



White Paper
Employee Share Incentives
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Trustees' duties

David Pett

Temple Tax Chambers



Topics discussed

- What is “in the best interests of the beneficiaries”?
- Who are the beneficiaries?
- What if trustees act beyond their powers?
- Mistakes by trustees acting within their powers: is the action void or voidable?
- What can the trustees do to protect themselves?
- When can trustees act otherwise than in the interests of the beneficiaries? (Adams v FSC CA 2024)



Who are the trustees?

- In what follows, directors of a corporate trustee are treated as having the fiduciary duties which are no less onerous than those of persons acting as trustees



Who are the beneficiaries?

- Draft with care: see Roadchef no.2 decision re meaning of “employees for the time being”
- Exactly who is excluded from benefit?
- If a s13 trust, check who are excluded participators and whether there is a power to benefit them in an income form (but beware FA 2025 changes to s13 IHTA to restrict income benefits)
- For a salutary lesson as to the consequences of misunderstanding the meaning of “excluded participator”, see ***Bhaur v Equity First Trustees (Nevis)*** [2023] 1012 CA



What is “in the best interests of the beneficiaries”?

- ***Cowan v Scargill*** [1985] Ch 270 Sir Robert McGarry V-C
 - If the purpose is to provide financial benefits, an investment power must be exercised to yield the best return, though taking account in exceptional circumstances of the particular inclinations of the beneficiaries
 - But, benefit has a wide meaning and sometimes matters which work to their financial disadvantage may yet be for their benefit
 - Powers must be used for legitimate purposes of the trust (which is why those purposes should be recited)
 - Powers must be exercised fairly and honestly, but that is not enough: trustees must, when exercising an investment power, take such care as would an ordinary prudent man and take advice if they do not understand matters



The EBT conundrum

- How is it in the best interests of all employees, past, present and future, for the CEO be made an (“incentive”?) award out of the trust fund?
- What if no other employees hold shares or are made awards/granted options?
- The implication is that “financial benefit” extends to security of employment and corporate success
- Could the exercise of such a dispositive power by the trustee(s) be challenged by a no win/no fee class action?
- An individual member of a class of discretionary beneficiaries has no locus standi to bring such a claim but discretionary beneficiaries do have an enforceable right to the trusts being properly administered by the trustees



The Roadchef saga (1993-2023): see [2014] EWHC 109 (Ch) – (Mrs Justice Proudman)

- The (simplified) facts:
 - Following an MBO, an EBT (along with a 1978-type “approved profit-sharing scheme”) was established to operate an ‘all-employee’-share participation scheme using shares (c12.25%) acquired with loan-funding from a bank, guaranteed by the company
 - The MD, Chairman and CEO, Tim Ingram-Hill (“TIH”), was keen to increase his own holding of shares
 - TIH arranged for EBT2 to be established to benefit those selected employees nominated by the company (i.e. for senior employees)



Roadchef

- TIH “persuaded” the newly-appointed corporate trustee of EBT1 to agree to transfer shares to a newly-formed EBT2, from which he could benefit
- TIH:
 - threatened the withdrawal of company funding of the EBT1/APSS
 - failed to disclose that he could/would benefit from EBT2
 - stepped down as trustee director of EBT1 so as to be able to benefit from EBT2 of which he became sole trustee director
 - had REBTL appointed as trustee of EBT1 and for him to be a director of it
 - amended EBT2 deed to allow him, as a trustee director, to benefit
 - “persuaded” EBT2 trustee to grant him share options over EBT2 shares
- Sale of the company netted TIH over £20m upon sale of his option shares acquired from EBT2



Roadchef

- Claim brought by EBT1 trustee (REBTL), representing the beneficiaries of EBT1, against TIH and trustees of EBT2
- Action funded on a no win/no fee basis

Roadchef

- High court held in 2014 that:
 - TIH had mixed motives: interests of Roadchef and his desire to profit
 - Transfer part of a pre-conceived plan to grant options to TIH
 - TIH was “not entirely honest”, but not “dishonest”
 - EBT1 trustee had standing to avoid the transfer of shares to EBT2
 - Transfer incapable of being regarded as beneficial to EBT1 beneficiaries and therefore outside scope of their power
 - Transfer void irrespective of wrongdoing of TIH)
 - It was a “fraud on the power” (per **Vatcher v Paull** [1915] AC 372) and void, not voidable
 - EBT1 trustee could trace proceeds of sale by TIH of the shares into hands of TIH and the current trustees of EBT2

