



**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION**

**CAUSE NO: FSD 82 OF 2022 (DDJ)**

**IN THE MATTER OF SECTION 48 OF THE TRUSTS ACT (2021 REVISION)  
AND IN THE MATTER OF GCR ORDER 85 RULE 7  
AND IN THE MATTER OF THE SUMMONS OF STANDARD CHARTERED  
TRUST (SINGAPORE) LIMITED AS TRUSTEE OF THE EMERGING MARKETS  
DIVERSIFIED FUND TRUST DATED 5 APRIL 2022**

**Appearances:** Nicholas Dunne of Walkers (Cayman) LLP

**Before:** The Hon. Justice David Doyle

**Heard:** 18 May 2022

**Ex Tempore**

**Judgment delivered:** 18 May 2022

**Transcript  
of Ex Tempore Judgment  
circulated:** 18 May 2022

**Transcript of  
Ex Tempore  
Judgment approved:** 19 May 2022



## HEADNOTE

*Factors to be considered when the court is dealing with an application by a trustee for the blessing by the court pursuant to section 48 of the Trusts Act (2021 Revision) of a momentous decision proposed to be made by a trustee*

## JUDGMENT

### Introduction

1. I have considered the two hearing bundles in respect of this matter. I have also considered the helpful oral submissions of Nicholas Dunne of Walkers who appears for Standard Chartered Trust (Singapore) Limited (the “Trustee”) with Matthew Welds (an articulated clerk) observing.
2. By summons dated 5 April 2022 (the “Summons”) the Trustee seeks certain directions on matters relating to the Emerging Markets Diversified Fund Trust (the “Fund”) which is governed by an Amended and Restated Declaration of Trust dated 27 August 2013.
3. It is stated that the Trustee became trustee pursuant to a deed of appointment, retirement and indemnity of trustees dated 5 September 2013.
4. The factual position which presently confronts the Trustees has been well set out in the comprehensive first affirmation dated 16 March 2022 of Mok Cher Hwee, the managing director of the Trustee. I have also considered the exhibited documentation and the protracted correspondence.
5. In very brief summary, it is stated that the Fund has a single investor, a company incorporated in Singapore called ABG Shipyard Singapore Pte Ltd (the “Unitholder”) and a single investment namely an outstanding loan of approximately US\$80 million (the “Loan”) to a company incorporated in the British Virgin Islands (the “BVI”) known



as Montego Sands Capital Investment Inc (the “Borrower”) which has gone into insolvent liquidation under the supervision of the BVI Court.

6. It is stated that it has subsequently become clear in the course of the liquidators’ investigations that the Borrower has insufficient resources with which to repay the Loan, the capital having apparently been utilised to fund an investment into a company incorporated under the laws of the United Arab Emirates called Al Aqili Distribution (“AAD”) which has itself sustained very significant losses such as to apparently render it insolvent.
7. The liquidator has stated that there is little prospect of the Borrower recovering anything from AAD other than US\$200,000 from which US\$20,000 would be deducted for the liquidators’ capped fees.
8. The Trustee therefore seeks approval to accept US\$200,000 in full and final settlement of the Loan and following payment of liquidation fees and expenses thereafter to terminate the Trust, its purpose having then come to an end.
9. The Trustee has encountered some significant difficulties in relation to its dealings with the Unitholder. In particular the Unitholder, or at least those purporting to act on its behalf, made unsuccessful attempts at a formal redemption. Since late 2019 the Trustee has heard nothing from or on behalf of the Unitholder. The Unitholder has failed to properly engage with the Trustee and has left the Trustee with no real alternative other than to apply to the court for relief.
10. The Trustee finds itself in a position where the only practical option appears to be the acceptance of the monies that are “on the table” from AAD, however meagre, for the liquidator of the Borrower to distribute those monies and for the Trustee thereafter to take steps to apply its share of those monies and terminate the Trust in accordance with its provisions.



### **The relevant law**

11. I have considered the relevant law including section 48 of the Trusts Act (2021 Revision) and the various authorities referred to in the helpful skeleton argument including Kawaley J's judgment in *In the Matter of A Trust* 2019 (1) CILR 130.

#### *Otto Poon (Jersey Court of Appeal)*

12. The position is also covered in a judgment of the Court of Appeal of Jersey (Sir Hugh Bennett, George Bompas QC and David Doyle First Deemster of the Isle of Man) in *Otto Poon Trust* [2015] JCA 109 which referred to the well-known test for approving momentous decisions by trustees. In short, the court must be satisfied that:

- (1) the trustee's decision has been arrived at in good faith;
- (2) the decision is one which a reasonable trustee properly instructed could have reached; and
- (3) the decision is not vitiated by any actual or potential conflict of interest.

