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VARYING THE TERMS OF A TRUST – A NEW POWER FOR THE COURTS?

Leo Teng Choy v *Leo Teng Kit*[1]

MR Leo Ann Peng seems to have been a man with a very clear view as to how his family should live. He made a will in 1970 in which he left his eldest son $1 only. He left his only substantial property, a house at 42 Phillips Avenue, to be held on trust for his wife and his four other sons to reside therein free of rent, provided that each of the four sons paid a quarter of all the expenses. Clause 3 of the will directed that the property should not be sold unless and until unanimously agreed by the four sons, and in the event of sale, the proceeds should be distributed equally amongst the four sons. At the time he made the will Mr Leo, his wife and the four sons to whom the trust related lived at the property. One of these sons moved out of the house in 1980, well before the death of Mr Leo in 1989. The father, however, did not change his will despite the fact that the departure of one of his sons from the property clearly altered his original plans. The reasons for this are not known.

During the course of 1992 or thereabouts, two of the remaining sons and their mother, the testator's widow, moved out of the property, eventually leaving only one son, the defendant, and his family, in sole occupation. The mother came to leave the property because she was hospitalised after suffering a stroke and it would appear that after her discharge the defendant refused to take her back. Eventually the three plaintiff brothers, together with their mother, decided that the best course would be to sell the property and to distribute the proceeds equally between the four sons. In anticipation of this litigation, the mother swore a statutory declaration in which she confirmed that the defendant had a violent temper and a violent disposition towards his brothers and their families.

At first instance Lai Siu Chiu J ordered the property to be sold at a price of not less than $3.5 million and the proceeds divided equally between the four brothers. She held that the will created a trust for sale of the property

[1] [2000] 1 SLR 256.

and that clause 3 merely postponed the sale. The defendant appealed and the Court of Appeal accepted his submission that there was no trust for sale in this case. A trust for sale imposes a duty on the trustees to sell the land and not merely a power of sale. The fact that the sale may be postponed at the discretion of the trustees does not prevent a trust for sale from arising because there still is a duty ultimately to sell the trust property. In this case, however, the will did not impose on the trustees a duty to sell, but merely granted them a power to do so subject to the consent of the four brothers.

The Court of Appeal, however, dismissed the appeal on the basis that section 56 of the Trustees Act[2] gave the court a power to authorise a sale. The court should exercise its discretion under this section in favour of the plaintiffs, as the testator's intention was to treat his four sons evenly. His overriding consideration was not so much to prohibit the sale of the property as to ensure that his four sons should benefit equally from his estate.

Section 56 provides as follows:

> (1) Where in the management or administration of any property vested in trustees, any sale, lease, ... is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may –
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> (a) by order confer upon the trustees, ... the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit; and
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> (b) direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.

There is no denying that in ordering a sale the court achieved the only possible just result in this case. It would clearly have been monstrous to have allowed one son to have the sole benefit of the property when his father had wanted all four sons to enjoy the property equally, especially when there was evidence suggesting that that son had effectively driven the other members of the family out of the house so that he could have it for himself. Nevertheless, one is left with a vague feeling of disquiet at the way in which the testator's clear instructions were swept aside. In the present case a fair result was undoubtedly achieved. There is, however,

[2] Cap 337, 1999 Rev Ed.

the risk that in other cases the court's wide power to reconstruct trusts under section 56 may lead to less satisfactory results. One is reminded here of the old adage that hard cases make bad law.

There are many precedents for the application of section 56 and of the English section which is in *pari materia,* section 57 of the Trustee Act, 1925. As might be expected, however, the cases generally involve the approval of relatively technical matters. *Leo* v *Leo* seems to be unique in allowing the section to be used to set aside one of the principal purposes of the trust.

In *Anker-Petersen* v *Anker-Petersen*[3] Judge Paul Baker QC said,

> [The] manifest object (of section 57 of the English Trustee Act) was to enlarge the inherent administrative jurisdiction of the court which had hitherto been confined to cases of emergency ... It was widened so that it was no longer necessary to wait for an emergency. The court was empowered to authorise transactions which were, in its opinion, expedient.

