You cant do that! When unreasonable decisions of trustees may be set aside

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Jersey's Royal Court has confirmed the scope of its jurisdiction to set aside unreasonable decisions of trustees(1). In a related decision, the Royal Court also made it clear that trustees who make unreasonable decisions are not generally entitled to have their reputation protected by non-publication or redaction of judgments(2).

The case concerned a Jersey discretionary trust. The Settlor had passed away, leaving the Trustee and the Protector to administer the Trust in accordance with the Settlor's wishes. The Settlor's widow (the **Widow**), son and minor grandchildren aged five and seven (the **Grandchildren**) were discretionary beneficiaries. The Grandchildren lived with their mother in Peru, following the breakdown of the marriage between their mother and the Settlor's son. The Trustee had the power to exclude beneficiaries with the consent of the Protector.

In the context of acrimonious divorce proceedings, the Widow exerted significant pressure on the Trustee to exclude the Grandchildren from the Trust. Following extensive correspondence, the Trustee resolved to exclude the Grandchildren as beneficiaries during the lifetime of the Widow and the Protector consented to the exclusion. The Grandchildren, through their guardian *ad litem*, applied to set the Trustee's decision aside.

As a starting point, the Court made it clear that it does not sit to entertain appeals from trustees' decisions and the mere fact that the Court may have acted in a different way to a trustee is not a ground for interference. The Court will however intervene when a trustee has acted perversely by improperly exercising its discretion.

The standard of unreasonableness that must be met in order for the exercise of a trustee's decision to be improper has not been determined in England and is controversial in New Zealand(3).

However, the Court found that the "no rational trustee" test was well established in Jersey. This test provides that the exercise of a trustee's discretion will not be set aside unless it can be shown that no reasonable trustee would have acted or decided in the same way. This is a stringent test that, in effect, amounts to "Wednesbury" unreasonableness.

The Court noted that powers of exclusion are powers of a "special kind". Such powers are not to be equated with ordinary discretionary powers to pay income or capital to a beneficiary. The Court held that the power to exclude beneficiaries is only to be used sparingly and in exceptional circumstances, particularly where minors are involved.

The Court also raised the possibility that a person in the position of trustee for a minor in Jersey (a *tuteur*) is required to act as a "*bon père de famille*" (literally a good father of the family). This obligation has been expressly incorporated into Guernsey's trusts legislation, but is not part of the statutory duties of trustees under the Trusts (Jersey) Law 1984. However, the Trusts (Jersey) Law is not a codification of the laws regarding trusts in Jersey and the Court suggested that it is arguable that such an obligation may apply to trustees of Jersey family trusts involving minor children. This would be consistent with the paternalistic nature of trustees' powers, as recognised in *Esteem(*4).

On the facts of the case, the Court found that the Trustee had never independently and dispassionately considered the circumstances of the Grandchildren as beneficiaries of the Trust in their own right. Instead, the Trustee had become unduly influenced by the invective of the Widow and fixated upon the mother of the Grandchildren, who was seen as a hostile party threatening to attack the Trust. As a consequence, the Trustee had confused the issues before it. While the Court acknowledged that it was a "bold move" to set the Trustee's decision aside, it found itself constrained into doing so because, in the circumstances of the case, no reasonable trustee would have excluded the Grandchildren as beneficiaries.

However, that was not the end of the matter. The Trustee found itself faced with a judgment that was highly critical of its actions. It consequently argued that the judgment should either not be published or should be heavily redacted.

The Court reviewed the principles that apply in Jersey to anonymity in trusts cases(5). The key principle is that justice must be done in public. In conflict with this key principle, considerable importance is attached to the confidentiality of private trusts in Jersey. The requirement for public justice and the need to respect the confidentiality of private trusts is balanced by the court sitting in private when considering administrative applications and sitting in public, but redacting judgments so as to remove any reference to the identity of beneficiaries and settlors, in respect of hostile trust proceedings and other non-administrative applications. However, there is no public interest in sparing the blushes of professional advisers who have made mistakes. On the contrary, there might be said to be a public interest in ensuring that such mistakes are put into the public domain. The Court viewed these principles as well established in Jersey and considered that it should resist any extension of confidentiality in this context.

The Court acknowledged that publishing the judgment would place information in the public domain that would otherwise be confidential to the Trust. However, the Court saw this as an inevitable consequence of the proceedings being conducted in public. The confidential information that the Trustee sought to have redacted constituted a major part of the evidence upon which the Court had based its findings. To redact such information would have left the decision bereft of any meaning.

The judgment was therefore published in full, save for minor redaction to the extent necessary to protect the Grandchildren from being identified and to protect the privacy of family members.

Comment

This decision provides clear guidance on when a trustee's decision may be set aside on the basis of it being unreasonable. The test for unreasonableness is high. It must be shown that no reasonable trustee would have acted the same way. The stringency of this test should provide some comfort to trustees of discretionary trusts, whose decisions may initially be questioned by dissatisfied beneficiaries on occasion.

However, trustees cannot expect to receive anonymity. Nor can they expect professionally embarrassing communications concerning the trust to be redacted from the judgment. The potential for trustees to be "named and shamed" in this way should serve as a strong reminder of the serious consequences of a trustee failing to properly fulfil its fiduciary duties.

1 Representation of A and B and In re C Trust [2012] JRC 086B
2 Representation of A and B and In re C Trust [2012] JRC 098
3 See Craddock v Crowhen (1995) NZSC 40,331 and *Re Fletcher Challenge Energy Employee Educational Fund* [2004] WTLR 199
4 In re Esteem Settlement [2001] JLR 7
5 Drawn from *JEP v Al Thani* [2002] JLR 542 and *In re Sanne Trust Company Limited* [2009] JRC 025B

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