

Trustees' Decisions – how to make 'em, shake 'em and break 'em

Marie-Claire Bleasdale
16 June 2021



TRUSTEES – HOW TO MAKE DECISIONS

- Scope
- Process
- Conflicts
- Practical issues

SCOPE

- FIRST STEP
- What power(s) do the trustees have?
- What are the objects of the power?
- Any limitations/restrictions on the power?
- Excessive exercise - void

EXCESSIVE EXERCISE



- Power not used to benefit the objects of the power

Roadchef (Employee Benefits Trustees) Ltd v Hill [2014] EWHC 109 (Ch)

PROCESS

- Pitt v Holt
[2013] 2 AC 108 § 63
- Pitt v Holt (CA judgment)
[2012] Ch 132 § 102-118
- Scott v National Trust
[1998] 2 All ER 705, 717



PROCESS

“Certain points are clear beyond argument. Trustees must act in good faith, responsibly and reasonably. They must inform themselves, before making a decision, of matters which are relevant to the decision. These matters may not be limited to simple matters of fact but will, on occasion (indeed, quite often) include taking advice from appropriate experts, whether the experts are lawyers, accountants, actuaries, surveyors, scientists or whomsoever.

It is, however for advisers to advise and for trustees to decide: trustees may not (except in so far as they are authorised to do so) delegate the exercise of their discretions, even to experts.”

Robert Walker J in *Scott v National Trust*



PROCESS

- Duty to consider exercising powers
Turner v Turner [1984] Ch. 100
- Ask the correct questions
Harris v Lord Shuttleworth [1994] ICR 991
- What purpose was the power given for?
Edge v Pensions Ombudsman [2000] Ch 602
- Do the trustees need advice? E.g. on meaning of trust deed?

PROCESS

- What facts are relevant to the decision?
 - Are you sure your sources of information are complete/reliable/accurate
 - Settlor's wishes/Letter of wishes
always relevant but not decisive; *Pitt v Holt*,
Re R Trust [2019] 22 I.T.E.L.R. 123
 - Tax consequences
Pitt v Holt
 - Circumstances of beneficiaries
Earle v Michelin Pension and Life Assurance Plan
76674/4
 - Ignore irrelevant facts
Klug v Klug [1918] 2 Ch 67



PROCESS

- Decision to be based on circumstances at the time decision is made
- Trustees shouldn't fetter their power to make future decisions
- Must be careful not to act as if previously bound
- Irrational decision – one no reasonable trustees would make

CONFLICT

- Consider any possible conflicts
 - financial
 - loyalty

CONFLICT

- Actual or potential personal conflict of interest?

Fees?

Hawksford Jersey Ltd v A [2018] JRC 171

Self dealing?

Brudenell-Bruce (Earl of Cardigan) v Moore and another
[2012] EWHC 1024 (Ch)

PRACTICAL MATTERS

- Take an organised approach to decision making
- Keep records
 - Memorandum of exercise of power
 - Lady Hood of Avalon v Mackinnon [1909] 1Ch 476
 - Minute of trustee decisions recording reasons for decision and information taken into account
- Consider protection against future liabilities
 - Is it appropriate to request an indemnity
- Check formalities required to validly exercise a power
 - Deed?
 - Other formality requires by law – registration?

Radcliffe Chambers

Radcliffe Chambers
11 New Square
Lincoln's Inn
London WC2A 3QB

T: 020 7831 0081
F: 020 7405 2560
DX: 319 London
clerks@radcliffechambers.com

www.radcliffechambers.com

