

Applications to the court by trustees

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Trustees are entitled to call upon the supervisory jurisdiction of the court in exercising their duties under a trust or when they face difficulties in the execution of their trusts. When the court is asked by a trustee to exercise its supervisory jurisdiction in a matter affecting the trust, it will in general be concerned with what is in the best interests of the trust and beneficiaries as a whole. Unless the application is hostile in nature, it will not be concerned with the rights of adversarial parties.

Trustees who seek a determination of the court are usually protected in costs as long as the application is not in substance hostile and they abide by the court's directions. However if they appeal that decision and lose, they run the risk of a costs order being made against them.

There is a distinction of note to be borne in mind when trustees are considering an application to court. When there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them 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 is within their powers, they may apply to court for its 'blessing' or sanction. As the trustee has not surrendered its discretion, the court's role will be limited to ensuring that the decision is lawful and within the power, that it does not infringe the trustee's duty to act as a reasonable trustee might act, ignoring irrelevant, improper or irrational factors, that is untainted by collateral factors, and that the trustee has in fact formed that view. However, where the trustees having discretion apply to the court and surrender that discretion, the court can act unfettered and determine the matter in such a way as it considers is in the best interests of the trust.

Reference: *Public Trustee v Cooper* [2001] WTLR 901

Where all the beneficiaries are of full age and capacity, they can resolve a difficulty by consenting that the trustee act in a particular manner, on receipt by the trustee of a suitable indemnity. However, this will not be possible where beneficiaries may be unborn or are minors. In the case of the latter classes the trustee will need to consider carefully its potential personal liability. Limitation periods may apply but the period will only run from the time a beneficiary (or potential beneficiary) reaches full age and that could be many years.

Procedure

The trustees can apply under Order 85, rule 2 of the Rules of the High Court (Cap 4A) (RHC) (or Order 85, rule 2 of the Rules of the District Court (Cap 336H) (RDC), and it will normally be appropriate to initiate proceedings by originating summons. Essentially, the application by the trustees will be for directions as to a particular aspect of the administration of the trust. The originating summons can be expressed in general terms if desired but the trustees' evidence must then be specific as to the decision or question in respect of which they seek the court's sanction or direction.

There may be a question as to who should be joined as respondents. Plainly all the trustees must be joined (whether as applicants or respondents) but as to the beneficiaries this may depend on who is (or is not) in favour of the direction sought. Generally, those that are in favour do not have to be joined.

To ensure that the trustees are fully protected, the evidence should disclose all material facts. It should show the value of the trust assets and why the direction sought is required.

If the respondents wish to take part in the proceedings generally or seek a different remedy, they must acknowledge service within 14 days of being served. Before the expiration of 14 days after the respondent has acknowledged service, the applicant (trustee) must file with court the affidavit evidence on which it intends to rely. Where a respondent who has acknowledged service wishes to adduce affidavit evidence he must within 28 days after service on him of the applicant's evidence file his own affidavit evidence and serve copies on the other parties. An applicant may within 14 days file and serve further affidavit evidence in reply.

References: RHC, O 12, rr 5, 9, O 28, r 1A; RDC, O 12, rr 5, 9, O 28, r 1A

Direction sought relating to litigation

If the direction sought relates to whether or not litigation should be pursued or defended (and liability for costs thereof), the evidence presented must include an affidavit/affirmation and a memorandum by the trustees or the solicitor having the prime responsibility for the case setting out all factual matters and factors which are relevant to the court's decision and deal with the prospects of success and cost implications. Specifically:

- if counsel's advice is relied on, the instructions to counsel should be annexed to the memorandum so that the court can see the basis on which the advice was given
- if no counsel's advice has been obtained, the solicitor's advice on the trustees' case should be so annexed
- if the trustees are unrepresented, they should give their own assessment on the merits of their case in the main action in the memorandum

It is important that the evidence indicates whether the trustees have proposed or undertaken, or intend to propose, mediation (and if not, why not). The evidence should also indicate whether the trustees have consulted with the beneficiaries of the trust and in the event that any beneficiary is not included as a party, the full reason in support of such omission. It would be unwise not to deal with these elements in advance of an application.

