

BERMUDA SUPREME COURT

IN THE MATTER OF THE A TRUSTS

REASONS FOR DECISION

[2018] SC (Bda) 42 Civ (17 May 2018)

The Trustees of the A Trusts sought approval for their decision to permit a company they controlled to make a substantial investment. These are the legal principles which informed that decision.

Legal findings: the Court's function

The application was clearly a Category (2) case as explained in *Public Trustee -v- Cooper* [2001] 1 WTLR 901.

In *Re ABC Trusts* [2014] Bda LR 117, the Court accepted that an application for approval could be made by reference to the following four questions:

- i. Do the Trustees have the power to enter into the proposed compromise?
- ii. Is the Court satisfied that the Trustees have genuinely formed the view that the compromise is in the interest of the ...Trust and its beneficiaries?
- iii. Is the Court satisfied that this is a view at which a reasonable body of trustees could properly have arrived at?
- iv. Does the Court consider that any of the individual Trustees have any actual or potential conflict of interests and, if so, does it consider that this conflict of interests prevents the Court from approving the unanimous decision of the Trustees to compromise the litigation?

The Court found that the question "Is the Court satisfied that this is a view at which a reasonable body of trustees could properly have arrived at?" necessarily requires regard to whether a proper decision-making process occurred, as reasonable trustees would not take into account irrelevant, improper or irrational factors, and would only be informed by considerations which are relevant to their decision.

Legal findings: the approach to the expert evidence

Central to the disposition of the Amended Originating Summons was the legal question of how the Court should approach the

TRUSTEES' APPLICATION FOR APPROVAL OF MOMENTOUS DECISION – NATURE AND SCOPE OF COURT'S APPROVAL JURISDICTION – APPROACH TO EXPERT EVIDENCE – RELEVANCE OF ALLEGED CONFLICTS OF INTEREST TO APPROVAL APPLICATION

expert evidence. The Trustees relied on the approach articulated by Vos LJ in *Cotton and another-v-Earl of Cardigan and others* [2014] EWCA Civ 1312, for one overarching principle and a second subsidiary point. The broader point of principle was the straightforward proposition that unless the Court had deliberately embarked upon a fact-finding exercise involving oral evidence and cross-examination, an approval application based on a documentary record alone was not the appropriate form of proceeding for resolving disputes between competing expert witnesses.

A narrower point upon which the Trustees' counsel relied was based on the following observations of Vos LJ earlier in the same judgment: "*In my judgment, the trustees were entitled to take this advice...And I do not accept that the trustees were obliged to second-guess the professional view of the experts they had instructed...*"

The Court found that the broader proposition supported by *Cotton*, that the Court is not required to find facts unless it embarks upon a proper fact-finding exercise, is a statement of general principle which is not coloured by the factual context of that case.

However, it found that the same does not apply to whether or not trustees are obliged to second-guess the professional view of experts. The disputed transaction involved not simply multiple expert opinions on various aspects of the substantive merits of what was a contentious business decision. It also involved competing expert opinions relied upon by those opposed to the transaction. This context did not justify the Trustees simply following its own experts and not 'second-guessing' them.

The Court accordingly found that it was for the Trustees to satisfy the Court not merely that they had followed advice, but further that, in light of all the expert material before them and the Court, it was reasonable for them to rely on such advice.

Legal findings: the relevance of conflict of interest to the Court's approval jurisdiction

Hart J addressed this topic in *Public Trustee-v-Cooper* [2001] WTLR 901. Firstly (at 932), he identified the governing principle expressed by Lord Herschell in *Bray-v-Ford* (1896) AC 41, 51-52: “*It is an inflexible rule of a court of equity that a person in a fiduciary position...is not, unless otherwise expressly provided...allowed to put himself in a position where his interest and duty conflict...*”

Hart J then described his task in resolving the conflict issues before him in the following manner: “*I turn, therefore, to the question of whether such conflicts of interest as existed at the material time were such as either to invalidate the decision reached... or were such as to cause the court sufficiently serious concern for it to decline to authorise them to implement their decision.*”

The Court accepted the principle that “the applicable test does not require [the Defendants] to establish definitively that conflicts actually influenced the proposed acquisition. The summary procedure that is normally followed in *Public Trustee v Cooper* applications makes it effectively impossible for a beneficiary to definitively prove that conflicts have influenced the transaction. It is sufficient to establish a basis for the existence of a ‘sufficiently serious concern’ for the court to decline its authorization in the absence of a satisfactory answer by the Plaintiffs.”

The Court was guided by the above principles in disposing of the approval application.

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.