

# The long and winding trust

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EXAMINE WHAT CONSTITUTES SUFFICIENT  
CONSIDERATION OF DISCRETIONARY BENEFICIARIES'  
INTERESTS BASED ON A RECENT BAHAMIAN SUPREME  
COURT DECISION

In *Ashley Dawson-Damer v Grampian Trust Company Limited & Lyndhurst Limited* (the Action),<sup>1</sup> Dawson-Damer (the Plaintiff), a discretionary beneficiary of a Bahamian trust, challenged appointments made in 2006 and 2009 on the basis that the trustee made the said appointments without sufficiently considering the Plaintiff's needs, circumstances and interests. The relief sought by the Plaintiff was not a claim for damages but rather the setting aside of the two aforementioned appointments and for the removal of the trustee.

## BACKGROUND

The trust was established by the will of a wealthy Scottish businessman (the Settlor) who settled and died in Australia in 1917. The trust was intended to support and maintain the Settlor's lineage. The Settlor's only daughter had one son, and the Settlor's grandson had two children, George (born 1938) and John (born 1940). John and the Plaintiff were married in 1982 and have two adopted children. John died in 2000.

The trust assets were resettled onto a new settlement in 1973 (the 1973 Settlement) and the class of beneficiaries included George, John, their spouses (including the Plaintiff), their children and remoter issue, save that adopted children were not included. The result of this was that John's adopted children and their descendants were not beneficiaries under the 1973 Settlement.

The 1973 Settlement was restructured in 1992, whereby the trustee of the 1973 Settlement transferred trust assets absolutely to a corporate beneficiary that would be restricted by the terms of its constitution in making gifts or setting up trusts for the benefit of members of the family. Subsequently, the Glenfinnan Trust, which is the subject of the Action, was settled in 1992 along with three other settlements. The Glenfinnan Trust was settled for the benefit of the beneficiaries under the 1973 Settlement.

In 2006, three new trusts were settled for three of George's children and their respective families, leaving 40 per cent of the trust assets in the Glenfinnan Trust. Thereafter, George and his wife were excluded as beneficiaries of the Glenfinnan Trust. In 2009, 95 per cent of the Glenfinnan Trust was transferred to a new Bermudian trust for the benefit of George's children and remoter issue.

The Plaintiff later became aware of the 2006 and 2009 appointments and commenced the Action by writ of summons on 20 March 2015 to challenge the aforementioned appointments and for removal of the trustee.

## ISSUES

The Action considered, in its narrowest sense, whether the trustee acted in breach of trust when making the 2006 and 2009 appointments. Specifically, the Supreme Court of the Bahamas (the Court) considered:

- the Settlor's wishes or intentions for the Glenfinnan Trust;
- whether the trustee treated the Plaintiff fairly and acted honestly and in good faith when making the 2006 and 2009 appointments; and
- whether the trustee's deliberations when making the 2006 and 2009 appointments were adequate and, in the event they were not, might it have made a difference to the trustee's decisions in 2006 and 2009.

## JUDGMENT AND ANALYSIS

The Hon Justice Ian Winder handed down his judgment in January 2022. Winder J found that the Settlor's intention for the Glenfinnan Trust was for it to be a long-term accumulating trust primarily for the benefit of next-generation beneficiaries,<sup>2</sup> and considered the wishes of a settlor to be an important element in the exercise of a trustee's discretionary power under a trust.<sup>3</sup>

Winder J then considered the trustee's steps taken when exercising its discretion relative to the 2006 and 2009 appointments. He found that the trustee did not properly take into account the Plaintiff's financial circumstances and weigh them against the needs of the beneficiaries in whose favour the two appointments in 2006 and 2009 were made,<sup>4</sup> but did not hold that there was a requirement for consultation with beneficiaries prior to the trustee's exercise of its discretion.<sup>5</sup>

However, when considering the Plaintiff's wealth, stable circumstances, age and the primary purpose of the trust being for the next generation, Winder J found that it could not be said that the trustee or any reasonable trustee would not have made the appointments even if it had given adequate deliberation to the Plaintiff's circumstances.<sup>6</sup> Accordingly, the inadequate deliberation did not amount to a breach of trust that would warrant a setting aside of the appointments or removal of the trustee.

The Action is undoubtedly one of the largest trust cases to have been argued in the Bahamas when considering the volume of documents before the Court, the length of the trial and the comprehensiveness of the legal submissions provided by the parties.

#BAHAMAS

#CONTENTIOUS TRUSTS AND ESTATES

#TRUSTS

1 2015/CLE/gen/00341 2 para.69 3 para.61 4 para.94  
5 para.95 6 See paras.104, 105, 114 and 116



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