In *Re New*[4] Romer LJ described the inherent jurisdiction of the court in the following terms:

> It is a matter of common knowledge that the jurisdiction we have been referring to, which is only part of the general administrative jurisdiction of the Court, has been constantly exercised, chiefly at chambers. Of course, the jurisdiction is one to be exercised with great caution, and the Court will take care not to strain its powers. It is impossible, and no attempt ought to be made, to state or define all the circumstances under which, or the extent to which, the Court will exercise the jurisdiction; but it need scarcely be said that *the Court will not be justified in sanctioning every act desired by trustees and beneficiaries merely because it may appear beneficial to the estate* ...[5] (emphasis added)

Two questions need to be addressed: did the court indeed have jurisdiction under section 56 and, if so, was it proper to exercise the discretion in the circumstances of the case? It is worthy of note that the section speaks of a "sale ... (being) expedient ... but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument". In fact, in *Leo* v *Leo* the trustees did indeed have a power to sell the trust property. The reason they could not exercise the power

3 (1998) 12 Tru L I 166, 171 (December 6, 1990).
4 [1901] 2 Ch 534.
5 *Ibid,* at 545.

was because the defendant refused his consent. It is odd to speak of the absence of a power when in fact the power exists, but the reason it cannot be exercised is because the requisite consents are unavailable.

In *Municipal and General Securities Co Ltd* v *Lloyds Bank Ltd*[6] authorisation was sought from the court under section 57 of the English Act for the sale of certain stock. Wynn-Parry J held that the court did not have jurisdiction to authorise the sale because the trust deed did in fact expressly confer on the trustees a power of sale in specified circumstances, although the particular power of sale sought in the case was absent.[7]

It should be said, however, that in other first instance judgments this objection to the existence of the jurisdiction has been overlooked. Thus in *Re Brassey's Settlement*[8] the trustees were empowered to invest money in shares of any "company ... in any British colony or dependency". The trustees wished to invest in companies in Canada. The court held that the description "British colony or dependency" in the investment clause did not include the Dominion of Canada, but it would confer on the trustees under section 57 an appropriate power to invest in companies in any British Dominion. Again in *Re Shipwrecked Fishermen & Mariners' Royal Benevolent Society Charity*[9] the charity had power to invest its funds in a limited range of investments and the court exercised its power under section 57 to confer on the charity power to invest in a wider range of investments.

In the *Municipal and General Securities* case Wynn-Parry J made some useful remarks on the exercise of the court's discretion under section 57. He said,

> It appears to me that there must be some limit to the scope of this section. It cannot be construed as having such wide import as would allow a complete re-writing of a trust deed or a substitution of a completely different object from that for which the trust was brought into being.
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> I find support in that view that there must be some limit to the scope of the section in the opening words, which are: "Where in the management or administration of any property vested in trustees. ..." If those words, "management or administration" are to have no significance, it would have been the easiest thing in the world for the section to have opened with the words: "Where any property is vested in trustees. ..."[10]

6 [1950] Ch 212.
7 See also *Re Pratt's Will Trusts* [1943] Ch 326.
8 [1955] 1 WLR 192.
9 [1959] Ch 220.
10 *Supra,* note 6, at 223.

It is submitted with respect that in *Leo* v *Leo* the court achieved a just result by altering the object of the trust. As Chao Hick Tin JA (delivering the judgment of the court) said,

> The plan of the testator, which was the basis upon which he wrote his Will, was that all the four sons and their wives (and children) should share the same roof in harmony. That was his basic premise.[11]

Given the need to extend the authorities on section 56 in order to do justice in the case at hand, it is perhaps unfortunate that the court did not base its decision on a narrow ground, namely, the conduct of the defendant.[12] In this connection the remarks of Dillon LJ in *Rafidain Bank* v *Saipem SpA,*[13] although made in a somewhat different context, are instructive.

> There is then the question whether the Court in its control over trusts has power to dispense with consents which are required by the trust instrument, but cannot be obtained. Plainly it has such power in relation to some transactions where a statute has expressly given the Court power to dispense with a consent which cannot be obtained; see for instance section 30 of the Law of Property Act 1925 ... Apart from that, however, the Court has for long had power to dispense with a consent which cannot be obtained if the consent is the consent of a person who is a trustee and the consent has been unreasonably withheld ... or the trustee is for improper motives refusing to exercise any discretion at all ... The Central Bank whose approval is here in question is not a trustee. If the Court has inherent power in trust matters to dispense with a consent which under the trust instrument is a condition precedent to the making of any payment to a particular beneficiary, and the person whose consent is in question is not a trustee, the Court could still, I apprehend, only do it if it was shown that that person's consent was being unreasonably withheld or that he was refusing to consider the question.

In fact the jurisdiction under section 56 was exercised in *Leo* v *Leo* on the wide ground that, although the testator wanted his family to live together, his overriding consideration was not so much to prohibit the sale of the property as to ensure that his four sons should benefit equally from his

[11] *Supra,* note 1, at 264.