#### *Section 48*

13. Under section 48 of the Trusts Act (2021 Revision) any trustee shall be at liberty, without the institution of suit, to apply to the Court for an opinion, advice or direction on any question respecting the management or administration of the trust money and such application should be served upon, or the hearing attended by, all persons interested in such application or such of them as the court shall think expedient. The trustee acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards that person's own responsibility, to have discharged that person's duty as such trustee in the subject matter of the application.



14. Section 48 contains an important proviso namely – the trustee shall not be indemnified in respect of any act done in accordance with such opinion, advice or direction if such trustee “shall have been found to have committed any fraud, wilful concealment or misrepresentation in obtaining such opinion, advice or direction.”
15. It is also provided that the costs of an application under section 48 are in the discretion of the Court.

*AA v BB (Chief Justice Smellie)*

16. Chief Justice Smellie in *AA v BB* (FSD unreported judgment 14 February 2020) stated (at paragraph 4 of his judgment) that in applications by trustees for the court’s sanction of “particularly momentous” decisions, the questions for the Court will normally be as follows:
  - (1) Does the trustee have power to enter into the proposed transactions?
  - (2) Is the Court satisfied that the trustee has genuinely formed the view that the proposed transactions are in the interests of the trust and its beneficiaries?
  - (3) Is the Court satisfied that this is a view that a reasonable trustee could properly have arrived at?
  - (4) Has the trustee any conflict of interest, and if so, does the Court consider that the conflict prevents it from approving the trustee’s decision?
17. The case before the Chief Justice principally concerned criterion (3) and the “rationality standard”.



*A Trust (Kawaley J)*

18. Kawaley J in *In the Matter of A Trust* also considered the court's role in respect of applications by trustees for the blessing by the court of momentous decisions by trustees.
19. In that case the question was whether a proposed distribution plan was one which a reasonable trustee might decide to implement. At paragraph 3 of his judgment Kawaley J commented that the opponent to such plan "assumed a heavy burden in seeking to persuade the court that the final distribution proposal was in whole or in part an irrational one."
20. It was agreed that the critical legal question is in effect whether the proposed decision was one which a reasonable body of trustees properly instructed could properly have arrived at. Reference was made to the observation of Vos LJ in *Cotton v Brudenell-Bruce, Earl of Cardigan* [2014] EWCA Civ 1312 to the effect that the trustee must put the court in possession of all relevant facts so that it may be satisfied that the decision of the trustee is proper and for the benefit of the beneficiaries. Moreover, it must be demonstrated that the exercise of the trustee's discretion is untainted by any collateral purpose. The court will not approve a trustee's decision without a proper evidential basis for doing so. But the court should equally not deprive a trustee of approval without good reason. The court is not a rubber stamp and must be cautious to ensure that it is satisfied that the trustee is indeed justified in proceeding in accordance with its decision. But the court should not place insurmountable hurdles in the way of trustees who are placed in difficult positions. The court has a supervisory jurisdiction that needs to be exercised in appropriate circumstances. Vos LJ also explained that the need for caution in approving a trustee's momentous transaction needs to be placed in context, adding: "Caution cuts both ways."
21. Kawaley J also referred to judicial statements emphasising the importance of trustees seeking the blessing of the court making full and frank disclosure to the court.

*The Judge's Perspective*



22. In an extra-judicial statement made in a lecture I delivered at the International Trust Conference (15 September 2015 available at [www.courts.im](http://www.courts.im)) entitled *The Judge's Perspective [seeing trust issues through the eyes of the Deemster]* I also referred to the need for full disclosure stating: "It is ...important for the trustee to put the court in possession of all the relevant facts and documents." I note that O 85 r 7 (3) (d) of the Grand Court Rules ("GCR") provides that an application under section 48 shall be supported by an affidavit which shall "give a full and frank disclosure of all facts material to the application". In the lecture I stated that trustees should not dump the problem on the court's lap saying "There you are, you sort it out, we don't know what to do" and I added:

"The court is entitled to expect the fullest assistance from a professional trustee who should ensure that all relevant law is before the court and that all the arguments for and against the various possible courses of action are well rehearsed. The court will usually be assisted by the trustee recommending a particular course of action and explaining the reasons for its recommendation."

