COURT AUTHORISATION OF SELF-DEALING BY TRUSTEES

IN THE LIGHT OF CHASTON v CHASTON

In this article, Charles Holbech, who recently joined Radcliffe Chambers, addresses the role of the court in authorising a self-dealing transaction by a trustee, such as the sale of land by the trustee to himself. The self-dealing rule is that such a sale is voidable at the instance of a beneficiary who has not assented to the sale, and who is not guilty of unreasonable delay.

Charles acted in a leading case on self-dealing by trustees: *Newman v Clarke* [2016] 4 WTLR 26 in which he succeeded, on a summary judgment application, in establishing that there was no breach of the self-dealing rule where a tenant unilaterally exercised a statutory right to purchase the freehold of land of which the tenant was a trustee, as the statutory right had been acquired before the tenant became a trustee.

The article considers the recent case of *Chaston v Chaston* [2018] EWHC 1672 (Ch) in which the Court authorised a sale at valuation to a beneficiary of a property of which the beneficiary was also a trustee, despite opposition from two beneficiaries who were pressing for a sale on the open market.

Strict Rule

The traditional approach of the court is that a trustee is not entitled to acquire trust property, if even a single beneficiary objects, notwithstanding that the trustee did not, in fact, take advantage of his office and the price is a fair one (*Re Thompson's Settlement* [1986] Ch 99). The court will not, therefore, generally authorise such a self-dealing (see In *Ex p. James* (1803) 8 Vesey Junior 337 where the court refused to permit the solicitor to the trustee-in-bankruptcy to purchase property in the bankrupt's estate).

Court Authorisation

In more modern times it has, however, been accepted that the self-dealing rule is not absolute, and that the court has a discretion to authorise a self-dealing transaction either prospectively or retrospectively (*Mills v Mills* [2015] EWHC 1522 (Ch). An application for court authorisation may be particularly appropriate where there are unborn, minor or untraceable beneficiaries who cannot give their consent. However, the court also has a discretion to permit a self-dealing in the face of objections from a beneficiary (*Holder v Holder* [1968] Ch 353, at 398 and 402). Indeed, is not uncommon for a trustee to be given permission to bid, on the basis that there will generally be no detriment to the objecting beneficiary if the trustee is simply seeking to be an additional bidder at a well-advertised auction.

The self-dealing transaction will only be authorised or allowed to stand in exceptional circumstances. In *Holder v Holder* an executor had sold estate land to himself. The sale was not set aside, but only because the executor had only carried out minor acts of administration before attempting to renounce. In *Hall v Peck* [2011] WTLR 605 the self-dealing rule was applied with full force at the instance of an objecting beneficiary. The rule applied unless it could be shown that any detriment to the estate was either non-existent or de minimis, and such as to be outweighed by, or otherwise not to justify, the consequences of setting aside the transaction.

Trust of Land

There have, however, been two recent cases which suggest that the court may have a wider discretion to approve a sale of land, in breach of the self-dealing rule, even where there is the potential for real detriment to an objecting beneficiary.

In *Bagum v Hafiz* [2016] Ch 241 the Court of Appeal approved a sale to a beneficiary, who was given a right to make pre-emptive bid. It was said that the court has, under sections 14 and 15 of the Trusts of Land and Appointment of Trustees Act 1996, a substantially wider discretion, exercised upon the basis of wider considerations, then the trustees themselves enjoy, when acting without the consent of the beneficiaries or an order of the court. The court is not rigidly constrained by the rules of equity which bind the trustees, and can prefer the interests of one beneficiary over another.

This might suggest that, where a trustee is seeking to purchase trust land, the court can override the objections of one or more beneficiaries on the basis that the sale is in the interests of the beneficiaries as a whole, or in accordance with the wishes of the majority and/or the intentions of the settlor (s. 15(1)(a) and 15(3) of the 1996 Act). A self-dealing transaction constrains the trustees, but not the court. *Bagum v Hafiz* did not, however, involve a self-dealing: the purchasing beneficiary was not a trustee.

Chaston v Chaston

Chaston v Chaston [2018] EWHC 1672 (Ch) did involve a self-dealing. The court made an order under section 14 of the Trusts of Land and Appointment of Trustees Act 1996 that land be sold by a trustee to himself at a valuation approved by the court, even though two beneficiaries, representing 50% of the beneficial interest, objected, contending for a sale on the open market. Surprisingly, perhaps, the Judge made no reference to the self-dealing rule. However, the Judge commented that the decision to sell to the respondent was being taken by the court, and not by the trustees at all; and that trustees cannot be in breach of duty in selling at the direction of the court.

The *Chaston* case can, however, be explained in a way which is consistent with the self-dealing rule. It was a material factor that the objecting beneficiaries had, initially, consented to a sale to the trustee at a value to be agreed. The beneficiaries had, therefore, licenced a self-dealing.

What if the beneficiaries had made their objections clear at the start? Could the court have overridden their objections to a sale to the trustee at valuation, even though they might suffer detriment as the land might sell for a greater sum on the open market? It is submitted that, if the court has a wide discretion to override beneficiaries' objections, this would drive a coach and horses through the self-dealing rule. Indeed, it could hardly be described as a rule at all.