trustee, putting it on notice that he would apply to the court for relief if further distributions were made to either B or his family. The trustee pre-empted this threat and brought an application for the Court to sanction its decision.

The trustee needed to satisfy the Court that its decision (which the Court accepted was momentous) was one which a reasonable and properly instructed trustee could have arrived at[2]. In passing, the Court noted that the three limbed Public Trustee v Cooper[3] test may be expanded in appropriate cases, for example to consider whether the trustee has demonstrated a general unfitness to act by reason of its prior conduct.

The Court reviewed the key legal principles that apply to the administration of discretionary trusts. First, while trustees may take account of any previous thinking, they must not allow it to fetter the exercise of their discretion. Their judgment must be exercised solely according to the circumstances as they exist at the time that the decision is made. Moreover, any decision will not be truly "final" until it is acted on by a trustee i.e. by making an appointment into particular funds or by making distributions. The Court held that the trustee's "final decision" in this case merely reflected the trustees thinking at that point in time. Although A may have felt that his entitlement to a 50% share had been depleted, in fact he had no actual entitlement to 50% of the trust assets at any time. His 50% allocation was only ever notional. When the trustee came to its eventual decision on how to apportion the trust assets, it did not matter that any of the factors that persuaded it to give A a lesser share were already known when it made the earlier notional allocation.

Second, the rules of natural justice do not apply in the traditional sense to decisions of trustees. A beneficiary has no general right to be heard or consulted, even when the trustee's decision depends on a judgment as to a state of facts. The focus is not upon the expectation of the beneficiary, but upon the information available to the trustee. In rare circumstances the concept of legitimate expectation may have some part to play in a trustee's decision making. However, the boundaries of legitimate expectation in trust law are not clear. The Court considered that neither the tentative authority which exists on the issue, nor the circumstances of the present case, were sufficient to give rise to any legitimate expectation argument on behalf of A. In any event, A was not able to satisfy the Court that, even if he had been consulted, he could have provided the trustee with any further information that was not already before it.

While the Court acknowledged that it was very troubled by the high-handed manner in which the trustee had treated A, it had to decide whether to sanction the trustee's decision by looking at whether the trustee had taken all proper considerations into account and had acted within the

bounds of rationality. It decided that the trustee had made its decision with reference to the circumstances as they existed at the time, was properly informed and had regard to, but was not fettered by, its previous thinking. Even if another trustee, or indeed the Court, might have exercised its discretion differently, the trustee's decision to allocate A less than half of the trust assets was within the limits of rationality. The Court therefore sanctioned the trustee's decision.

Comment

The Court's decision demonstrates the wide scope that trustees have when making decisions on behalf of discretionary trusts. So long as a trustee properly takes the circumstances as they exist at the relevant time into account, it is not bound to act in accordance with any previous indications that it may have given to the beneficiaries. It does not matter how strongly such previous indications may have been worded (for example, by being recorded as a "final decision" in the trustee's minutes). If the trustee has not acted on the indications in a way that would give them legal effect, its discretion is not fettered. Furthermore, trustees are not generally required to consult with beneficiaries in the decision-making process, even if they intend on changing their mind in a way that will be detrimental to a beneficiary's interests.

This should provide some comfort for trustees who, when faced with a difficult decision, decide to change their mind.

Notes

[1] In the matter of the Y Trust [2011] JRC 135
[2] In re the S Settlement [2001] JRC 154
[3] Public Trustee v Cooper [2001] WTLR 903

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

Disclaimer

This client briefing has been prepared for clients and professional associates of Ogier. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Regulatory information can be found under Legal Notice

Meet the Author

Simon Davies

Partner

Guernsey

E: simon.davies@ogier.com

T: +44 1481 737175

Key Contacts

Edward Mackereth

Global Managing Partner

Jersey

E: edward.mackereth@ogier.com

T: +44 1534 514320

Related Services

Dispute Resolution