

## No alternative: when may a trustee surrender its discretion to the Court?

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In the matter of the Y Trust, Royal Court Reported Judgment 25 March 2015.

#### Facts of the Case

Central to this case were the protracted and hostile divorce proceedings between two beneficiaries of the Trust, referred to in the judgment as the mother and the father. The divorce process was first instigated in 2012 and a settlement was finally reached on the third attempt in 2015 (the **Agreement**).

The Agreement provided for the division of the Trust's property between the mother, the father and their children. While the mother and children were beneficiaries of the Trust, the father had inadvertently become an excluded beneficiary. It was therefore proposed that the Trustee should close the class of beneficiaries and terminate the Trust so that the beneficiaries could direct the Trustee to distribute the assets of the Trust in accordance with the Agreement. The Agreement accordingly included provisions to limit the potential exposure of the Trustee in making a payment to an excluded beneficiary (i.e. the father).

The Trustee was concerned it was conflicted between its interests in limiting its liability and its duties to the Trust. The Trustee therefore sought to surrender its discretion to the Court in relation to the exercise of the powers outlined in the Agreement.

#### Relevant Principles

The test applied in applications to surrender discretion to the Court is set out in In re S Settlement [2001] JRC 154. This provides that:

*“[T]he court will only accept a surrender of discretion for a good reason, the most obvious good reasons being either that the trustees are deadlocked (but honestly deadlocked, so the question cannot be resolved by removing one trustee rather than another), or because the trustees are disabled as a result of a conflict of interest.”*

However, the test may only be applied on a restricted basis. This was emphasised by the Court of Appeal in In re B Settlement [2010] JLR 653, where it was held that a surrender of discretion should be regarded as a last resort and that it would normally only be accepted by the Court where no “sensible alternative” exists.

## **The decision**

The Court held that the Agreement was undoubtedly in the interests of the mother and the children as it would bring an end to the expensive and lengthy divorce proceedings. However, the Court also accepted that the express intention to remove any risk to the Trustee in the Agreement also represented a conflict of interest to the Trustee.

Before accepting the surrender of discretion, the Court first looked to whether a “sensible alternative” existed.

The Court considered that, while the Trustee could have distributed the entirety of the Trust to the mother to discharge its obligations under the Agreement, this would not be acceptable to the father following the lengthy and fraught divorce process to date.

The Court also looked at whether it would have been preferable for the Trustee to have made the relevant decisions under the Agreement before seeking the Court’s blessing. However, it was felt that it may have presented a problem on the grounds that the Court had to be satisfied that the decisions taken by the Trustee had not been vitiated by any actual or potential conflict of interest which has or might have affected its decision.

The alternative solution to a surrender of discretion would have been arbitration; however, the Court felt this would not have been appropriate since the arbitrator had no control over the Trustee or the Trust property.

In conclusion, the Court was prepared to accept that no sensible alternative existed to a surrender of the Trustee’s discretion. The Court therefore accepted the surrender and directed the exercise of the relevant powers in accordance with the Agreement.

## **Conclusion**

This judgment serves as a reminder that an application by trustees to surrender discretion to the Court is not something to be undertaken lightly. It is important that trustees considering this option should investigate whether there any “sensible alternatives” to the surrender of discretion

before proceeding. However, this judgment also demonstrates that, while such a decision is intended as a last resort, the Court is minded to be practical in considering such cases and trustees who may have felt paralysed by a conflict, even where the end result would have been preferable for the beneficiaries, have some recourse.

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