

BERMUDA SUPREME COURT

IN THE MATTER OF THE X TRUSTS

JUDGMENT

[2018] SC (Bda) 56 Civ (12 July 2018)

The Trustees of the X Trusts sought direction in relation to various matters relating to the administration of the X Trusts. The present judgment relates to their application for directions as to “*whether they should remain as trustees of the X trusts or retire*”.

The Trustees are private trust companies which have for some years been responsible for managing the Trusts which control underlying assets worth billions of dollars. The beneficiaries may for present purposes be described as falling into two family branches, the Y branch which contends that the Trustees are liable to be removed and the Z branch which contends that they are not. The Trustees adopted an essentially neutral position although their counsel firmly challenged any suggestion of wrongdoing on their part.

The need for the directions arose in the following way. Following meetings between the Trustees and beneficiaries, the Trustees produced a ‘Proposed Plan’ for the future of the X Trusts. The Y branch expressed shock and dismay at certain aspects of the Proposed Plan, in particular the fact that the Trustees had reached firm decisions to usher in “epochal” changes to the trust structure without adequately consulting the Y branch. It was complained that it was no longer possible for the Y branch to have any confidence in the ability of the Trustees to manage the proposed restructuring in a fair manner.

The following questions arose for determination:

- (a) what was the legal test for removal of a trustee?
- (b) did the Court have the power to require directors of a corporate trustee to resign as opposed to removing the corporate trustee where a case for removal was made out?
- (c) since the directors of the Trustee had offered their resignations in the event that the Court determined it was appropriate for them to resign, should the Court signify that

APPLICATION BY CORPORATE TRUSTEES FOR DIRECTIONS AS TO WHETHER THEY SHOULD REMAIN IN OFFICE – SUBMISSION BY CERTAIN BENEFICIARIES THAT DIRECTORS OF CORPORATE TRUSTEES SHOULD BE REMOVED – **TEST FOR REMOVAL** – WHETHER COURT HAS JURISDICTION TO COMPEL DIRECTORS TO RESIGN – WHETHER REQUIREMENTS FOR REMOVAL MADE OUT

resignation is appropriate in respect of some or all of the directors?

The Trustees formally adopted a neutral position allowing the case for and against removal to be argued by the senior limb (supported by a junior limb) of the Y branch and by the senior Z branch respectively.

Factual background

The Trusts are discretionary. By a Letter of Wishes, the Settlers provided that “*without seeking in any way to restrict the Trustees in the exercise of their discretionary powers*”, the Trusts should be regarded as being ‘*primarily two parts for the benefit of the Z branch and ‘as to one part for the benefit of’ the Y branch.*

By a 2001 Memorandum of Understanding (the “MOU”), the beneficiaries agreed, inter alia, as follows:

“It is now thought better for such trusts to be treated on a one Family group basis without such split, and for management of such trusts to be carried out with this in mind...”

Some 15 years later, senior members of the Z branch notified the Trustees and Protectors that they were withdrawing from the MOU. The Y branch was copied with this communication. The Z branch fleshed out the case to the Trustees and Protectors for a return to the 2/3rds 1/3rd split coupled with a division of the trusts into two. The Y branch, however, “*support the explicit endorsement of a ‘one family’ approach to the Family Trusts, entailing a continuation of unified management of the settlements.*”

The Trustees sought advice from leading counsel, who opined as follows: “*There is no single correct legal answer. It is a matter for the trustees’ discretion - both whether they take a decision at*

all and, if so, what it should be. But family feelings are such that saying nothing is likely to be the worst option."

In 2017, the Trustees issued a Proposed Plan intended to be used as the basis for further consultations before final decisions were taken.

Kawaley CJ stated in his judgment that he found the following proposals the most significant:

(a) *"the Trustees consider that it is currently in the best interests of the Family Trusts to continue to operate the management of the family Trusts through the single, unified group of four Trustee companies..."* (Y branch "gain");

(b) the interests of the Z branch in the Trusts *"are as to 2/3"* and *"as to 1/3"* for the benefit of the Y branch (Z branch "gain").

In response to the Plan, counsel for the senior Y branch sent a Memorandum to the Trustees, stating in strong terms their concern with its content and saying: *"our clients are considering requesting the resignation of the directors of the Trustees, and/or applying for the removal of the Trustees from office."*

In overall terms, the Senior Z branch supported the Proposed Plan.

Legal findings: the test for removal

The Court's inherent supervisory jurisdiction over trusts includes the power to remove a trustee where this is required for the welfare of the beneficiaries, who are entitled to have their trusts administered by proper persons. Be that as it may, it seems that trustees will often form their own judgment as to whether grounds for removal are made out and tender their resignation, making it unnecessary for the Court to formally adjudicate a removal application.

In the instant case, however, the Trustees had not themselves offered to resign and there was no application to remove them as such. Instead the more nuanced approach of seeking the resignation of the 'offending' directors had been adopted. The directors nonetheless confirmed that they would resign if the Court considers that they should take this course.

The senior Y branch's principal complaint was that the Trustees changed the longstanding basis on which Trust allocations had notionally been made by making precipitous final decisions at the prompting of the Z branch of the family. Kawaley CJ stated: *"This complaint is on its face a potentially valid one, subject to an objective assessment of its merits in the particular legal context of the X Trusts."*

Legal findings: jurisdiction to remove one or more of the directors of the corporate Trustees

The following crucial points were ultimately agreed:

(a) the Court has no jurisdiction to direct the removal of the directors from the relevant corporate boards. That power lies with the relevant shareholders;

(b) the Court has jurisdiction to indicate that it would be in the best interests of the Trusts if the directors were to resign in circumstances where they have agreed to be bound by any such indication signified by this Court in deciding the present application.

In the instant case, the directors of the corporate Trustees, whom the Court has no power to formally remove, had expressly conceded that the Court may validly decide whether or not it is desirable for them to resign, if a case for removing the Trustees is made out.

In summary, the Court found that it had no jurisdiction to direct the removal of one or more of the directors. However, Kawaley CJ said: *"The Court does possess the inherent jurisdiction in supervising a Bermudian trust to signify that, rather than removing the corporate trustees, it would be desirable if one or more of the directors resign. The existence of this jurisdiction was implicitly conceded by the Trustees in the present case."*

Findings: was a case for removal of the Trustees made out?

Kawaley CJ found that there was no basis for the removal of the Trustees or for signifying the desirability of one or more of the directors resigning. He stated: *"In light of the Advice the Trustees received on the governing legal principles, together with the fact that the Trustees and their directors are clearly trust professionals, the assertion that they capitulated to the demands of the Z branch is inherently improbable."*

In my judgment the criticisms of the procedure followed by the Trustees, objectively viewed in the legal context of the present discretionary Trusts, do not constitute grounds for a loss of confidence in the due administration of the Trusts... Assuming in favour of the senior Y branch that they have genuinely lost trust and confidence in the Trustees, the relevant facts objectively viewed fall far short of supporting a case for their removal."

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.