

Judicial blessings

A recent case illuminates when a trustee can enter into a commercial transaction and the scope of s57 of the Trustee Act 1925. Adam Carvalho and Joseph de Lacey highlight the key points



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'The court did not need to agree that the trustee's decision was "right", but just that the decision fell within a range of reasonable decisions.'

What happens when a trustee who owns a controlling shareholding receives an offer too good to refuse? Trustees are subject to obligations and, often, restrictions that differ from other types of shareholders. It may, therefore, be necessary for the trustee shareholder to conduct sale negotiations in parallel with a process that will ensure, from a trust perspective, that the sale can complete and that issues do not arise as a result in the future.

The case of *South Downs Trustees Ltd v GH* [2018] provides a useful example of a trustee's application for:

- judicial 'blessing' of a decision in principle to sell a majority shareholding; and
- the court to exercise its power under s57 of the Trustee Act 1925 to grant the trustee a power to enter into a sale purchase agreement (SPA) despite express terms of the trust deed prohibiting such a disposition.

The key facts

South Downs Trustees Ltd was the trustee of an employee benefit trust (the EBT). The trustee held 73% of the shares in a holding company (the shares), which owned (through subsidiaries) a business worth tens of millions of pounds. Importantly, clause 7 of the EBT deed prohibited any disposition of its interest in the shares if this 'would result in the Trustee ceasing to have control [of the holding company]' (the clause 7 restriction).

The trustee received an unsolicited offer to buy the underlying business. The

capital benefit to the beneficiaries would exceed the value of the distributions that they could reasonably expect to receive if the business remained held within the EBT. The purchaser had also provided reassurances that it would not reduce the workforce, backed by undertakings, even though these were considered by the court no more than binding 'in honour'.

The trustee received professional advice on the offer and concluded, in principle, that it should be accepted.

Section 57(1) Trustee Act 1925

The first issue that needed to be addressed was the clause 7 restriction.

Section 57 allows the court to confer powers upon a trustee where 'in the management or administration' of the trust a sale, purchase or transaction is 'in the opinion of the court expedient', but cannot be effected because of 'the absence of the necessary powers'.

Could the court confer a power upon the trustee to enter into the SPA under s57?

Preliminary requirements

Applications under s57 are relatively rare. In the 2015 case of *Re Portman Estate*, in which Farrer & Co acted for the applicant, Birss J confirmed the matters which the court will consider when exercising this jurisdiction:

- there must be no power to carry out the transaction which the trustees wish to carry out under the trust instruments;
- it must be expedient that the trustees should be able to enter into the relevant transaction; and

- the court must consider the exercise of its discretion in order to confer the power on the trustees.

These requirements were met in *South Downs*. Chief Master Marsh was also satisfied that the proposed sale of the shares could be regarded

which contains an express restriction on the powers of the Trustees.

However, in *Alexander v Alexander* [2012] the court had found that a prohibition against will trustees disposing of land could amount to an 'absence' of the desired power for the purpose of s57.

Chief Master Marsh was also satisfied that the proposed sale of the shares could be regarded as relating to the 'management and administration' of the EBT.

as relating to the 'management and administration' of the EBT; indeed, the sale was the ultimate act of management as it would effectively bring the trust to an end.

Can s57 allow a transaction that is prohibited under a trust deed?

An interesting question then arose. Could s57 allow the trustees to enter into the SPA despite the clause 7 restriction? Section 57 will not allow the court substantially to 're-write' a trust. However, this is understood to refer to the rearrangement of 'beneficial interests to a greater advantage' (and there was no question, here, of the beneficial interests being affected).

Chief Master Marsh had noted that:

... on a first reading, section 57(1) is not obviously apt to deal with a provision such as clause 7 of the EBT

Chief Master Marsh accordingly construed s57 widely, such that it could give the court 'power to override an express restriction on the powers of trustees'.

Expediency

The expediency test must be applied by reference to the interests of the beneficiaries as a whole. The transaction might be more advantageous to some rather than others, but that will not prevent the transaction from being expedient 'if it is for their overall advantage or benefit'. On balance the court found that the benefits of the sale outweighed the risks. The risks of a change of ownership to the current employees were not sufficient to weigh against the financial benefits; the court was also encouraged by the investigations undertaken by the trustee into the purchaser. This was a purchaser, it was

said, which invests in infrastructure and makes long-term investments. The amounts in question were 'life changing' and the trustee had received 'careful' advice about the sale price.

On this basis, Chief Master Marsh ordered that pursuant to s57 the trustee had power to put into effect the transactions set out in the SPA for the disposal of the EBT's shares in the holding company.

Public Trustee v Cooper [2001]

As *Public Trustee v Cooper* demonstrates, while a trustee may have the power to sell a 'jewel in the crown' asset, it will often still be concerned to ensure that it is protected from subsequent criticism about the terms or timing of the transaction. Where a trustee has made such a 'momentous decision' in principle, it can, as a solution, apply to court for judicial blessing of the decision.

