CAREY OLSEN

The blessings and burdens of a Cayman trust dispute

Service area / Dispute Resolution and Litigation, Trusts and Private Wealth
Location / Cayman Islands
Date / March 2019

Raw family wounds, generational rifts, and suspicions of wrong-doing are the bread and butter of trust disputes in the modern world. It is therefore a brave, and perhaps foolhardy, trustee who would seek to implement momentous change to a trust in the face of such contention – even where expressly empowered to do so by the trust deed. Recognising this, in the recent case of *In the Matter of A Trust*[1] a trustee of a Cayman Islands trust, faced with a "parting of the ways" between the beneficiaries of the trust and concerned about the level of acrimony between them, asked the Grand Court of the Cayman Islands (the Court) to bless a proposal to distribute the trust assets. In finding that the trustee was indeed proceeding reasonably in the circumstances and noting that the beneficiaries assumed a heavy burden to prove otherwise, the Honourable Mr Justice Kawaley (the Judge) has issued a detailed and careful analysis of the guiding principles applicable to contentious blessing applications of this nature.

Background

The A Trust was a Cayman Islands Trust (the Trust). The settlor of the Trust (the Settlor) was the father of the three defendants to the proceedings (collectively, the Siblings), who were the principal beneficiaries of the Trust. The Trust primarily comprised real estate assets, held through a relatively complex structure, and had been settled in the hope that it would provide a more efficient way of distributing the Settlor's assets after his death without conflict between the Siblings. Indeed, in a memorandum recording the Settlor's wishes, it was noted that the Settlor had a desire to avoid the "delay, and hardship brought about by lengthy probate procedures". The Settlor had therefore expressed his wish that, on his death, trustee should distribute the assets of the trust equally between the Siblings (who were the primary beneficiaries of the Trust).

Following the death of the Settlor, and pursuant to his wishes, the trustee of the Trust (the Trustee) turned to consider how best to make a final distribution of the assets of the Trust. The trust deed itself contained broad discretionary powers, authorizing the Trustee to appoint the trust fund "in such proportions or manner and upon such other terms and conditions as the Trustee shall in its absolute and uncontrolled discretion deem appropriate" and otherwise to appropriate any part of the trust fund towards any beneficiary "as the Trustee may deem just and reasonable without the necessity of obtaining the consent of any person".

With these powers in mind, the Trustee prepared a final distribution proposal (the FDP) which provided for how and to which beneficiaries the assets of the Trust would be distributed. Even though it was not compelled to do so by the terms of the trust deed, the Trustee engaged in a consultation process with the Siblings. The FDP was supported by the two of the Siblings ("D1" and "D3") but strongly opposed by the third ("D2") who alleged that the Trustee had favoured the views of D1 and D3 when consulting with the Siblings about the FDP and had failed to fairly evaluate his own representations on their merits. When efforts to resolve these concerns failed, the Trustee filed an Originating Summons (the Application) with the Court seeking either that the Court authorize the FDP, or that the Court direct how the trust fund should otherwise be administered in the circumstances.

1 (unreported, 17 January 2019)

Legal tests

The Application was made pursuant to section 48 of the Trusts Law (2017 Revision), as it then was, and was acknowledged by the Court and the parties to be a "Category 2" application with reference to the familiar case of *Public Trustee v Cooper*[2]. This is because the Court was being asked to bless a momentous decision which the Trustee was empowered to make but did not wish to implement without the Court's confirmation that it did not entail an improper exercise of the relevant power.

The Judge restated and applied the well-known principles applicable to applications of this nature, and noted that the critical legal test in the case was whether the opinion of the trustee was one at which a reasonable trustee properly instructed could properly have arrived. In determining this, the guiding principles to which the Court should have regard included those confirmed previously by the Judge when sitting as a judge of the Supreme Court of Bermuda in the case of *Re XYZ Trusts*[3], namely:

- A trustee must put the court in possession of all relevant facts so that it may be satisfied that the decision of the trustees is proper and for the benefit of the beneficiaries;
- It must be demonstrated that the exercise of the trustee's discretion is untainted by any collateral purpose;
- The quality of evidence required to be placed before the court depends on the circumstances of the particular case and the nature of the facts in controversy; and
- The level of information required will obviously vary according to the nature of the decision under review, but court may also send the trustees away to produce more evidence if necessary.