Reference: Practice Direction 20.3: Beddoe applications

Care must be taken when the proposed litigation concerns not the trustee directly but companies held by the trust. It has been held by the Hong Kong Court of Appeal that the court had no Beddoe-type jurisdiction to direct how (wholly owned) companies, who were not trustees, should respond to a trustee-in-bankruptcy summons; defence of the summons was instead a matter for the companies' directors.

Reference: *Highmax Overseas Ltd v Chau Kar Hon Quinton* [2014] HKCU 1228

Common general applications

The kinds of issues that trustees may bring before the court are varied and extensive. The sorts of applications that could be made include:

- determining who is included in any class of persons having a beneficial interest in any property subject to a trust
- determining the rights or interests of any person claiming to be beneficially entitled under a trust
- an order approving any sale, purchase, compromise or other transaction
- an order directing any act to be done that the court could order to be done if the estate or trust in question were being administered or executed under its direction

Construction summons

If the trust instrument is ambiguous or obscure in its language, the trustees should not act on their interpretation of its meaning. If they are wrong, they could be personally liable, particularly if they commit a breach of trust. Thus for protection they should seek the directions of the court. This does not of course give trustees carte blanche to refer everything to the court, and if their application is frivolous or unnecessary they may find themselves liable in costs.

Payment into court

There may be occasions when trustees need the protection of the court in respect of money in their hands. In such circumstances they or a majority of them may pay money or securities in their hands or under their control into court.

Reference: Section 62(1) of the Trustee Ordinance (Cap 29) (TO)

A receipt or certificate from the proper officer is sufficient discharge to the trustees.

Reference: TO, s 62(2)

If only the majority wish to pay the funds in and the concurrence of the others cannot be obtained, the court may order the payment to be made notwithstanding less than total agreement.

Reference: TO, s 62(3)

Practitioners will likely find this provision of most use in the following circumstances:

- where there are conflicting claims
- where there is doubt as to entitlement
- when confronted with missing beneficiaries
- where a child or a person resident outside the jurisdiction of Hong Kong is absolutely entitled

The procedure is for the trustee to file an affidavit giving:

- a short description of the trust and the instrument that created it, or the circumstances in which the trust arose
- the names of the persons interested in or entitled to the money or securities to be paid into court, with their addresses so far as known
- agreement to answer any inquiries that the court may make or direct relating to the application of the money or securities
- an address for service

References: RHC, O 92, r 2(1); RDC, O 92, r 2(1)

In order for the money to be paid out, an application must be made by summons supported by affidavit evidencing the fulfillment of conditions under which that should happen. The summons must be an originating summons unless the application is made in a pending cause or matter, or an application for the same purpose has previously been made.

References: RHC, O 92, r 5, RDC, O 92, r 5

Approval of transaction

Basically, a trustee has two ways of obtaining the approval of the court to a transaction, namely:

- by an application under RHC, O 85, r 2 or RDC, O 85, r 2 (Order 85 action)
- by an application under the Trustee Ordinance (Cap 29) (section 56 application)

References: Reference: TO, s 56

A trustee can make an application under RHC, O 85, r 2(3)(d) or RDC, O 85, r 2(3)(d) for an order approving any sale, purchase, compromise or any other transaction. From a practical point of view the court will not be deciding upon the transaction itself, merely with whether or not approval should be given to the trustees' decision. This means that the trustees must have the power to carry out the transaction, either through the trust instrument or general law.

An Order 85 application might be appropriate when, for example, a trustee is proposing to purchase trust property. It will likely be necessary to join all the beneficiaries to the action and, needless to say, the court will be especially vigilant to ensure that the evidence clearly indicates that the transaction is for the benefit of the beneficiaries as a whole and the trust generally.