Roadchef

- Other issues:
 - Was it a voluntary disposition made by mistake amounting to a breach of fiduciary duty? If so, void.
 - Was it a voluntary disposition made by mistake, but no breach of duty? If so, voidable
 - (see **Pitt v Holt, Futter v Futter [2013]UKSC26**)
 - Was EBT2 or TIH a b.f. purchaser for value without notice of any breach of duty? No.
 - Was TIH in breach of duty as director of EBT1 trustee? Yes. He could only avoid conflict by informed consent
 - Was TIH liable for deceit (fraud)? No. He believed transfer was legitimate.
 - Was EBT1 trustee liable as an accessory to dishonesty? No
 - No statutory relief under s 1157(1) CA 2006 or s61 TA 1925, as neither TIH nor EBT2 trustee acted reasonably (even if they acted “honestly”)



Roadchef – the final outcome

- In the end, those employed at the time of the wrongful actions who had since left were excluded from the ultimate payout from the trust;
- current employees, not affected or even having a bona fide interest at the time, were included!
- Consequence of beneficiaries being the employees “*from time to time*”
- After the lawyers had their “win fee”, the employees back in 1995 enjoyed no, or only very small, payouts if still employed



What if trustees do not have the necessary power , e.g., to enter into a transaction?

- Apply to the court (per CPR Part 64):
- trustees may make a claim for the court to determine any question arising in the execution of a trust.
- S57 Trustee Act 1925:

“Where in ***the management or administration*** of any property vested in trustees, any ... transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose the court may ...confer upon the trustees, ...the necessary power ...on such terms, and subject to such provisions and conditions, if any, as the court may think fit”
- Seek the court's approval or blessing for its decision to enter into the transaction under the second limb of the ***Public Trustee v Cooper*** test: is the trustee’s decision reasonable? – not, is it right?
- See, for example: ***South Downs Trustees Ltd*** [2018] EWHC 1064 (Ch)



South Downs Trustees v GH,IJ,KL [2018] EWHC 1064 (Ch)

- Trust deed prohibited a transfer of shares if that would result in a change of control of the company (and no power of alteration to confer the power)
- Trustees applied under:
 - S57 Trustee Act 1925: ct may confer a power for the “management and administration” of trust property if:
 - There is no power to do so
 - It is expedient that the trustees should enter the transaction
 - Ct must consider the exercise of its discretion
 - Per **Alexander v Alexander** [2011] WTLR 187 (absence of power in Will to dispose of land), ct has discretion to override an express restriction on trustee powers provided regard had to settlor’s wishes or directions



South Downs

- “*management and administration*” must be construed widely
- Here, held: trustees not intending to rewrite the trusts – they are exercising the ultimate power of management, i.e. to bring the trust to an end by sale and distribution of proceeds
- “*implementation of the EBT objects...in a final manner*”
- Re “*expediency*” : transaction was for overall benefit of beneficiaries
- **Public Trustee v Cooper** [2001] WTLR 901 (2nd limb): both decision to sell, and manner of distribution were within bounds of reasonableness



Public Trustee v Cooper [2001]WTLR 901 (Ch)

- The ct will assist trustees in the exercise of a discretion if:
 - First:** the qu is whether the proposed course is within the trustees' powers; or
 - Secondly:** the trustees need ct blessing to a momentous decision (to protect themselves); or
 - Thirdly:** the trustees seek to surrender their discretion to the ct (rare – but if trustees deadlocked or there exists a conflict). This requires a detailed review of the facts (see, e.g. *Lehtimaki v Cooper* ([2020] UKSC 33)); or
 - Fourthly:** for retrospective approval if a decision is attacked



What if trustees make a mistake in the exercise of a *dispositive* power?

If not within scope of the power, it's a breach of duty and void ab initio:

- procedural defect
- substantive defect
- defect under general law (eg rule against perpetuities)

If inadequate deliberation (failure to take account of all relevant considerations, voidable at instance of a beneficiary

- but 3rd p purchaser for value has good title if he had no notice, but
- beneficiary's interest attaches to proceeds of sale

Pitt/Futter: 3rd category, if unconscionable for beneficiary to be held to the gift, then ct can order rescission



FSC Capital & others v Adams and others

[2025] EWCA Civ 53 (on appeal from EWHC 1649(Ch))

- Case re exercise of an investment power by trustee
- Facts (in summary):
 - Jersey EFURBs used to facilitate loan schemes for employees and contractors established by the settlors
 - Repayment rights re >2,000 participants (“the Loan Assets”) settled into trusts
 - No engagement with participants so, as trusts were “cash-flow insolvent”, the individuals behind the arrangements determined to have newly-appointed BVI trustee (“PTC”) sell the Loan Assets to FSC Capital with which they were connected. BVI trustee then dissolved. Sales seen as “a commercial opportunity”.
 - Sale consideration was a basic sum plus deferred, and capped, amount (£1.7m) calculated as what was owed to creditors of the trust (book value = £279m)



