

## TRUST LAW

# The trustees' self-dealing rule is less strict than you might think

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## Anthony Grant

One of the fundamental rules in the law of trusts is that a trustee must not self-benefit.

The rule has always seemed to me to be too harsh. If a trustee is willing to pay a better price than anyone else for a trust asset, why should the beneficiary not get the better price?

In fact, the rule is not as strict as is commonly understood.

A self-dealing transaction can be approved by the court in various circumstances – for example, if there is an independent valuation of at trust asset, and the valuation is approved by the court.

When approving a sale to a trustee, the Court of Appeal in England has said it is entitled to take into account a wider range of matters than the trustees can, meaning a court may reach a decision that is not available to the trustees on the material available to it.

The court then directs the trustees what to do. They cannot be in breach of a duty in selling at the direction of the court.

Powell J has recently delivered a decision on this topic in which a trustee was authorised to buy a trust asset (it's a business) at a particular price.

In doing so, Powell J has referred to three English cases. The first was *Mills v Mills* [2015] EWHC 1522 (Ch) where it was held that a court has a discretion to authorise a self-dealing transaction both prospectively and retrospectively, after evaluating the transaction on its merits.

The second was *Brown v Brown* [2019] EWHC 138 (Ch) where an independent valuation was obtained and the price the trustee was willing to pay was above market value.

The third case was *Chaston v Chaston* [2018] EWHC 1672 (Ch) where the High Court dismissed an appeal by a beneficiary who argued that the property in question should be



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placed on the open market as opposed to being sold at a price determined by a valuation exercise.

In the case Powell J has decided, the only affected person consented to the sale, subject to his approval of the agreement for sale and purchase.

At the time of writing this article, Justice Powell's decision is not available for public distribution.

His decision is sensible and is in the best interests of trustees and beneficiaries.

## Restraint removed

There has been another significant High Court case involving an application to approve the sale of real estate in a falling market.

Section 133 of the Trusts Act say a trustee "may apply for directions about ... the performance of any function by the trustee." Section 133 is a statutory re-enactment of s 66 of the Trustee Act 1956, albeit in a somewhat different form.

The restraints the courts had imposed on the use of that section were substantially removed by Justice Kós in *NZ Māori Council v Foulkes* [2014] NZHC 1777, 29 July 2014 where he held that the simple authorisation in s 66 had "become engrafted with a body of qualifying case law" which was in danger of depriving trustees of the statutory right to seek directions from the court.

It is interesting to see how two judges have recently approached a request to allow the sale of a trust real estate asset in a declining property market.

The first case is *In the Estate of JD Moleta* [2022] NZHC 1763, 21 July 2022. A trustee asked the court to sanction the sale of a property "for the best price offered" after the "conclusion of

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an appropriate advertising campaign".

In March this year, the trustee had received a conditional offer to buy the property for \$865,000. On the same day, the Auckland Council issued a CV for the property, giving its value at \$1.8 million.

A week later a respected firm of valuers assessed the market value of the property at between \$1.15m and \$1.3m. Real estate agents were instructed to seek further offers and the best they could get was \$870,000.

In the following month, the valuers advised that a "realistic sale price as at May 2022" would be between \$1m and \$1.15m but that any offer of more than \$1m "should be considered carefully". The valuers said the CV of \$1.8m was "completely unrealistic".

Peters J refused to approve the sale, saying "the order proposed is 'open ended' in the sense that it would authorise the applicant to sell the ... property for any price, no matter how modest, provided that it was the best offered after a marketing campaign (of which no specifics have been advised)." [25]

The disappointed trustee may find some assistance from the recent decision of Justice Powell described earlier in this column. That case was concerned with two sales: the sale of a business as a going concern and the sale of some real estate.

In the case over which Powell J presided, the trustees described their proposed process for the sale of the real estate as involving the following actions:

- Three appropriately qualified agents would be approached to give an appraisal and a proposal, including commission, a recommended sale process, marketing and timeframe;
- The trustees' consultant would then choose the agent he considered represented the best value and the best prospect for securing the highest attainable price for the land and buildings and he would follow the sale process the agent recommended; and
- The consultant would commission new valuations for the land and buildings and would be guided by the valuations in setting price expectations for them.

Justice Powell said he was "satisfied that the proposed process for the sale of the land and buildings is appropriate". He nevertheless directed that "in the event [that] the sale process for the sale of the land and buildings materially diverges from the process outlined by [the trustees' consultant] the executors must seek approval of that alternative process".

Powell J's approach has the benefit of providing ongoing assistance to a trustee. Kós J described the purpose of s 66 as being the resolution of "any uncertainty as to the exercise of a power" and it is desirable that the court should be able to provide constructive assistance to trustees.

As things stand, the trustee in the *Moleta* case is left with considerable uncertainty about his options. Such uncertainty is undesirable and the trustee in that case may want to propose a more detailed plan of sale of the type Powell J has approved. ■

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