[12] In fact the court expressly refused to determine the reasons why the four sons could no longer live together or to decide who was at fault: *ibid,* at 265.

[13] Unreported (2 March 1994).

estate. Therefore "the court in sanctioning the sale would not only not be acting contrary to the directions expressed in the will, but would, in fact, be carrying out the overriding intention of the testator."[14] In truth, however, it is impossible to say whether the testator attached more importance to his sons receiving an equal share of the property or to their living under the same roof. It is inconceivable that any modern parent in Singapore would want his sons to live for the rest of their lives under the same roof. Mr Leo Ann Peng came from a different generation and his views on life were formed in a different age. His will was written over thirty years ago and even at that time he was obviously not a young man. He clearly thought it was important for his extended family to live together and he may well have taken the view that if one of his sons did not want to live with the others, he should be prepared to fend for himself.[15]

It is submitted with respect that the approach to the construction of a testator's intention taken in *Leo* v *Leo* sets an unfortunate precedent. In any family trust it is possible to reduce the settlor's intention to its most basic element and to say that his overriding consideration was to benefit his family. On this basis any express limitations on the trustees' powers can be swept aside once it is found that they no longer benefit the family.

Suppose a testator leaves a house on trust for his sons and his unmarried sister with the proviso that his sister should be allowed to live rent free in the house for the rest of her life and that the trustees should not sell the house without her consent. After the testator's death the trustees come to the conclusion that substantial profits can be realised by selling the house for redevelopment. The sons agree, but their aunt does not. The sons argue that the proceeds of sale will be sufficient to enable them to buy flats for themselves and that their aunt's share will be sufficient to keep her in considerable comfort in an old age home for the rest of her life. However, the aunt says that her brother set up this arrangement precisely because he wanted her to spend the rest of her days with her family in the house she had lived in for most of her life. Had the sons sought legal advice prior to *Leo* v *Leo* they would probably have been told that there was nothing to be done about the matter so long as the sister was mentally competent and that they should try to live happily together. Now, however, the advice may well be that the courts do have the power to order a sale in such a situation, but given their reluctance to override the directions of the testator, they will probably do so only in extreme cases. Of course, the more acrimonious the family dispute becomes, the more difficult it will be for the parties

[14] *Supra,* note 1, at 265, *per* Chao Hick Tin JA.

[15] That may well explain why he did not alter his will in 1980 when one of the four sons left the house. Of course, this fact cannot be used as an aid in interpreting the will executed in 1970, as was pointed out in the judgment: *ibid.*

to continue living together and the more likely it will be that the courts can be prevailed upon to intervene. Family disputes over property are all too frequent. *Leo* v *Leo* serves to encourage litigation and also acts as an incentive to exacerbate the dispute. In practice, of course, few of these cases are actually likely to come before the courts. What is more likely to happen is that the aunt will be advised of the risk of the court ordering a sale despite the provisions of her brother's will and she may feel it wiser to settle on the best terms she can get.

This discussion inevitably raises the question how a testator can ensure that his wishes are honoured given the new power of the courts to override any limitations he may place on the trustees' powers. Different techniques are possible to achieve this result, but it will take some ingenuity – and increased expense for the testator – to find the appropriate method in any given case and there may well be cases where the testator will have to be advised that nothing can be done to prevent the court from extending the powers of the trustees. An example may be helpful. The court in *Leo* v *Leo* affirmed its earlier holding in *Rajabali Jumabhoy* v *Ameerali R Jumabhoy*[16] that section 56 cannot be invoked to sanction or authorise an act or transaction where there is an express prohibition against such act or transaction contained in the trust instrument. So a settlor who wishes to ensure that his trustees only invest in "ethical" investments should not provide a list of authorised investments in which the trustees can invest. Instead he should provide that the trustees can invest freely in investments of any description but then go on to lay down a list of prohibited "unethical" investments.

This technique will obviously not work in every case. In the case of the unmarried sister, it would be undesirable to have a total prohibition on sale. It will be necessary to use another method to ensure that the sister's power of veto is preserved. One possibility might be to give the sister some interest outside the terms of the trust. For example the sister might be given the right to occupy the house together with her nephews for her life, but in addition she might be given a lease for life[17] of her bedroom in the house. Provided that she does in fact have exclusive possession of this room, the lease would not be a sham and would effectively make the house unmarketable.

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16 [1998] 2 SLR 439.

17 This is still possible in Singapore. An alternative would be a 99 year lease determinable on earlier death.

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