

CAYMAN ISLANDS GRAND COURT

Y Trust No.1 (January 2016) (Unreported)

ABSENT OR DEFECTIVE PROTECTOR CONSENT - VALIDITY OF TRUST ADMINISTRATION - APPROVAL OF APPOINTMENT OF PRIVATE TRUST COMPANIES

This case illustrates various ways in which the problem of absent or defective protector consent may be overcome, and the factors relevant to obtaining the Court's approval to the appointment of private trust companies in place of individual trustees.

The Trust was established in 1982 and settled by a company under the control of one of the family members. The Settlor was also named as the first protector and under the terms of the Trust, the Trustees had the power to appoint a new protector when a protector had not been in office for one month. The Trustees executed a Deed of Appointment in 1982 to appoint a new protector. However, the Settlor/original protector was still in existence, having not been dissolved, as was the intention, for a period of one month. Thus, the 1982 Deed of Appointment was considered to be ineffective. The invalidly appointed Protector was treated as the protector until it released its protector powers and was dissolved in 1992. The Settlor/original protector, being the entity which had validly held office as protector (albeit unknown to the parties) was dissolved in 1985 upon which there ceased to be a validly appointed protector. The issue was whether or not any acts undertaken during the period between the constitution of the Trust in 1982 and the dissolution of the Settlor in 1985 required protector consent which had not been validly given. Unfortunately, a Deed of Retirement of Trustees executed in 1984 was such an invalid act, which placed in doubt 31 years of subsequent trust administration.

The Plaintiff Trustees sought to establish the validity of the 1984 Deed of Retirement on four grounds:

1. rectification of the Trust to name the protector appointed under the 1982 Deed as the correct protector and for the

determination that its consent was duly given to the 1982 Deed by application of the presumption of regularity;

2. the provision in the trust deed whereby a trustee could serve notice of its desire to retire was a right, not a power which required protector consent;
3. retirement of the Trustees was effective under the statutory power [Section 8 of the Trusts Law (2011) Revision]] which did not require protector consent; and/or
4. as the Settlor was a party to the 1984 Deed in its capacity as settlor, there was an inferred or imputed exercise of the Protector's power of consent by the Settlor even though it did not know it was the protector and did not consciously intend to act as protector.

Ground 1 failed on the basis that rectification is a discretionary remedy. Smellie, CJ was not satisfied that the written consent of the new protector appointed pursuant to the 1982 Deed had been obtained. Ground 4 failed as Smellie, CJ was not satisfied that the Settlor could properly have exercised the power when it was unaware that it was the protector. The Application succeeded on Grounds 2 and 3. Smellie, CJ held that the Trustees' retirement under the terms of the Trust was not subject to protector consent on two grounds: (1) it was a right not a power; and (2) it was not vested in the Trustees as a body, but in the individual Trustee. With regard to the Application succeeding on Ground 3, as the Trust did not expressly make the statutory power subject to protector consent, by reference to Section 110(2) of the Trusts Law which states that powers conferred by the Trusts Law are "in addition to the powers conferred by the

instrument”, it was held that as the Trust’s power and the statutory power were different in nature there were no grounds for implying that the statutory power should be subject to protector consent.

In addition to establishing the validity of the trust’s administration, the Plaintiff’s sought the Court’s approval to their retirement in favour of private trust companies. Smellie, CJ provided a useful summary of the factors making the appointment of private trust companies appropriate on the facts of the case.

Founded in 1928, Conyers Dill & Pearman is an international law firm advising on the laws of Bermuda, the British Virgin Islands, the Cayman Islands and Mauritius. With a global network that includes 130 lawyers spanning eight offices worldwide, Conyers provides responsive, sophisticated, solution-driven legal advice to clients seeking specialised expertise on corporate and commercial, litigation, restructuring and insolvency, and private client and trust matters. Conyers is affiliated with the Codan group of companies, which provide a range of trust, corporate secretarial, accounting and management services.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.