

# Exercising Trustee Powers

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serle court



# Introduction – Why this topic?

- ❑ Exercising discretionary powers is one of the most important things a trustee does
- ❑ Potential for challenge by beneficiaries
- ❑ Recent developments in this area



# Common Discretionary Powers

- ❑ Flexible discretionary trusts are increasingly popular
  
- ❑ A wide range of fiduciary discretionary powers are conferred on trustees and others (such as protectors):
  - ❑ Powers of appointment
  - ❑ Powers of addition
  - ❑ Powers of exclusion
  - ❑ Powers of amendment
  
- ❑ Fiduciary duties apply to them to regulate their exercise



# The Key Duties

- ❑ *Wong v Grand View per Clarke P* (Court of Appeal):
  - ❑ To act within the scope of the power conferred ('excessive execution')
  - ❑ To give adequate deliberation to whether and how to exercise the power ('adequate deliberation')
  - ❑ To exercise the power for a proper purpose ('the proper purpose rule')
- ❑ Each is a distinct duty, and failure to comply has different consequences



# Excessive Execution

- ❑ Fairly straightforward:
  - ❑ A power only has the powers conferred on them by the trust instrument or by law
  - ❑ They must therefore act within the scope of those powers
  - ❑ If they purport to do something beyond the scope of the power, it is a nullity (because they lack the power to do it)
  
- ❑ Essentially a question of construction of the powers
  
- ❑ Reported challenges on this base are *comparatively* rare



# Adequate Deliberation (1)

- ❑ Focus of much litigation over the past 10 years
  - ❑ *Pitt v Holt* [2013] UKSC 23
  - ❑ *Gany v Khan* [2018] UKPC 21
  - ❑ *Dawson-Damer v Grampian*
  
- ❑ Duty to give ‘adequate deliberation’ – but what does that mean?



# Adequate Deliberation (2)

- ❑ Focus is on proper process
- ❑ Need to consider relevant matters and not to consider irrelevant matters
- ❑ ‘Old’ *Rule in Re Hastings-Bass*
- ❑ *Pitt v Holt* – putting the law ‘back on track’ after taking a ‘seriously wrong turn’
- ❑ Key point: the standard of deliberation is ‘adequate’ not ‘perfect’



# Adequate Deliberation (3)

## □ *Pitt v Holt* - the key points:

- A mere failure to take into account relevant matters is not sufficient to justify setting aside
- Need for a breach of fiduciary duty in order to set aside
- Failure to take into account relevant matter will amount to a breach of duty if 'sufficiently serious'
- *Dawson-Damer* – deliberation was inadequate, but not sufficiently serious to amount to a breach of duty.
- If breach shown, Court has a flexible discretion as to whether to set aside





# Adequate Deliberation (4)

- ❑ Exercising the discretion – *Gany v Khan*:
  - ❑ Court has a flexible equitable discretion
  - ❑ No separate causation test of whether the trustee ‘would’ or ‘might’ have acted differently – that question is *relevant* but not *decisive* in the exercise of the discretion
  - ❑ *Dawson-Damer*: Court at first instance took a different approach
    - ❑ Application of separate causation test – failure to show trustee ‘would have acted differently’
    - ❑ Subject to an appeal
    - ❑ Judgment awaited



# Proper Purpose (1)

- ❑ *Wong v Grand View* [2022] UKPC 47:
  - ❑ Flexible trust for family of settlors
  - ❑ Powers of appointment, addition and exclusion
  - ❑ Powers exercised to add trustee of a purpose trust, exclude the family beneficiaries and appoint the whole fund to the purpose trust
  - ❑ Successful summary judgment challenge brought by beneficiary on basis of erosion of '*substratum*' (question of proper scope)
  - ❑ Court of Appeal – allowed appeal
  - ❑ Appeal to Privy Council



## Proper Purpose (2)

- ❑ Privy Council allowed appeal, but rejected *substratum* argument
- ❑ Focus was on proper purpose
- ❑ Powers were fiduciary and had to be exercised for proper purpose
- ❑ Purpose has to be discerned objectively by reference to admissible material (trust instrument, *original* letter of wishes etc)
- ❑ Purpose of fiduciary powers will often be to benefit the existing beneficiaries (but not always)
- ❑ Powers of addition are *potentially* (but not necessarily) different
- ❑ Purpose in this case was to benefit family



# Proper Purpose (3)

- ❑ Effect of exercise for improper purpose: void not merely *voidable*
- ❑ Wider implications of void exercise:
  - ❑ Lack of certainty over validity of an ostensibly permissible exercise of a power (i.e. one within its scope)
  - ❑ Problems for trustees when served with notice of removal?
  - ❑ Common situation where removal of trustee is apparent response to disagreement between trustee and settlor / protector



# Avoiding Problems

- ❑ How to minimise the risk of challenge when exercising a power:
  - ❑ Legal advice
  - ❑ Clear drafting of trust instruments (and purposes of powers)
  - ❑ Thorough evidence gathering exercise by trustees
  - ❑ Applications to Court for approval in advance of the exercise of the power
  - ❑ Courts' attitude to approval applications: increasingly favourable?



# Applications to Court

## □ *Public Trustee v Cooper:*

- (1) Application to determine whether what is proposed is within the power
- (2) Application to 'bless' the decision that the trustees propose to take is a proper one (review of the trustee's decision)
- (3) Surrender of discretion: asking the Court to exercise the discretion in circumstances where the trustee is disabled from doing so.



# Letters of Wishes

- ❑ Very common in flexible structures to have letters of wishes.
- ❑ Can be considered when discerning the purpose of the trust – but only contemporaneous wishes are relevant
- ❑ Letters of wishes (including subsequent letters) can (and should) be considered by trustee
- ❑ Danger of over-reliance on letters (highlighted in *Pitt*)
- ❑ Common problems for trustees



# Conclusions

- Numerous potential pitfalls for trustees when exercising fiduciary powers
- Extreme care needs to be taken when exercising powers
- Help is available – and used properly it can enable the problems to be avoided.