

5 Stone Buildings

Challenging trustees' decisions

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- Full discretionary trust for settlor's spouse, children and remoter issue.
- Settlor dies leaving letter of wishes stating that all of the fund should pass to the settlor's spouse (second wife) and nothing to his three children by his first marriage
- Trustees tell beneficiaries that they intend to comply with the letter of wishes

Decision yet to be made – what do you do ?

- Plenty of law on challenging the decisions and actions of trustees ex post facto
- Very little on the tools and arguments available to beneficiaries to challenge steps which trustees are about to take.
- Also raises the question of what options trustees have in response.

A few differences between challenging past and future acts

Past acts / Future acts

- Normally difficult to challenge if involves binding agreement with unconnected third party (eg sale of trust property)
 - May be able to stop the agreement being concluded
- In England Hastings Bass type of challenge will not apply unless either (a) effected under a mistake or (b) decision was a breach of trust
 - Possible scope to get trustees to take into account what they ought to be taking into account
- Beneficiary will be arguing that a trustee acted improperly (and possibly in breach of trust)
 - Trustee is likely to be unwilling to take the risk that the decision is in breach of trust

Beneficiary's tools for challenge

- Scope of power
- Bad decision making
- Exercise of power inappropriate
- Trustee should be removed
- Court should step in and substitute its own decision
- What is consequent relief ?

Decision outside scope of power – void ?

- Construction
- Exercise in breach of purpose

Wong case – recent resurgence started with *BA* case ([2018] EWCA Civ 1533)

- Uncertainty about how you gauge the purpose – what evidence is admissible ?

PNPF v Taylor (Warren J) ([2010] EWHC 1573 #114) vs Jersey cases (eg *Alhamrani, Rysaffe*) and *Wong* in Bermudan CA

- In theory provides scope to challenge a decision – in practice scope for application to most types of private trust cases may be limited

Bad decision making – mistake

- Orthodox position – decision can only be restrained if a threatened breach of trust (cf *CIF v A-G [2020] UKSC 33* para 217)
- If decision is going to be made on the basis of a misapprehension, a threatened breach of trust ?
 - Honest mistake defence applies ? Duty to enquire ?
- Maybe if decision could be set aside in equity once made (see eg *Day v Day [2014] Ch 114*) then court can restrain under supervisory jurisdiction ?

Bad decision making – mistake (ii)

- What potential mistakes here ?
- Status of letter of wishes
 - In practice likely to reduce to a factual dispute
 - Heard as part of *Public Trustee v Cooper* application ? (analogous to *Axminster* [2021] EWHC 1652 para 254ff and cf *ITS v Hope* [2009] EWHC 2810 at 68(2) and (3) ?)
- Mistake as to the needs of the children ?
 - Is this going to work ?
 - How are you going to find out trustees' position on this ?

Bad decision making – *Wednesbury/Hastings Bass*

- Took into account inappropriate matters / Failed to take into account appropriate matters.
- Position theoretically different in Jersey from England (/Guernsey)

If in Jersey supervisory jurisdiction to stop the trustees from acting on Hastings-Bass flawed decision even if not in breach of trust (cf argument on mistake) ?

In England (/Guernsey), difference between taking into account inappropriate matters and failing to take into account inappropriate matters ?

Bad decision making – Wednesbury/Hastings Bass ii

- Failure to consider appropriate matters will often end up as a breach of trust once the problem is brought to the trustee's attention
 - duty to investigate matter once raised ?
 - question will then be how if at all the matter is taken into account
- With inappropriate matters may be different –
 - Mistaken ?
 - Is the matter in fact inappropriate ?
 - Decision perverse ?

Bad decision making – Wednesbury/Hastings Bass ii

- How applies here ?
- Failure to consider appropriate matters
 - Needs of children ? (duty to enquire)
 - Inheritance Act ?
- Consider inappropriate matters
 - Letter of wishes inappropriate if not work of settlor ?
 - Workaround ? Best evidence of settlor's intention ? What if multiple letters ?

Exercise of power otherwise inappropriate

- Reverse *Public Trustee v Cooper* ?
- Trustee subject to conflict ?
- But if within power, no conflict and decision making process is OK, what is left ?

Trustee is unfit/should be removed

- Jones v Firkin-Flood [2008] EWHC 417 Briggs J

281.the Trustees had by their conduct prior to February 2008 demonstrated their collective and individual unfitness to be Trustees of this trust. It is most unusual for the court to be invited to bless a discretionary decision by trustees against such an unpromising background. the relatively limited role which the court has hitherto chosen to adopt in category (2) cases may well have been developed in the context of decisions by trustees whose general fitness was not in dispute. **For that reason I would add to the category of cases in which the court may feel insufficiently certain about the propriety of a proposed discretionary decision that it declines to bless it, without at the same time prohibiting it, a case just like the present, where the trustees have demonstrated a general unfitness to act, by conduct prior to the taking of the decision in question.**

Trustee is unfit/should be removed (ii)

- But nb that you have to show proper unfitness to act

Letterstedt v Broers lack of confidence not enough (*Brown v New Quadrant* [2022] WTLR 49 para 69)

Can the court substitute its own decision?

- Charities – yes (*Re: JW Laing Trust [1984] Ch 143* and *CIF v A-G [2020] UKSC 33 at para 218 - 219*)
- Stalemates – *Garnham v PC (2012) 1 JLR 204 para 94 and 95* (approved in *CIF v A-G* at 219 and *Piedmont [2021] JRC 248 at para 95*)
- Trustees unfit to decide ?
 - In England highly contentious in principle, but in practice court would most likely remove and give a strong steer (cf *Mettoy [1990] 1 WLR 1587 at 1617 and Firkin-Flood*) unless para 219 of *CIF* applies to non-charitable trusts ?
- In Jersey – *In Re H Trust [2007] JLR 569* (at para 53)
- But if the court does not step in and does not remove you can end up with successive identical decisions (cf *Scott v National Trust*) - untouchable trustees.

- Why would the court substitute its own decision here ?
 - Decide status of letter of wishes ?
 - Needs of children ?
 - Realistic to remit decision back to trustees ?

Relief

- Refusal to approve Public Trustee v Cooper application
- Restraining decision being made
 - Threatened breach of trust ?
 - or
 - Interim relief
 - plus Direction
- Declaration of factual matter ?
 - Plus direction ?

What can trustee do ?

- Make decision ?
- Apply to court ?
- Accommodate objections ?



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Thank you,
any Questions?

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