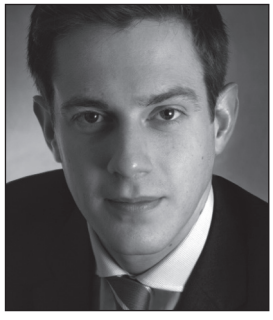
Review and inform

Harriet Atkinson and Robert Laird Craig discuss a case that emphasises the high standards the courts expect from trustees towards beneficiaries



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'The court highlighted that trustees often had to balance a portfolio between a life tenant and a remainderman.'

The recent case of *Jeffery v Gretton and Russell* [2011] examined the duty imposed on trustees by s4(2) Trustee Act 2000 to keep trust investments under review. Jeffery involved a will trust comprising a valuable but dilapidated property. The trustees decided to keep the property for almost six years while they undertook refurbishment works. They did not take professional advice on the merits of selling the property in its dilapidated condition and the repairs to the property significantly overran the trustees' original time estimates. The court found that the trustees had breached their duty to review regularly the trust portfolio by their decision to keep the property and renovate it themselves. The court described the appropriate method for determining compensation for the beneficiaries but found the beneficiaries had not suffered any material loss so no damages were payable.

The facts

Paula Beken (the deceased) executed her will on 30 September 1992 revoking an earlier will drawn up in 1986. The will appointed her son by her first marriage, Denis Gretton (Mr Gretton), and a friend of the deceased, Thomas Russell, (the defendants) as executors. Under the will the deceased's second husband, Keith Beken, received a life interest in her property, an unusual yet substantial, sea-front Grade II listed house in Cowes, Isle of Wight known as Townsend House. If Mr Beken occupied Townsend House during his lifetime, he was obliged to maintain, insure and pay the outgoings for the property. On Mr Beken's death the property passed to Mr Gretton and his two children, Anna-Marie Jeffery (the claimant) and Nicholas Gretton, in equal shares.

The deceased died in 2001. By a deed of variation dated 8 September 2002 Mr Beken's life interest was terminated and Townsend House vested in the three residuary beneficiaries. The trustees elected to pay inheritance tax on the property by instalments while the refurbishment was carried out. Mr Beken died on 9 February 2007 and Townsend House was sold for £885,000 in September 2008.

The claimant contended that the defendants concealed the deed of variation and she was kept in ignorance of her right to enforce her entitlement under the will. She claimed the defendants had agreed with Mr Beken that Townsend House would not be sold during his lifetime and had allowed Mr Beken to continue living in Townsend House until his death in 2007. Through their delay in selling the property the trustees had failed to discharge their duty to the beneficiaries. The trustees argued that the property was unlikely to sell for a good price until it had been refurbished and, as there was little money in the estate to pay for the repairs, it made good sense for Mr Gretton to undertake them himself, with the help of close family.

The claim

The claimant sought compensation for the financial loss suffered as a result of the trustees' breach of duty. In resolving the dispute the court was required to make various findings of fact. The claimant brought the case on a number of grounds, of which the following are relevant to this article:

- She was not told of the 2002 deed of variation. She claimed that this was

a deliberate act by the defendants to keep her ignorant of her entitlement to a share of Townsend House.

- It was wrong for the defendants to have allowed the house to be used by Mr Beken prior to his death. She claimed the motive for doing so was that Mr Gretton wished to acquire the house for himself and exclude her from benefit.

- The defendants were wrong in deciding to pay inheritance tax by instalments as this ensured that Townsend House would not be sold. Again, she claimed the motive was to allow Mr Gretton to acquire the property and prevent her from benefiting.

- Townsend House could have been sold after the will was varied in 2002, or commercially repaired and let between 2002 and 2008. Instead, she claimed, it was used for the benefit of Mr Gretton as a holiday home thereby depriving her of her one-third share of the net value of the property for that period.

The defendants asserted that:

- The claimant did know of the deed of variation, it having been discussed informally and her having agreed to it and that there was no reason for the proposal to be kept from her.

- Mr Beken did not continue to live in Townsend House but moved in with his son. It was only pending a sale of the property that Mr Gretton agreed to allow Mr Beken back in to visit the house and tidy the garden.

- Townsend House was an unusual and dilapidated property that was unlikely to sell until it had been refurbished. The works were undertaken by Mr Gretton at his own expense and this is why the refurbishment took as long as it did.

The court's findings of fact

On the evidence, the claimant knew about, and had agreed to, the deed of variation in 2002. There was no merit in the claim that Mr Gretton deliberately kept her in ignorance of her entitlement under the will and, in fact, the court found that Mr Gretton had kept her informed of decisions relating to the property.

The court agreed that Mr Beken had not lived at Townsend House. He merely visited periodically in order to 'look after the property and provide a degree of security' (para 62), but had never resided there. In addition, the court accepted that there had been no agreement between the defendants and Mr Beken (or the defendants and the residuary beneficiaries) that Townsend House would not be sold in his lifetime. The defendants had taken advice and understood that in executing the deed of variation it was necessary for Mr Beken not to live at the property to avoid a reservation of benefit in the property in his estate. The court did, however, find that after the deed of variation was executed Mr Gretton informally made the decision that the defendants would not sell the house out of 'friendship and kindness' to Mr Beken (para 65).