In the ordinary course of the administration of a trust the trustees can exercise their statutory powers to enter into various transactions or:

Reference: TO, s 16(f)

(f) compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments or composition or arrangement, releases, and other things as to the personal representative, trustees or sole acting trustee seem expedient, without being responsible for any loss occasioned by an act or thing done under this section if the personal representative, trustees or sole acting trustee has or have discharged the statutory duty of care in doing so

The trustees must, however, ensure that a contrary intention to the statutory power is not expressed in the trust instrument. They should also be aware that when exercising the power they also now have a statutory duty of care imposed upon them.

The duty of care is such care and skill as is reasonable in the circumstances, having regard in particular to any special knowledge or experience that the trustee has or holds themselves out as having and, if they act as trustee in the course of a business or profession, to any special knowledge or experience that it is reasonable to expect of a person acting as such.

Reference: TO, s 3A(1)

In consequence, and in order for trustees to protect themselves from liability to beneficiaries, an application may well be sensible when they have doubt as to the correctness of a proposed course of action.

Where trustees actually lack a power to deal with property in the manner they propose, they may apply for authorization to deal with trust property under Section 56 of the Trustee Ordinance (Cap 29) (TO), which empowers the court to confer administrative and management powers on trustees where expedient to do so. The powers conferred on trustees by the Trustee Ordinance and general law are now so wide that an application under this section would rarely be necessary but if the trustees wish to carry out an action that they do not have the power to do, they may still have to make an application under this provision.

The power can be conferred for a particular transaction or generally, with such terms and conditions as the court deems necessary. The application can be made by a trustee or anyone beneficially interested under the trust.

Practitioners should ensure that the proposed transaction for which the power is required can meet the criteria:

- of being for the benefit of the trust as a whole
- that there is no power available under the trust instrument or general law

The court must consider the proposed transaction to be 'expedient'. Examples include:

- to purchase unauthorised investments
- to raise money for education
- to purchase a house for a beneficiary to live in
- to raise capital for a life tenant
- to sell where consent is not forthcoming
- to enlarge powers of investment

TO, s 56 does not extend to a rewriting of the trust deed. It has been held that the words 'management or administration' at the beginning of the section place a limitation on when and how it may be invoked.

References: *Re Municipal and General Securities Co Ltd's* [1950] Ch. 212
Man Ping Nam v Man Tim Lup [2010] HKCU 183

Approval of distribution of trust property

Where there is a missing beneficiary or a person dying without issue the trustees can obtain a Benjamin order permitting the distribution of trust property without the necessity of retaining a contingency fund to meet possible liabilities.

References: *Re Benjamin* [1902] 1 Ch. 723

Re Estate of Yu Leung Fong [1991] 1 HKC 494

Despite the fact that such an order could be obtained, the expense would unlikely be justified if insurance is available. The cost of a policy is a proper and allowable expense of an administration.

Reference: *Re Evans (deceased)* [1999] 2 All ER 777

Approvals in respect of land

There is no direct equivalent in Hong Kong to the Trusts of Land and Appointment of Trustees Act 1996 (TLATA) in UK. Under TLATA, s 14, it is possible for trustees of land to obtain an order relating to the exercise by them of any of their functions or declaring the nature or extent of a person's interest in trust property. This would enable trustees or any other person who has an interest in land to make an application to, for instance, sell it without obtaining any consents from or having to consult with, any person. In Hong Kong, a plaintiff might instead seek declaratory relief as to beneficial ownership as well as an order for sale under the Partition Ordinance (Cap 352).

Reference: Section 6 of the Partition Ordinance (Cap 352)

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Andrew Lynn is a barrister working in the areas of trusts (traditional/commercial) and probate, company/shareholder disputes, and commercial and public law litigation generally. He was sole counsel at trial and lead counsel for the successful appellant on appeal both to the Court of Appeal and Court of Final Appeal in Hong Kong's leading 'trusts in divorce' case, *Kan Lai Kwan v Poon Lok To Otto* (2014) 6 HKC 111, and has acted as counsel in several other significant civil cases before the higher courts. He has published in professional and academic journals and also speaks at trust industry events.

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