FSC Capital v Adams

- Held by HC (Edwin Johnson J) (in summary):
 - The sales were for an improper purpose, a breach of trust, and void in equity
 - FSC Capital was not a bona fide purchaser for value without notice, and was required to reconstitute the trusts
 - Appeals by FSC Capital dismissed by CA (Lady Justice Asplin)



FSC Capital v Adams

- Jersey law trusts, so qus are of Jersey law, but this is based on English trust law (1984 Jersey Trust Law is not a complete codification)
- Note: case concerns improper exercise of a power, not something done outside the scope of that power – as was the case with **Roadchef** (which is void, per *Hastings-Bass*)
- Improper purpose:
 - What is proper purpose of the relevant power? – objective
 - What purpose has it in fact been used for?
 - Equity intervenes only if primary purpose was improper
 - Fiduciary powers must be used to further the purposes of the beneficiaries



The **Z Trusts** case in Jersey ([2015] JRC 196C)

- Concerned the validity of appointment of additional trustees when trust was insolvent
- Suggested that, if trust is insolvent, trustees have a duty to act in the interests of its creditors, not the beneficiaries (see para[30])



FSC Capital v Adams

- The position in Jersey law is not so absolute, but Jersey trust laws depend on the certainty they derive from English law (per Males LJ)
- A Jersey court would take account of the SC decision in *Sequana* (a case re company law and duties of directors of an insolvent company)
- Extent to which interests of beneficiaries can be subordinated to those of creditors depends on the circumstances and, in particular, whether there is “*light at the end of the tunnel*”
- Here, trusts were ***cash-flow insolvent***, but no evidence as to balance sheet insolvency. The controlling inds did not know the true value of the Loan Assets, but thought they could have substantial value, hence the “cap”



FSC Capital v Adams

- Were the sales, being within a power of sale, exercised for an improper purpose (or, were they a “fraud on the power”)?
- Purposes found to be:
 - to terminate the trusts;
 - benefit FSC by assigning Loan Assets free of trust obligations and for a consideration limited by the Cap
 - benefit former trustees and related companies by paying off sums due to them;
 - ensuring there was no surplus left for the beneficiaries.
- Interests of beneficiaries disregarded – justifiable if no possibility of satisfying all creditors, but exclusion of beneficiaries was a primary purpose
- Held (and upheld): sale was for improper purposes



FSC Capital v Adams

- Void or voidable?
- No answer in JTL or Jersey law authority
- English law: **Coulette v Storey** (re appointments out of capital from a marriage settlement) is binding CA authority that improper exercise of a fiduciary power is void
- **Vatcher v Paull** [1915] PC on appeal from Jersey: *“enough that appointor’s purpose and intention is to secure a benefit for himself or some other person not an object of the power”*
- Position may be different in company law: see **Tianrui (Intl) Holding Co v China Shanshui Cement Group Ltd** [2024] UKPC 36 – improper exercise of power to allot shares held voidable so cannot defeat claim of bf purchaser without notice of the impropriety
- Here, would be held void under Jersey law insofar as it concerns transfer of the beneficial interest in the Loan Assets – Jersey law would proceed on basis it is void (per Males LJ)



FSC Capital v Adams

- Was the assignee a “bona fide purchaser for value” without notice of the breach of trust?
- Burden on FSC to show it had no actual notice of the breach of trust
- Judge held that neither individual could have been satisfied that it was legitimate to disregard the interests of the beneficiaries and therefore it was not a purchaser without notice



Current relevance

- Following the “loan charge” debacle, some independent trustee companies are left with “orphan trusts” i.e. there is no one to pay their fees
- Such a Jersey trustee company brought a county court action for repayment of a trust loan outstanding to a director – the amount sought exactly matching the outstanding fees
- Were the steps taken to seek repayment for that purpose a “fraud on the power” when (i) it was clearly not in the (sole) beneficiary’s interest, (ii) the beneficiary was “good for the money” and therefore the trust was not balance-sheet insolvent, and (iii) the only purpose was to benefit the trustee/creditor?



Lessons to be drawn

- Independence of trustee(s)
- Address actual and potential conflicts of interest
- Trustees need independent advice
- The recitals to the trust deed are important
- Consider carefully the definition of “beneficiaries”
- Do not treat an EBT of a large employer company as if it were a “purpose trust” – consider and record why an exercise of a dispositive power is in the best interests of the class of beneficiaries as a whole
- If the numbers are big enough, do not ignore the risk of a class action



Questions