I also note that Order 85 rule 7 (c) of the GCR requires the affidavit in support to "define the question in respect of which the Court's opinion, advice or discretion is sought."

In the lecture I stated that:

"The courts are here as a service to facilitate rather than to obstruct lawful activities and business while also providing assistance by way of judicial intervention where necessary and appropriate. We are here to serve the local and international community."

I concluded the lecture by stating:

"So from the judge's point of view, especially in relation to applications by trustees for directions, all we want is for the applicant to provide us with all the



necessary information and assistance to enable the court to do justice ... As much as the court will endeavour to support trustees, the trustees must, along with all other associated parties, support the process of the court ... To ensure the legal process runs smoothly you must be well prepared with the relevant facts and documents as well as arguments for and against possible courses of action. If in preparing for court you endeavour to see legal issues from the point of view of the judge it will significantly help you to persuade the judge to grant the relief you are seeking.”

### **Textbook example – thanks to the Trustee and the attorneys**

23. I have to say that the case presently before me is a fine example of how trustees should go about applying to the court where assistance is necessary. The facts and the law have been properly put before the court as have the questions in issue. This is a textbook example of how to proceed properly in respect of such matters. The Trustee is clear in the decision it wants to make and has transparently set out the thinking behind and the reasons for such proposed decisions. The filing of the draft order is also of great assistance. I thank the Trustee and its attorneys for the very helpful way in which this matter has been presented to the court.

### **Determination**

24. I now turn to my determination of the Summons and the relief requested.
25. I am satisfied that all reasonable steps have been taken to notify the Unitholder of this hearing. In this respect I note the evidence contained in the second affirmation of Mok Cher Hwee dated 9 May 2022 and also paragraph 59 of the first affirmation. There has been no appearance by or on behalf of the Unitholder today. I do not think it is expedient for anyone else to be notified or for any further steps to be taken in respect of notification to the Unitholder. I note the termination provisions in the governing documents of the Trust.





26. The Trustee has the power to take the proposed steps but the Trustee recognises that those steps would be momentous in three respects:
- (1) they involve a very substantial write-off in respect of the Trust's sole asset;
  - (2) the Trust will ultimately come to an end; and
  - (3) such action would be unilateral.
27. On the evidence presented to the court there appears to be no better solution available, nor is there any reasonable prospect of it being available in the future.
28. The Trustee's proposed course of action has plainly been arrived at in good faith. It is one which a reasonable trustee properly informed and instructed could have reached and it is not tainted by any actual or potential conflict of interest. I accept that the payment to be received will in large part be applied to the payment of the Trustee's fees and expenses. It will also be applied in respect of the investment adviser's fee pro rata. Such fees having been incurred pursuant to the provisions of the Declaration of Trust. There will be no distribution to the Unitholder. In my judgment this does not taint the Trustee's proposed sensible decision. Indeed it would have been in the Trustee's own interests to pursue an increased return if there was a reasonable prospect of doing so but plainly there is not. The Trustee will in effect be out of pocket.
29. In summary, I am satisfied that:
- (1) the Trustee has the power to do what is proposed;
  - (2) the Trustee is acting in good faith and has genuinely formed the view that what it proposes is in the best interests of the Trust;
  - (3) a reasonable trustee could properly arrive at the proposals. The rationality test is plainly met; and

- (4) there is no conflict of interest. I accept that under the proposals the Trustee will receive payment for a proportion of its outstanding legitimate fees and expenses. Such does not, however, taint the appropriateness of the proposals and such does not prevent the court from approving the proposals.
30. Unitholders and beneficiaries do not always make life easy for trustees. If they fail to engage properly with trustees they must take the consequences. They only have themselves to blame if through lack of proper engagement further fees are incurred which, in accordance with well-established principles and the terms of the relevant trust deed, are paid out of the trust fund and effectively exhaust it so that nothing is left to distribute to them.
31. The Trustee has done its best to engage with the Unitholder and the Borrowers' liquidator and it is time to draw a line and to finalise matters rather than let them drag on indefinitely.
32. This is a proper case for the court to sanction the Trustee's proposed course of action and I have no hesitation in doing so.

### **Order**

33. I make an order substantially in terms of the draft helpfully filed in advance of today's hearing such order to incorporate the amendments I specified during my exchanges with counsel.

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**THE HON. JUSTICE DAVID DOYLE**  
**JUDGE OF THE GRAND COURT**