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Trustees' Decisions – How to Break 'em



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SUMMARY

- 8 Grounds of Challenge for Beneficiaries
- 4 Warnings to Beneficiaries and their Advisors

GENERAL PRINCIPLES

- A decision made by a trustee or trustees is an exercise of a power vested in the trustees by the trust instrument or by operation of law.
- The duties of trustees and the exercise of their powers are enforced by the Court.
- Beneficiaries may challenge an exercise, or a purported exercise, of a power by applying to Court.
- Beneficiaries must show that the exercise is either outside the scope of the power or, otherwise, that the discretion given to the trustees has been improperly exercised.

GROUND 1: DEFECTIVE EXECUTION

- Has the power to make the decision in fact been exercised at all?
 - Has the right person exercised the power to make the decision?
 - Have any necessary consents obtained?
 - Have any necessary formalities (i.e. by deed) been complied with?
 - Have joint trustees acted unanimously?
 - Has the power been made within a time stipulated by the instrument?
- If the answer is 'no', then the decision is void.
- BUT: Equity will in some cases aid a defective execution of form, see *Burgess v BIC UK Ltd.* [2018] EWHC 785 (Ch) and [2019] EWCA Civ 806. Also see section 159 of the Law of Property Act 1925.

GROUND 2: EXCESSIVE EXECUTION

- Does the decision exceed the scope of the power (i.e. an appointment to a non-object or an excessive interest to an object)?
- Is it in breach of some rule of law (i.e. perpetuities)?
- If the answer is 'yes', then the decision is void.
- See *Pitt v Holt* [2013] 2 A.C. 108 (SC), per Lord Walker at §60.

GROUND 3: INADEQUATE DELIBERATION

- Did the Trustees fail to give proper consideration to relevant matters in making a decision which is within the scope of the relevant power?
- Did the trustees take into account irrelevant matters?
- If 'yes', then the decision is voidable.
- This used to be known as the "Rule in *Re Hastings-Bass*", but has since been clarified by the Supreme Court in *Pitt v Holt* [2013] 2 A.C. 108 (SC): a breach of duty is required.
- Relief is discretionary and subject to equitable defences, see *Pitt v Holt* [2013] 2 A.C. 108, per Lord Walker at §63.
- If there is wilful inadequate deliberation, then the Court is likely to set aside the decision and appoint new trustees.

GROUND 4: FRAUD ON A POWER

- Have the trustees exercised the power for ulterior motives?
- Are those motives for a purpose outside to scope of the power?
- If 'yes', then the decision is void as being a "fraud on the power".
- There are three types of "fraud on a power":
 - Corrupt purpose to benefit the trustee.
 - Bargain to benefit a non-object.
 - Other foreign purpose.
- Where there are mixed motives, the Court applies a "but-for" causation test, see *Roadchef Employee Benefits Trust Ltd. v Hill* [2014] EWHC 109 (Ch).

GROUND 5: BAD FAITH, CAPRICIOUSNESS ETC.

- Have the trustees exercised the power in bad faith, by not giving genuine and responsible consideration to the making of the decision?
- Have the trustees acted capriciously, for reasons which are irrational, perverse or utterly irrelevant?
- Have the trustees acted impartially, by ignoring the interests of a class of beneficiaries?
- If 'yes', then the decision is void.
- See *Re Piedmont Trust* [2015] JRC 196 (Jer.) for an example of this proposition being applied to irrationality.

GROUND 6: CONFLICT

- Did one or more of the trustees have a personal interest in the exercise of the power, thereby creating a conflict?
- Was the conflict neither inherent in the circumstances of the trust when it was executed nor expressly authorised by the trust instrument?
- If 'yes', then the decision is voidable.
- The trustees must show that the decision was fair and reasonable and that they took no advantage of their positions as trustees.
- Examples of conflicts:
 - Self-dealing.
 - Financial interest of trustees in the exercise of power.
 - Purchase of a beneficial interest from beneficiary.

