The boundaries of blessing applications - Re *XYZ Trusts* [2022] SC (Bda) 10 Civ

COMMENTARY BY LEMUEL LUCAN-WILSON, 31ST MARCH 2022

The hearing dealt with a blessing application made by trustees in connection with the restructuring of the trust funds. of some 23 settlements between sub-funds in which separate branches of a larger family would then be beneficially interested. By the time of the hearing, the objections were limited to part of one of the three branches ("**the Objectors**") on the basis that the new structure would not have sufficient liquidity.

Background

The proposed restructuring had had a long history – two mediations had taken place between the various family members in 2010, culminating in non-binding Heads of Terms, which were later supplemented in July 2013. Eventually, in the absence of family agreement, the trustees concluded that they should prepare a proposed asset allocation, and successfully applied for approval of their decision to develop a comprehensive restructuring plan.

Following further disputes, the trustees made an application for the court to bless the development of the detailed proposals. This was granted, and at the same time, the trustees' powers were suitably widened under s47 of the Bermuda Trustee Act 1975 to allow them to develop and implement the necessary plans, but the trustees were directed to return to court for directions on whether to implement the detailed proposals after the beneficiaries had had a suitable opportunity to object.

The decision

The question for the Court was whether the trustees should be given the court's blessing to implement the detailed proposals, in accordance with the second category

of the jurisdiction set out in the unreported decision of Robert Walker J cited in *Public Trustee v Cooper* [2001] WTLR 901. Given the previous enlargement of the trustees' powers, there was no debate about the existence or extent of the powers, so Subair Williams J considered that the appropriate way forward for the court was to consider:

1. Whether the trustees had formed an honest and genuine view that the proposed restructuring was for the best interests of those beneficially entitled as a whole, and
2. Whether the trustees had acted reasonably and lawfully in forming their decision.

The judge noted that if she held that these requirements were satisfied, it was not material whether the trustees could have made a different decision or done things different; the Court was merely being invited to consider whether the trustees had acted irrationally rather than passing comment on their choices.

There were two main objections regarding the liquidity of the proposed restructuring:

- First, that the initial restructuring plans would leave the structure without sufficient cash to pay the expenses of the liquidation. However, it transpired during the hearing that whilst legal costs were due, dividends which had been expected at the date of the application had now been paid, and even with legal costs, there was a significant sum left in the structure in question.
- Secondly, as to the long-term liquidity of the structure, the Sub-Funds were intended to be funded by dividends from family companies. As part of the restructuring, a dividend policy had been agreed that the beneficiaries of the structure would be entitled to the greater of £8,000,000 and 50% of the companies' net profits. The structure was to be funded by dividends from core companies. The £8m minimum amount was accepted at the hearing as being sufficient in amount, but concerns were raised about the discretionary nature of the policy, and the lack of influence the Objectors had over ensuring that suitable dividends would be declared. The objectors argued that the trustees had an obligation to insist on more rigorous dividend policies to guarantee the payment of £8,000,000.

The judge considered that these objections were ill-founded. The trustees had to achieve a balance between corporate growth and sustainability; the companies were necessary for the security of the distributions and needed to be protected. The policy

minimum was appropriate and where the profits proved to be significantly higher, beneficiaries would be entitled to the greater of £8m and 50% of the net profits, which could not be said to be irrational. The significant latitude built into the £8m and the fact that the company profits would also likely increase at least somewhat in line with inflation also meant that the judge considered it could not be said that the failure to index link the £8m to RPI or another index was irrational.

In addition, there was a "liquidity rider" which provided that if dividends totalling £40m had not been paid over the next 5 years, the shareholders would direct the companies to procure a liquidity event so that suitable dividends would be paid. The judge noted that this was good protection, and that although the companies could struggle in the future, that would not be attributable to the implementation of the trustees' proposals.

Further, the judge noted that she could not *"properly ignore the resonant voices of the majority of the beneficiary family members"*. Ultimately, the role of the Court was very simple, looking at each objection individually and in the round, the court had to answer whether the trustees had acted rationally or not, and the court could not "chip in" on its impressions and opinions on the best options available.

The case serves as a good reminder of the relatively limited scope of blessing applications compared to what the beneficiaries may desire. Frequently, disgruntled beneficiaries may disagree with a decision proposed by a trustee, but the fact that matters could be managed differently is not enough to persuade the Court to refuse to bless the decision. And in this case it is also interesting to take into account the significant time lapse between the first memorandum, and the application before the Court; the fact that the trustees would not go back to try and agree further amendments was reasonable.

For more information on our Trusts, Tax, Probate and Estates practice, please click here.

If you are viewing this document on LinkedIn, you can download it by clicking on the  *icon in the top-right-hand corner when in full screen view.*