In *South Downs* Chief Master Marsh agreed that the decision to enter into the SPA transactions was momentous as it would result in the disposition of the EBT's chief asset and would lead to the EBT being wound up. Chief Master Marsh thought the trustee was right to take a flexible view of its role and the need and benefit of continuing the EBT in the circumstances.

Was the decision to sell the assets of the EBT a reasonable one and was the manner in which the proceeds of sale were to be distributed reasonable?

Although the judgment does not set out the evidence that Chief Master Marsh had reviewed, it is clear that the trustee had

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explained the decision-making process in detail, and Chief Master Marsh thought this was 'structured and logical', and took into account financial and non-financial considerations.

The court did not need to agree that the trustee's decision was 'right', but just that the decision fell within a range of reasonable decisions. Chief Master Marsh said that the trustee's decision could not be said to be an unreasonable one, and 'it is not necessary to go further'.

Finally, the court had to be satisfied that the decision was not vitiated by any conflict of interest. A potential conflict arose as a director of the trustee was a minority shareholder. However, the issue of this potential conflict had been 'carefully investigated' and the evidence showed that the issue had been recognised and managed appropriately.

Chief Master Marsh's comments provide further guidance to trustees who wish to obtain judicial blessing of a decision in principle. It is necessary to provide, as part of any such application, detailed evidence about the trustee's decision-making process. The court is likely to scrutinise the considerations that have been taken into account (financial and non-financial) and the conclusion that has been reached by the trustee, together with considering any conflicts of interest.

Procedural aspects: privacy

The trustee sought an order for their applications to be heard in private and for confidentiality orders to be put in place. Given the corporate transaction that was, seemingly, unfolding in parallel with the court application, this would clearly have been necessary to preserve the confidentiality of sensitive information.

The trustee had a duty of candour to the court about, for example, the merits of the transaction and its negotiating strategy, but naturally would not have wanted the purchaser to know its views and the advice it had received on these matters prior to concluding the SPA.

It was also important to prevent the significant unrest in the workforce which could have resulted from the relevant information becoming publicly available. Indeed, the employees were not told of nor consulted on

the proposals, but rather an advisory committee had been informed on their behalf.

The court noted the general rule that hearings be held in public except where the hearing involves 'confidential information... and publicity would damage that confidentiality', or where the hearing involves 'uncontentious matters in relation to the administration

of the trusts'. In the circumstances a limited derogation from the principle of open justice would not have assisted. Chief Master Marsh concluded that the bulk of the information, and the identity of the defendants (ie the representative beneficiaries), should be kept confidential.

Privacy is a hot topic at the moment in England and Wales (and other jurisdictions). Despite the increased reluctance for trust cases to be made fully in private in this jurisdiction, in practice if a case can be made out for privacy or reporting restrictions such orders are still available (and there are practical measures that can be put in place, in parallel, to address this issue as well).

Use of a single law firm by all the parties

The Chief Master ended his judgment by noting that, while each defendant had advice from independent counsel, each counsel had been instructed by lawyers from the same law firm, which also acted for the trustee.

This is not unusual in such cases and there are some practical benefits. However, Chief Master Marsh commented that a different firm acting for some of the parties could reduce the possible perception of 'collusion in an undefended claim', and might have led to the different firm helpfully pursuing lines of enquiry not considered by a single firm.

In practice, the risk of 'collusion' in this case seems low, and given that the different parties each had the benefit of separate chancery counsel it can be expected that the relevant arguments were explored thoroughly. Nonetheless

there is a clear presentational advantage to a separate firm acting for at least one party.

Chief Master Marsh warned that, in the future, it should not be assumed that no objection to the instruction of a single firm might be taken by the court. This should be borne in mind for similar applications.

The court had to be satisfied that the decision was not vitiated by any conflict of interest.

Conclusions for practitioners

We would suggest the following practical conclusions can be drawn from this case:

- Where a trustee lacks a power to effect a sale, or even where a sale is prohibited under the terms of the trust, the court may be able to allow the sale to proceed under s57.
- A trustee applying for judicial blessing of a decision in principle does not need the court to agree that the decision is 'right', but just that it falls within a range of reasonable decisions. The trustee minutes and witness evidence will be important in this regard.
- The court can put in place privacy orders to protect the privacy of a commercial negotiation and the advice regarding the transaction.
- Consideration should be given in such applications (and, for example, variations) to the involvement of at least one separate firm. ■

Alexander v Alexander
[2012] WTLR 187 Ch D
Re Portman Estate
[2015] WTLR 871 Ch D
Public Trustee v Cooper
[2001] WTLR 901 Ch D
South Downs Trustees Ltd v GH & ors
[2018] EWHC 1064 (Ch) (to appear in
the next *Wills and Trusts Law Reports*)