GROUND 7: MISTAKE

- Have the trustees made a mistake in respect of a voluntary transaction of trust property, such as an appointment?
- Was that mistake a mistake of fact or law?
- Was that mistake “operative” and of so serious a character as to render it unconscionable for the donee to retain the property?
- If ‘yes’, then the decision is voidable.
- See *Pitt v Holt* [2013] 2 A.C. 108 (SC).
- The doctrine of equitable mistake includes fiscal consequences, including un-apprehended tax liabilities.
- A misrepresentation can give rise to a mistake of fact.

GROUND 8: DURESS AND UNDUE INFLUENCE

- Did the trustees or one of them act under duress when making the decision?
- Did anyone assert undue influence on the trustees or one of them, so that the decision was not made with free and informed consent?
- If 'yes', then the decision is void.
- See *Campbell v TL Clacher No. 2 Pty. Ltd.* [2019] QSC 218 (Aus.) and *Re Piedmont Trust* [2015] JRC 196 (Jer.) for examples of these issues being raised in trust cases.
- Generally, for duress see *Barton v Armstrong* [1976] A.C. 104 (PC) and *Pao On v Lau Yiu Long* [1980] A.C. 614 (PC) and for undue influence see *Royal Bank of Scotland Plc v Etridge (No.2)* [2002] 2 A.C. 773 (HL).

WARNING 1: NON-INTERVENTION

- Where the exercise of a power is discretionary, the Court has a policy of non-intervention.
- The Court will not restrain or compel trustees to exercise a permissive power, where the trustees' conduct is informed, *bona fides* and uninfluenced by improper motives, see i.e. *Tempest v Lord Camoys* (1882) 21 Ch.D. 571 (CA) at 578, per Lord Jessel.
- The mere fact that the Court would not have acted as the trustees have done is no ground for interference.
- The settlor has chosen to entrust the power to the trustees, not to the Court.
- It is notoriously difficult to challenge successfully the exercise of a discretion by trustees; it should not be undertaken lightly. However, the Court will direct inactive or supine trustees to engage with their duty to consider exercising a permissive power.

WARNING 2: PROOF

- The onus of proof is on the beneficiaries, but obtaining evidence to challenge the exercise of a power by trustees can be difficult:
 - Trustees exercising a discretionary power are not bound to disclose their reasons, see *Re Londonderry's Settlement* [1965] Ch. 918 (CA).
 - Disclosure will not be ordinarily by ordered by the Court of documents containing reasons for the trustees' decisions, though the Court has a discretion to make such an order, see *Schmidt v Rosewood Trust Ltd.* [2003] 2 A.C. 709 (PC).
 - Materials within the usual exemption include minutes of meetings, communications detailing deliberations and material upon which the reasons were or might have been based.

WARNING 3: RELIEF?

- For decisions which are rendered voidable as opposed to void, the granting of relief by the Court is discretionary and may be refused.
- Relief is subject to the usual equitable defences of laches, complicity and acquiescence, see *Pitt v Holt* [2013] 2 A.C. 108 (SC) at §43.
- Beware the Pyrrhic victory: even if a decision is set aside by the Court, the trustees could remake it validly or otherwise the Court could make a decision contrary to the beneficiaries' expectations.
- Beneficiaries who unsuccessfully challenge a decision by trustees in hostile litigation are likely to be ordered to bear their own costs – and possibly those of the trustees.

WARNING 4: NO-CONTEST CLAUSES

- It is increasingly common for *inter vivos* settlements and will trusts to include so-called “no-contest” clauses.
- These often purport to terminate the interest of a beneficiary in the event that he or she challenges any decision taken by the trustees.
- There is no general rule against provisions preventing or discouraging beneficiaries from going to court to litigate over lifetime trusts, will trusts or wills, see *Nathan v Leonard* [2002] EWHC 1701 (Ch.) (wills) and *AN v Barclays Private Bank and Trust (Cayman) Ltd.* (2006) 9 I.T.E.L.R. 630 (Cayman) (trusts).
- However, there is scope to argue that a clause which is imposed merely “*in terrorem*”, to intimidate beneficiaries, is repugnant, offends public policy by seeking to oust the jurisdiction of the Court and is therefore invalid.
- Cautious beneficiaries can first seek a declaration that substantive relief does not come within the “no contest” clause (or that the clause is invalid), and then claim the substantive relief only if such a declaration is granted.

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