Best and better

Xenia Frostick of Speechly Bircham argues that 'acting in the best interests of the beneficiaries' is widely misunderstood

It is hardly possible to look at a guide to trusteeship (whether it be a pension scheme, a charity or any other trust) without discovering that the trustees have a 'duty to act in the best interest of the beneficiaries'. Even if you had never studied trust law, such a duty sounds intuitively right. In point of fact, no such duty exists.

If it did exist it would impose a straitjacket on trustees that would make it extremely difficult for them to act properly. Do we really mean a *duty* (not a discretion) to *act in* (not just consider) the *best* interest (not just the interest) of the *beneficiaries* (and not anyone else like the settlor)?

Trust law, recognising how restrictive this would be, never created such a duty. The term is referred to in a number of cases (starting with *Cowan v Scargill [1984]* 2 All ER 750). However, none of these cases actually create a new duty. They all use the phrase rather like a rapper or a trendy sound-bite and then go on to analyse the law in an impeccably traditional way.

Take *Cowan v Scargill*. This concerned the trustees' duty to invest. Here the judge did not refer to a trustee's duty to 'act' but rather to 'exercise their powers' in the best interest of the beneficiaries 'holding the scales impartially between different classes of beneficiaries'.

This was important because one reason for the dispute was that the union trustees wanted to boycott investments in overseas coal mining companies to protect the jobs of the UK miners. Here the analysis is based on the traditional rule that trustees must act even-handedly between the beneficiaries.

Next is the analysis of 'best interests', only this term isn't used in *Cowan v Scargill* which prefers to refer to 'benefits'. However, it fails to come up with an adequate definition. Indeed, that is a major problem with the case if it is supposed to have created a new duty. It does not define the duty, set out a test for it, nor say how it is to be applied.

However, the phrase is mentioned in more cases than just *Cowan v Scargill*. Do any of these cases develop and explain the rule? Not so far as I can see. There is *Martin v City of Edinburgh District Council [1989]* 1 PLR 9 which uses the phrase and then analyses the case in terms of a traditional fraud on a power.

Before going any further, I should say that this is not common-law (hand in the till) type fraud. It means using a power for an improper purpose. It is referred to as a fraud because its misuse defrauds those who would be entitled in default. All powers must say who will receive the money or assets if the power isn't exercised.

It is time to remember the trust law was traditionally a pragmatic and flexible law. The trustees' duty is to safeguard the position of the beneficiaries

The important conclusion to draw from these cases is that the old trust law rules still apply. So far there has been no new duty developed. However, the belief that such a duty exists is beginning to hamper trustees. They are not free to manage their trusts as well as they would like.

Take the trustees of a pension scheme struggling to balance the members' rights against the funding of the scheme and the solvency of the employer. In the long term it's in no-one's interests if the employer of an under-funded scheme is driven to insolvency. But have the trustees got any choice if they only act in the best interests of the beneficiaries?

Official sanction?

Unfortunately, the phrase has already found its way into official publications such as the *Guide for Pension Scheme Trustees* published by OPRA (the Occupational Pensions Regulatory Authority). If we continue to use it we will give it a prominence denied by the courts – and before long it will lead to a claim.

If that happens, we can only hope the courts will be as sensible as they were in *Pikos Holdings (Northern Territory) Pty Ltd v Territory Homes Pty Ltd*. The decision is unreported but is discussed in *Trust Law International* Vol 12 No. 1 1998. In this case the trustees wanted to avoid the onerous and expensive task of calling a meeting of unit holders. They alleged it was in the members' financial interests to breach the rule which required this. The court held that there was no duty (not even the alleged duty to act in the best interests of the beneficiaries) which overrode the trustees' obligation to act in accordance with their trust deed and rules.

It is time to remember the trust law was traditionally a pragmatic and flexible law. The trustees' duty is to safeguard the position of the beneficiaries. They must not squander the scheme assets or run the scheme inefficiently or for an improper purpose. They do have the flexibility to reach agreements that will allow their scheme to survive in turbulent times. Safeguard the position of the beneficiaries by all means, but please do not burden trustees with the duty to act in the beneficiaries' best interests. J

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