



APPLICATIONS BY TRUSTEES FOR THE COURT'S 'OPINION, ADVICE OR DIRECTION'

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The Courts of Equity have always recognized the right of trustees to approach the Court for directions. Under the laws of The Bahamas, express provision is made for trustees to apply for guidance with respect to the administration of trusts under Section 77 of the Trustee Act 1998 ("Section 77").

When Will It Be Appropriate To Apply For Directions?

In the leading English case of Public Trustee v Cooper [2001] W.T.L.R. 901 (Ch D), Mr Justice Hart quoted from a judgment of Robert Walker J in an unnamed 1995 case wherein Walker J. said that when the court has to adjudicate on a course of action proposed or actually taken by trustees, there are at least four distinct situations (and there are no doubt numerous variations of those as well):-

- The first category is where the issue is whether some proposed action is within the trustees' powers;
- The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided on how they want to exercise such powers but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved

and which is within their powers;

- The third category is that of surrender of discretion properly so called. There the court will only accept a surrender of discretion for a good reason, the most obvious good reasons being either that the trustees are deadlocked or because the trustees are disabled as a result of a conflict of interest; and
- The fourth category is where trustees have actually taken action, and that action is attacked as being either outside their powers or an improper exercise of their powers. Cases of that sort are hostile litigation to be heard and decided in open court.

Key Principles Underpinning Trustee Directions Applications

- The Trustee should ensure that it has done its homework and take proper expert advice

In the decision of the Supreme Court of New South Wales in Re Appln of NSW Trustee & Guardian - BC201402504 it was stated that:

"In applying to the court for judicial advice, the trustee is not abrogating or delegating its obligation to apply its own judgment in deciding whether to do (or not do) something in execution of the trust. The trustee must actively and honestly bring its mind to bear on any particular problem confronting it. Where necessary,

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“...provided that the court’s advice, opinion and/or directions are embodied within an Order, the Trustee will receive the benefit of the ‘statutory indemnity’ supplied by Section 98 of the Trustee Act...”

it is entitled to do so with the benefit of such legal or other advice...The trustee should then determine a course of action subject, again if it thinks appropriate, to obtaining judicial advice about that course of action...in almost all cases an application for judicial advice should be accompanied by counsel's opinion. The content of that opinion will be a significant matter which the court will take into account in determining whether or not to give the advice sought.”

- The Trustee should endeavour to provide full materials and information to the Court

Section 78 of the Trustee Act provides that applications pursuant to Section 77 must be brought pursuant to a “written statement” signed by counsel and attorney.

The applicant should disclose all relevant matters and materials to the Court. This is not least because, section 77(4) provides that ‘a trustee shall not receive the protection afforded by Section 77(3) [as to which please see below] “...if he is guilty of any fraud or willful concealment or misrepresentation in obtaining such opinion, advice or direction.”

- The Trustee should be concerned to assist the court and to ensure that (where appropriate) relevant/interested parties are given notice of the application

An application pursuant to Section 77 is in the nature of a private application. However, the Judge seised of the matter is empowered to direct that notice be served upon and the hearing attended by all persons interested in such application or such of them as the Judge thinks expedient.

The Effect of the Court’s Advice, Opinion or Directions under Section 77

Section 77(3) states that “A trustee or personal representative acting upon the

opinion, advice or direction given by the Judge shall be deemed so far as regards his own responsibility to have discharged his duty as such trustee or personal representative in the subject matter of the said application.”

Additionally, provided that the court’s advice, opinion and/or directions are embodied within an Order, the Trustee will receive the benefit of the ‘statutory indemnity’ supplied by Section 98 of the Trustee Act, which provides that “...this Act and every order purporting to be made under this Act shall be a complete indemnity to all persons for any acts done pursuant thereto...”.

Costs of the Section 77 Application

Legal costs of Section 77 applications are “in the discretion of the Judge”. However, the preponderance of authority holds that absent exceptional circumstances, a trustee (even where it has been ‘hyper-cautious’) should be entitled to recover its legal costs from the trust fund.

There is a paucity of reported instances in which a trustee has been deprived of its costs; one such case was BA v Verite Trust Co Ltd, Re E, L, O and R Trusts [2008] JRC 150 wherein the Royal Court of Jersey held that “A trustee may only be denied an indemnity for its costs if it has acted unreasonably, which is a high hurdle”.

Conclusion

In circumstances where trustees are faced with difficult questions concerning trusts under their stewardship or where they are applying their minds to momentous decisions which could, for example, potentially give rise to substantial liability, it shall be a counsel of prudence for that trustee to seek expert advice and with the benefit thereof, to consider seeking the court’s opinion, advice and/or directions.

N. Leroy Smith, Partner, focuses on all facets of trust law including representing fiduciaries and individual clients (both private and institutional) in a range of trust and estate litigation; and advising clients in the drafting and administration of Bahamian trusts.