

TRUSTS AND ESTATES LAW

Extracting reasons from trustees for their decisions

By Anthony Grant, *Trusts & Estates Litigator*

One of the attractions of the law of trusts is that so many countries have much the same laws as we have and judges from around the world are continually contributing to new developments.

My last article was about some changes in the law of trusts in Jersey. My article today is about a new development in the Bahamas. The case is *Dawson-Damer v Grampian Trust Co Ltd* [2017] 2 BHS J No 126, a decision that was given by Justice Ian Winder of the Common Law and Equity Division of the Bahamas Supreme Court on 3 December 2017.

The Bahamas has a law (section 83(8) of its Trustee Act) which is intended to prevent the disclosure of various documents to beneficiaries. The ambit of section 83(8) was an important part of the decision in *Dawson-Damer* and a QC from London was brought over to the Bahamas to act as *amicus curiae* to assist the Court to decide what documents and information can be given to inquisitive beneficiaries. Justice Winder held that trustees are constrained by section 83(8) in relation to requests for copies of documents but not in the provision of further particulars, and he ordered a trustee to provide further particulars of the following allegations:

- ◇ "All facts and matters alleged to have been considered by [the trustee] as part of the alleged due consideration" of a beneficiary's claim for a distribution. The Judge said, "I am not satisfied that the answering of this request can be considered as compelling [the] trustee to disclose the contents of any document protected by s 83(8)." This ruling was based upon the premise that trustees have a duty "to enquire [into] and ascertain" various facts before they make a decision, and a beneficiary is entitled to be informed of the facts that the trustees discovered and took into consideration when they made their decision.
- ◇ "Full details of all facts and matters alleged to have been considered" in respect of a decision that a prior trustee had made. Justice Winder held: "It is ... only reasonable that [the

trustee] ought to provide particulars of these considerations which affected its decision-making process. This is quite a different issue from the evidence which it says it will adduce to support the facts pleaded."

- ◇ The trustee pleaded that it had "from time to time ... considered whether or not to exercise its dispositive powers in favour of the plaintiff". This was met by a request for the trustee to "provide full particulars of each and every occasion on which it is alleged that [the trustee] considered whether or not to exercise its dispositive powers in favour of [the beneficiary] and each and every matter taken into account by [the trustee] when making the decision whether or not to exercise its dispositive powers in favour of the plaintiff". (para [81])

One of the documents in the trustee's possession was an opinion by Robert Walker QC (before his appointment as a Justice of the UK Supreme Court). The trustee said it relied on his opinion. The Judge said, "I am satisfied that the document itself and the instructions [that were given to Mr Walker QC] ought to be disclosed ...". The trustee was also ordered to disclose any other opinions of Mr Walker QC and any instructions that were given to him for his previous opinions. It was held that, although section 83(8) was intended to stop a trustee from being compelled to disclose documents, this did not stop it from being compelled to disclose information or documents where there had been a waiver or partial waiver of disclosure of documents.

The *Dawson-Damer* decision has great significance for beneficiaries who believe that trustees have either acted unfairly or failed to consider their circumstances properly. If trustees can be required to disclose to a beneficiary all the factors that they took into account when they reached a decision, and if – as is not uncommon



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with some trusts in New Zealand at least – the trustees paid no attention or minimal attention to the individual circumstances of many beneficiaries, then the trustees are at risk that their decisions may be challenged and set aside.

This conclusion takes no account of the significance of section 83(8). In the Bahamas, that section prevents the trustees from having to disclose most documents but there may be a question whether in the absence of such a statutory restraint, the trustees will be required to disclose some documents as well. While the courts will generally not require trustees to disclose their reasons for deciding whether or not to make a distribution, a requirement that they must disclose information, and potentially documents that record the various factors they took into account, may be sufficient to show that the trustees had not complied with their responsibilities properly.

This leads to a further problem for trustees. Where there is an attack on their reasoning, they may be prevented from having access to trust funds to defend themselves, unless they get a *Beddoe* Order. And, in the way that the *Beddoe* regime has been interpreted by the courts, such orders are almost impossible to obtain.

This all points to the need for trustees to be careful, thorough and focused in their deliberations. A casual approach to their trusteeship may turn out to be expensive. ❌