

An unknown known?

A note on *MCP Pension Trustees Ltd v Aon Pension Trustees Ltd* [2010] EWCA Civ 377

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A trustee is under a strict obligation to distribute the trust assets in accordance with the trust. In many cases this is simple, as where one person is entitled to the distribution. In other cases, as where the trust requires a distribution among a class comprising many persons, it can be complicated to ensure that each person in the class is identified and provided for. Winding up an occupational pension scheme is one example, another example is a trust to distribute to the grandchildren of a particular person. In each case the problem is to ensure that all the members of the class are identified; for if not, and the trustee overlooks a beneficiary, it will (in principle) be liable to compensate the overlooked beneficiary. One way to control this risk is by advertising, but this did not succeed in the *MCP* case, and in the Isle of Man may not be available in relation to trusts which do not relate to land.

In *MCP* the claimant was the trustee of a final salary occupational pension scheme (the “scheme”). The defendant provided administration services to the scheme. In about 1996 the trustee agreed to a transfer of 32 members from another scheme together with the relevant assets. By an error which the trustee contended was due to the negligence of the defendant, the 32 transferees were not recorded as being members of the scheme. The trustee wound up the scheme in 2003 without providing for the 32 transferees. It was accepted for the purposes of the hearing that the trustees had genuinely forgotten of the existence of these members. During the wind-up of the scheme the trustees undertook an extensive advertising campaign for claims in accordance with section 27 of the Trustee Act 1925 (the Isle of Man equivalent being section 26 of the Trustee Act 1961). None of the 32 transferees responded to the advertising. It was found on investigation that the trustee was personally liable to the 32 transferees, and it paid compensation to them. Fortunately the trustee had purchased insurance against this risk, which funded the compensation. The trustee acting at the behest of the insurers sued the defendant administrators of the scheme for negligence. The defendants denied liability. The preliminary issue for determination was whether by virtue of section 27 of the Trustee Act 1925 the trustee had had no liability to compensate the 32 transferees at all.

Section 27 (paraphrased) provides that:

With a view to the distribution among the persons entitled to any real or personal property, the trustees of a settlement, trustees of land or trustees for sale of personal property may give notice by advertisement of their intention to make such distribution and requiring any person interested to send to the trustees within the time fixed in the notice particulars of his claim in respect of the property.

(2) At the expiration of the time fixed by the notice the trustees may distribute the property to or among the persons entitled thereto, having regard only to the claims of which the trustees then had notice and shall not, as respects the property so distributed, be liable to any person of whose claim the trustees have not had notice at the time of distribution.

(3) This section applies notwithstanding anything to the contrary in the will or other instrument, if any, creating the trust.

The argument for the defendant administrators was that the trustee having, at the time of the distribution, forgotten about the 32 transferees, the trustee did not at that time have “notice” (within the meaning of section 27) of their claims, and having advertised in accordance with section 27(1) was by section 27(2) relieved of liability to the 32 transferees.

The Court of Appeal, upholding the decision of the High Court, decided that the trustee having once known of, and therefore having had actual notice (for the purposes of section 27) of, the claims of the 32 transferees, the fact that the trustee had forgotten about them did not mean that such actual notice ceased. Actual notice does not lapse with memory and in general will persist and remain notice at the time of distribution. Accordingly, section 27(2) did not relieve the trustee of liability. The Court considered that Parliament had not intended to give precedence to the protection of forgetful trustees over the interests of innocent beneficiaries; the purpose of section 27 is to allow trustees to distribute without risking proceedings from those whose interest they could not reasonably be expected to know about.

The judgments discussed the distinction between knowledge and notice, and the High Court and Court of Appeal decided that the case concerned notice, not knowledge, and that the two concepts are different. The issue of knowledge can arise where it is sought to make a person liable as a constructive trustee by reason of their conscience being affected by knowledge. But under the scheme a trust already existed, hence knowledge was not relevant. The doctrine of notice was developed in the context of conveyancing, and includes actual, constructive and imputed notice. A person may have actual notice of a fact, and yet not know it (for example, if he has been supplied in the course of a conveyancing transaction with a document and so have actual notice of its content, even though he may not have read it or, having read it, has forgotten it). Parliament used the word “notice” in section 27, not “knowledge”, and the case therefore turned on the

construction of that word in the context of section 27. Since the Court decided that the trustee had at the time of distribution actual notice of the claims of the 32 transferees, it was not necessary for it to decide whether “notice” in section 27 included the concepts of constructive or imputed notice, hence that issue remains open.

The case gives rise to two practical points. First is that for the purposes of section 27 actual notice does not in general lapse, therefore advertising will not protect a trustee against a claim of which it at any time had actual notice. Accordingly, where a distribution is intended but there may be doubt about the composition of the class of beneficiaries, the books and records relating to the trust should be carefully examined so that all potential claimants of whom the trustee has actual notice are identified. This may in turn give rise to other issues, such as the appropriate document retention policy.

Second, before it was amended by the Trusts of Land and Appointment of Trustees Act 1996, section 27 applied to “the trustees of a settlement or of a disposition on trust for sale”. The 1996 Act inserted the words “trustees for sale of personal property”. In the Isle of Man equivalent, section 26 of the Trustee Act 1961, a similar amendment has not been made. On the pre-1996 wording of section 27 the Court of Appeal commented (obiter) that section 27 having been applicable only to trustees of a disposition on a trust for sale and trustees of a settlement, which trusts were defined by reference to land and not personalty, there was a cogent argument that they would not include trusts of personalty (that is, broadly, property other than land). That may be the position in the Isle of Man; if so, trusts which do not own land would not be within section 26. Given that the opening words of section 26 are “with a view to the ... distribution among the persons entitled to any real *or personal* property”, there are cogent counter arguments, but the issue has never been determined in the Isle of Man.

There are several other ways to protect trustees who are distributing the trust fund; for example, an application to court for directions, or overlooked beneficiary insurance cover.

Contact Us:

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