

BERMUDA

SUPREME COURT

In The Matter Of ABC Trusts [2015] SC (Bda) 29 Civ (10 September 2014)

TRUSTS - COURT'S FUNCTION IN APPROVING EXERCISE OF TRUSTEE'S DISCRETION - DOES REGARD NEED TO BE GIVEN TO WIDER SOCIAL EFFECTS OF PROPOSED SETTLEMENT

On 18 August 2014, the Judge approved a decision of the Trustees to proceed to conclude negotiations commenced some years ago with the onshore tax authorities about certain personal 'wealth' taxes which were potentially due from the Trusts and/or the Beneficiaries. The contested application by the Trustees for further directions in relation to the approval sought, raised legal questions which are likely to be relevant in future cases and therefore, the Judge provided reasons for the same.

Court's function in approving proposed exercise of Trustees' discretion

The fifth Defendant in this matter sought to argue that: (a) the Trustees' application involved a surrender of their discretion to the Court, (b) the Court should accordingly be put in possession of all material relevant to the exercise of that discretion and (c) the Court's function is solely to determine what ought to be done in the best interests of the estate. The first two limbs of that submission were controversial.

The Judge did not accept that the Court was compelled to find that in seeking the directions which the Trustees sought, they were surrendering their discretion to the Court. Instead, the application was more properly characterised as seeking the blessing of the Court for a momentous decision.

Were the Trustees required to have regard to the wider social effects of the proposed settlement and to interests other than those of the Beneficiaries?

The Trustees in the present case effectively conceded that it was consistent with the commercial interests of both the Trust and

the Trustees to avoid a situation where the Trustees and/or the Beneficiaries could be fairly accused of manifesting a socially irresponsible attitude to the payment of onshore taxes which were properly due. That was the driving motivation behind initiating the negotiations, which have resulted in the proposed settlement. The Trustees' definition of the content and scope of their duties in this regard was entirely consistent with the Judge's extra-judicial opinion in that:

"...it is simplistic to imply that offshore commercial law operates in an ethically deprived legal zone... Bermudian offshore structures are formed in and regulated by a legal framework which aims to...ensure compliance with internationally recognised standards of commercial morality".

(See *Offshore Commercial Law in Bermuda* (Wildy Simmonds & Hill: London, 2013), Paragraphs 1.64, 1.69)

Applying the above principles to the facts of the present case, the Judge found that in all the circumstances:

1. it would be an unreasonable way of expending trust assets to investigate the need to pay a further premium to ward off the risk of wholly unjustified criticism of a tax settlement which was: (i) manifestly hard-fought and negotiated on objectively credible terms; and (ii) negotiated in circumstances where there appeared to be no obvious inequality of arms between the well-resourced Trustee and Beneficiary team and an apparently well-resourced revenue authority team working on behalf of a stable and sophisticated State;

2. the Trustees' decision to pursue the negotiations to their conclusion was based on their genuinely formed view that this course is consistent with the best interests of the Trusts and their Beneficiaries as a whole;
3. the said view was one which a reasonable body of Trustees could properly have arrived at;
4. the Trustees had no actual or potential conflicts of interest and
5. the Trustees had placed before the Court sufficient relevant information to support the findings in (1) to (3) above, without the need for any further enquiry.

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