The Judge also cited with approval the commentary in *Cotton v Earl of Cardigan*[4] which confirms that the court hearing the trustee's application is not a rubber stamp and must be cautious to ensure that it is satisfied that the trustees are indeed justified in proceeding in accordance with their decision.

The proposed distribution plan

In considering the FDP, and the background to the Application, the Judge referred to the broad discretionary powers contained in the trust deed and noted that although the Trustee clearly regarded it as desirable to consult with the beneficiaries to ascertain their wishes and seek their agreement to the proposed plan of distribution, they were under no strict legal obligation to do so. The creation of, and consultation with the Siblings about, the FDP, was therefore an effort of the Trustee's own accord. The Judge also noted that a distribution plan had first been proposed, and even agreed by the Siblings, in 2014, concluding that "*the fact that the [Siblings] were agreed four years ago and have since parted ways creates an immediate impression that the disagreements are emotionally driven rather than grounded in principle*".

The FDP itself was very detailed in terms of the transfer out of assets held in the entities forming part of the wider trust structure, and there was agreement between the Siblings on a number of fronts. However, there were still large pockets of controversy as between the Siblings. The Trustee argued that there had been a number of "*shifts in position*" from D2 which rendered it "*impossible to rely upon any proposal he agreed to as reflecting a firm position*". In those circumstances, it was the Trustee's view that it was entitled to draw a line under the consultation process and proceed without further regard to the Siblings. D1 and D3 largely agreed with this approach, save that they requested a number of last tweaks to the FDP. On the other hand, the position taken by D2 was that the Trustee had acted irrationally and failed to properly take into account various counter-proposals concerning the FDP proposed by D2. Suspicions were also raised by D2 as to whether or not there had been a proper accounting of trust assets.

The Judge found the pivot between positions by D2 notable, describing the "*no more Mr Nice Guy*" approach taken by D2 prior to the hearing as having swung towards a "*most reasonable man in the world*" image by the time the parties appeared before him. Largely because of this, the Judge concluded that the Trustee was entitled to take the view that any further proposals made by D2 were "*likely to be as ephemeral as a fabled Cheshire cat*".

The decision

Having considered the FDP in detail, the Judge found that the FDP was reasonable based on the evidence presently before the Court. In doing so, and rejecting submissions by D2, the Judge noted that the Court was not required to go further and scrutinize the accuracy of asset valuations concerning trust assets (including those that had not yet been carried out) and concluded that there was no evidence before the Court to show that the approach adopted or contemplated by the Trustee was in any way irrational. The FDP was therefore approved by the Court, save that the Court recommended that the Trustee reconsider:

- The wishes of D2 to have one of the properties transferred to him; and
- The wishes of D1 and D3 to have another of the properties transferred directly to D1.

The Trustee was granted liberty to amend those parts of the FDP which the Court recommended should be reconsidered.

2 [2001] WTLR 901
3 [2017 SC (Bda) 111 Civ 12 December 2017
4 [2014] EWCA Civ 1312

Continued

A postscript

In contentious trust disputes, the adversarial nature of litigation often only deepens the wounds, widens the rifts, and grows the suspicions between family members. As in this case, the effect of this is that even the most careful planning by the settlor of a trust can implode in the face of mistrust and bitterness between beneficiaries. Cognisant of this, the Judge included a thoughtful postscript in the judgment:

"It is hoped that following a hearing which has focused on the rationality of the Trustee's conduct, the Beneficiaries will realise that letting go of their past grievances and healing the familial wounds is the only rational thing for them to do."

Wise words, and sound advice, that beneficiaries of other trusts may do well to heed.

Subscribe for more

FIND US

PO Box 10008
Willow House
Cricket Square
Grand Cayman KY1-1001
Cayman Islands

T +1 345 749 2000
E cayman@careyolsen.com

FOLLOW US

Subscribe for more

Visit our dispute resolution and litigation team at careyolsen.com