

UPDATE

# Trustee discretion and the Court: In the Matter of HHH Trust

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The Royal Court of Jersey has recently refused an application by a beneficiary of a discretionary trust, who challenged the amount of costs and expenses agreed between the settlor and trustee pursuant to an earlier court order: *In the Matter of HHH Trust*, [2015] JRC 193.

This case highlights the autonomy of trustees in exercising their discretionary powers under a trust deed where done so reasonably and underlines the limits of the Court's engagement in such matters.

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## Background

A beneficiary (the **Beneficiary**) of the B Sub-Trust (the **Trust**) disagreed with the quantum of costs claimed by the settlor (the **Settlor**), who had been awarded costs following an unsuccessful application by the Beneficiary for disclosure by the Settlor.

Costs had been awarded by the Court out of the Trust Fund on the grounds that the Settlor, as a fiduciary, had an implied equitable right of indemnity, which was equivalent to a trustee's right to be reimbursed in full. After lengthy discussions between the Settlor and the Trustee, costs of £270,000 were agreed by the parties.

However, the Beneficiary did not accept this amount and applied under Article 51(2) of the Trusts (Jersey) Law 1984 for the costs to be assessed by the Greffier on the grounds that the costs had been unreasonably incurred.

In dismissing the Beneficiary's application, the Court considered two key issues, namely:

1. the principle of non-intervention; and
2. the grounds for challenging the trustee's decision.

## The principle of non-intervention

The Settlor contended that, since the costs had been agreed with the Trustee as reasonable, it would be an 'unprincipled intervention of the Court over powers which by the trust deed had been given to the trustee and not to the Court'. Additionally, the Trustee stated that its decision and decision-making process were reasonable and clarified that it had not surrendered its discretion to the Court.

The starting position of the Court was that the principle of non-intervention is well established. Quoting *S v L* [2005] JRC 109, the Court considered that:

'The jurisdiction of the Court must be exercised on a sensible and principled basis. A settlor does not choose the Court as a trustee; he chooses his appointed trustee. It is that trustee upon whom the various discretions conferred by the trust deed have been conferred ... The Court cannot overturn a decision of a trustee which has not surrendered its discretion to the Court, merely because the Court would have reached a different decision. It may only intervene where the decision is one which no reasonable trustee could arrive at.'

It follows that, where a decision of a trustee is reasonable and its discretion has been properly exercised, the Court may not intervene to challenge it.

In this case, the application by the Beneficiary was not founded on an argument that the decision, or the decision-making process of the Trustee, had been unreasonable. Had this been the case, the Beneficiary may have had stronger grounds to challenge the quantum of the agreed costs.

### **Grounds for challenging the Trustee's decision**

The Court noted that it is for the person challenging the conduct of trustees to show, relying on a limited number of grounds, why their discretion had been improperly exercised. The grounds for impugning the decision of a trustee which were relevant in this case were:

- where the trustees have based themselves on a faulty judgment as to a state of facts where such a judgment is a pre-condition to the exercise of the power;
- when trustees have never brought their minds to bear on exercising their discretion;
- the trustees have failed to take into account relevant and only relevant matters or in some other way the exercise is vitiated by mistake or misapprehension sufficient to warrant upsetting it under general principles or to attract the so-called principles in *Hastings-Bass*; and
- the trustees have acted in breach of a duty of care in the exercise of investment or other administrative powers.

The Settlor noted that no such grounds had been put forward by the Beneficiary; therefore, it was not open to the Court to interfere with the decision of the Trustee.

The Court agreed with the approach of the Settlor, holding that it was not for the Court to permit beneficiaries to circumvent a trustee's decision-making process. In challenging a fiduciary's costs in such a manner, the Court held it would be interfering with the conduct of the Trustee, in breach of the principle of non-intervention.

### **The decision**

In rejecting the Beneficiary's application for an assessment of the Settlor's costs, the Court held that neither the Trustee's assessment of the costs nor the decision made had been successfully impugned by the Beneficiary. As such, the Court could therefore see no grounds upon which it could interfere with the Trustee's decision and directed the Trustee to discharge the agreed costs.

### **Conclusion**

Trustees may take some comfort from the reluctance of the Court to interfere in the exercise of discretionary powers under a trust deed where the trustee's decision and decision-making process is undertaken reasonably.

Additionally, this case underlines that the Court will not step in simply because a beneficiary is aggrieved by the decision of a trustee. As noted in the judgment, the onus is on persons challenging the conduct of trustees to establish that their discretion has been improperly exercised on one of a limited number of grounds. Without establishing such a ground, the aggrieved party will struggle to have its claim upheld.

However, the approach of the Court in this matter will not serve to exonerate all decisions made and decision-making processes undertaken by trustees. Trustees must remain careful and conscientious in their approach to exercising their discretion, ensuring that they act within the remit of the powers given to them under the trust deed and they seek advice where they are unclear as to the extent of their powers.

Additionally, trustees should always ensure that their decisions are well-reasoned and their decision-making processes are clearly recorded, in order to demonstrate that any exercise of discretion has been undertaken in a reasonable manner.

Finally, trustees should carefully note the listed grounds of challenge and ensure that in their day-to-day administration they are not acting in such a way as to make them vulnerable to criticism or challenge.

# Contacts

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