

Discretionary Trusts: Mere Power Too Meagre to Stand?

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Does the object of a mere power have the necessary *locus standi* to sue for breach of trust? This was one of the questions which the Royal Court had to consider recently in the context of a strike out application in **Freeman v Ansbacher Trustees (Jersey) Limited** [2009] JRC003.

The settlement in question was a discretionary trust which provided for accumulation trusts of income, subject to powers of appointment of capital or income in favour of the specified class of beneficiaries until the vesting date, with ultimate default trusts in favour of the specified class.

Two of the plaintiffs in the proceedings alleging breach of trust were original members of the specified class whilst the third plaintiff had been added at a later date. The claims of the first two plaintiffs were found to be prescribed, leaving only the claims of the third plaintiff.

SOLE TRUSTEE

The defendant in the proceedings had been the sole trustee for the first 20 years of the trust's existence, following which it had been a joint trustee for a relatively short period. The defendant had retired as a trustee in 2000. The principal trust assets were held through an underlying Jersey company.

A MIXTURE OF TRUSTS AND POWERS

The court remarked that the term 'discretionary trust' was somewhat imprecise and that a discretionary trust will normally contain a mixture of trusts and powers. Powers may be subdivided between fiduciary (where the donee owes a duty to the objects of the power to consider from time to time whether and how to exercise it), and personal powers.

Fiduciary powers may be further subdivided in to trust powers (which a trustee is compelled to

exercise) and mere powers (which the trustee has to consider whether or not to exercise from time to time). In this particular case the Trust comprised:-

- (i) mere powers of appointment to appoint capital and income to the Specified Class during the trust period;
- (ii) a trust to accumulate income; and
- (iii) a default trust at the end of the trust period for those of the Specified Class then living, in equal shares absolutely.

The third plaintiff therefore had two interests under the trust:-

- (i) as an object of the mere power to appoint capital and income and the mere power to distribute income; and
- (ii) as a beneficiary of the ultimate default trust.

The parties up to this point were agreed as to the nature of the trust and the third plaintiff's interest in it. However, on the issue of whether the object of a mere power has the necessary standing to sue for breach of trust and, where appropriate, seek the reconstitution of the trust fund, a difference of opinion arose.

RECONSTITUTION OF THE TRUST FUND

What could be agreed was that there was no Jersey authority on the point and that guidance should therefore be obtained from England, namely Lewin on Trusts (18th Edition) paragraphs 39-69:

*“The traditional approach of the court was to draw a line between discretionary trusts and fiduciary powers. Objects of discretionary trusts had locus standi to bring an action to secure the trust fund and their right in it, while objects of fiduciary powers had locus standi to seek a removal of trustees who failed to give due consideration to an exercise of their fiduciary powers, but none to seek any other kind of relief, with the possible exception of a claim to enforce an exercise of the power in special circumstances. In our view, following the decision of the Privy Council in **Schmidt v Rosewood Trust Ltd**, locus standi does not depend on the distinction between discretionary trusts and fiduciary powers. And objects of both discretionary trusts and fiduciary powers have locus*

standi to seek relief for the protection of their rights, though the court has a discretion to determine what relief, if any, should be granted. “

TRADITIONAL APPROACH

Counsel for the defendant argued that Jersey should follow the traditional approach (namely that the object of a mere power has no *locus standi* to seek the reconstitution of the trust fund on account of a breach of trust).

However, the court was clear that this position failed to stand with **Schmidt** and that the correct position in Jersey was that the object of a fiduciary power (whether a trust power or a mere power) does have *locus standi* to apply to the court for relief and that such relief can include the reconstitution of the trust fund where loss has been caused by a trustee's breach of a trust.

The court went on to explain its reasoning and in particular stated that a typical discretionary trust will often confer mere powers of appointment on the trustees, even where the clear intention of the settlor is that the objects of the mere power (such as his children or grandchildren) are the persons who are realistically expected to benefit from the trust fund.

It would be a 'highly unsatisfactory situation' if such beneficiaries were held not to have standing to sue the trustees for breach of trust where, for example, the trustees had made speculative investments which had resulted in a devastating loss to the trust fund.

CONTINGENT INTEREST

The third plaintiff also had a contingent interest as a default beneficiary under the trust. Again there is no Jersey authority on the standing of such a beneficiary to sue for breach of trust. However, the court chose to follow the well established position in England that such beneficiary does indeed have *locus standi*, highlighting that it is at the discretion of the court as to whether such relief should be granted. Thus the court confirmed that in this particular case, the third plaintiff had two bases on which to justify the necessary *locus standi*.

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