The court found that the claimant was entitled to assume that the trustees were taking professional advice and discharging their statutory obligations to keep their investments under review.

The decision

The court dismissed the claim and found in favour of the defendants. The defendants held the property not as executors but as trustees of land, with the powers and duties implied by law, save to the extent that these had been modified under the will. Under the terms of the will, the trustees held Townsend House on trust either to retain or sell it so they were not under a duty to sell (although they had power to do so). The court highlighted that trustees often had to balance a portfolio between a life tenant and a remainderman. However, in this case the trustees' only obligation had been to 'consider the portfolio, take reasonable care in assessing it, and to come to a view' (para 68).

Section 4(2) of the Trustee Act 2000 sets out the duty imposed on trustees:

> A trustee must from time to time review the investments of the trust and consider whether, having regard to the standard investment criteria, they should be varied.

The duty to review did apply to the defendants and the court found that each of the defendants had acted unreasonably and was guilty of breaching this duty:

- Mr Russell because (para 69):

> the lapse of time was such that he should have positively considered whether the initial plan to hold on to the property and have the work such as it was carried out by Mr and Mrs Gretton and family, at least once the one or two years that he contemplated the work taking passed.

- Mr Gretton because he had 'positively decided not to review or change the investment during Mr Beken's lifetime' (para 69) by informally agreeing with Mr Beken not to sell the property until after his death.

In setting out his decision, the judge, Mr Leslie Blohm QC, concluded, at para 72, that:

> a decision by trustees to carry out works on the scale carried out over a period of six years, without taking professional advice, was in breach of the duties owed by the trustees to the beneficiaries.

He commented that the trustees should have taken professional advice on the implications of their proposal to refurbish the property themselves thereby retaining it for what was going to be a very substantial length of time. As such, the trustees had not acted reasonably and were in breach of their duty to take a fair review of investments as required under s4(2) of the Trustee Act 2000.

The court considered whether the defendants should be relieved from the consequences of the breach

of trust by reason of operation of s61 Trustee Act 1925, which states:

> if it appears to the court that a trustee... is or may be personally liable for any breach of trust... but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the manner in which he committed such breach, then the court may relieve him either wholly or in part from his personal liability for the same.

While the defendants were not found to have been dishonest in their dealings with the property, the court did not think it was reasonable to have 'taken a punt on increasing property values' (para 76). Further, he commented that in ordinary cases of property being held by trustees it might be argued that an informal approach might be 'reasonable' (para 76), however in this case the property was unusual, valuable and significantly dilapidated. The work was not being carried out by professionals 'but intermittently by enthusiastic amateurs' (para 76). In the circumstances it was not reasonable for the trustees to act as they did and the court refused to allow the defendants to be relieved from liability under this provision from their breach of trust.

The refusal by the court to grant relief to the defendants under s61 of the Trustee Act 1925 shows anincreasing tendency by the courts to set a high benchmark for trustees in carrying out their duties to beneficiaries.

Overall, the court found that the claimant was entitled to assume that the trustees were taking professional advice and discharging their statutory obligations to keep their investments under review. The burden lay on her, however, to establish that a breach of trust has caused loss to the beneficiaries. The claimant had calculated the loss by combining lost income on the basis that the property was retained for letting up to May 2007. The judge found that this was not the correct basis for assessing her loss. Instead, her loss should be calculated by comparing the position arising, had a sale taken place in 2002, with the position arising on the actual sale in 2008. Using that calculation, it was found that neither the trust fund nor the claimant had suffered loss. The judge concluded, at para 84, that:

> The outcome of all of this is that there is no loss suffered by Mrs Jeffery as a result of the breach of trust that I have found. That is fortunate for the trustees, but it is fortuitous. This is not a case of judicious breach of trust; it is a case of a thoughtless breach of trust that happens to have turned out well.

Points for practitioners

While the trustees were not liable for any losses, the case applies a strict interpretation of the s4(2) duty. In concluding that Mr Russell breached his statutory duty to the beneficiaries by failing to assess the merits of selling Townsend House (without the obligation to sell the property following such a review) after one to two years of the deed of variation, there is a clear burden on trustees to show evidence that they had conducted a review at that point.

The refusal by the court to grant relief to the defendants under s61 of the Trustee Act 1925 shows an increasing tendency by the courts to set a high benchmark for trustees in carrying out their duties to beneficiaries. Trustees and practitioners should respond to this by ensuring that documentary evidence is kept to show that assets within a trust are reviewed regularly and that conclusions as to why they are retained or sold are properly recorded. In this case, events turned out well as the trustees benefitted from the property increasing in value over time. The outcome could have been very different, however, if the property had been retained in a period of volatility in the property market, as in recent years. ■

Jeffery v Gretton & anor [2011] *WTLR* 809