

Chapter 12

Challenging the Exercise of Powers by Trustees

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Introduction

The courts have traditionally been reluctant to interfere with the exercise of a power or discretion by trustees. Various reasons have been given for this. The discretion has been given to the trustee, and not to the court and it would be wrong to substitute the court's judgment for that of the trustee. Moreover, the finality of trustees' decisions is rightly regarded as having important practical significance – not just for the trustees themselves but also for everyone who has to deal with them. Where the power is properly characterised as a 'trust power', the court will interfere with a refusal or failure to exercise it and will ensure that it is actually exercised; but where the trustees have a discretion whether to exercise the power or not, the court will not compel them to exercise it:¹ the court will not intervene where there has been a conscious decision, taken in good faith, *not* to exercise the discretion.² In order to shore up these so-called fundamental principles, there is also an associated fundamental principle that trustees need not give reasons for their decisions. All of this is supposed to be elementary.

The core argument of this brief paper is that these principles are not absolute, as they are often made to appear, and, indeed, that they are too often expressed in misleading terms. It is accepted that a court will not allow a challenge to, or interfere with, the merits of a decision or judgment of a trustee. However, there is a fundamental difference between the decision-making process adopted in reaching that decision or judgment and the actual decision itself. The process must be conducted properly; and, if it is not, it may be challenged in court. Due process requires real and genuine consideration of factors relevant to the question under consideration and the exclusion of irrelevant

1 *Tempest v Lord Camoys* (1882) 21 Ch D 571, 578, 579, and 580. See also *National Trustees Executors and Agency Co of Australasia Ltd v Dwyer* (1940) 63 CLR 1. However, the court will ensure that a discretionary trust is carried into effect.

2 *Re Gulbenkian's Settlements* [1970] AC 508, 518; *Tempest v Lord Camoys*, *ibid*; *Re 90 Thornhill Road, Tolworth Surrey* [1970] Ch 261, 265; *Re Mays* [1943] Ch 302. This is in contrast to a failure to exercise the discretion at all: see, for example, *Turner v Turner* [1984] Ch 100; *Klug v Klug* [1918] 2 Ch 67; *Re Wells* (1889) 43 Ch D 281; *Wilson v Turner* (1883) 22 Ch D 521.

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