ANALYSIS

Appointment of Judicial Trustee

At first glance, *Leong Fook-ho v Leong Fook-kong*,[1] a recent decision of the Hong Kong Court of Appeal, is just another example of the appointment of a judicial trustee under s 63 of the Trustee Ordinance.[2] On closer examination, however, the decision is of considerable importance, as it demonstrates the potency of s 63 in removing recalcitrant trustees, as well as the need to review the relevant statutory provisions concerning the appointment of trustees.

The facts

Under a deed of family arrangement, the estate of a deceased mother was held by the father upon trust for himself for life, thereafter for all six children of the marriage. On the death of the trustee-father he left all his property by will to only one of the children, the defendant. The father also appointed this son the sole executor of his will. The father died in 1992 and the defendant had not obtained probate of the will. In 1994, the other four children applied to the court seeking, inter alia, a declaration that the mother's estate was trust property under the deed of family arrangement and an order for the appointment of a judicial trustee to replace the defendant. Barnett J at first instance granted the declaration but refused to appoint a judicial trustee. His reason was that, as the defendant was entitled to appoint new trustees under s 37 of the Trustee Ordinance, and he had not shown himself unsuitable to exercise that power, the court should wait and see whether he exercised it. If he did not, Barnett J contemplated that the plaintiffs could then apply to the court for his removal and the appointment of a suitable person in his stead. The plaintiffs appealed against Barnett J's refusal to appoint a judicial trustee.

The Court of Appeal decision

The Court of Appeal allowed the appeal and gave an order for the appointment of a judicial trustee. Bokhary JA, delivering the unanimous judgment of the court, gave two reasons for the appointment: first, where it was highly probable that only judicial intervention at once could save the parties from further costly litigation, the court would not adopt a 'wait and see approach' and would exercise its power under s 63. In the present case, the defendant had not

1 [1995] 1 HKC 142, [1995] 2 HKLR 42.

2 s 63, Trustee Ordinance 1925. Section 63 (1) reads as follows: 'Where application is made to the court by or on behalf of the person creating or intending to create a trust, or by or on behalf of a trustee or beneficiary, the court may, in its discretion, appoint a person (in this Part called a judicial trustee) to be a trustee of that trust, either jointly with any other person or as sole trustee, and, if sufficient cause is shown, in place of all or any existing trustee.' In Hong Kong, s 63 is the only statutory avenue where a recalcitrant personal representative can be removed. However, in England, the court has power to remove personal representatives under s 50(1) of the Administration of Justice Act 1985.

obtained probate of the father's will. According to Bokhary JA, things would remain in a limbo unless the defendant started a probate action; and yet if he did, the plaintiffs would certainly contest the will and judicial intervention under s 63 would be necessary anyway. Hence the court held that a judicial trustee should be appointed without waiting for the defendant to obtain probate.

Second, Bokhary JA held that the existence of a personal representative's power of appointment under s 37 of the Trustee Ordinance did not oust the court's power under s 63. The court held that, if it had good reason seriously to doubt that the personal representative would exercise his power of appointment under s 37 in conformity with his duty to the beneficiaries, it would intervene under s 63 to replace him with a judicial trustee.

Rejection of the wait and see approach

It is remarkable that the court decided that a judicial trustee should be appointed even *before* the grant of probate. Under existing practice, before probate has been granted the court would interfere in appropriate cases by appointing a receiver,[3] whereas after probate has been granted the relief usually sought is the appointment of a judicial trustee.[4]

However, receivers are usually appointed as a temporary expedient to preserve property pending the grant of probate, not as permanent substitution for the ordinary trustees.[5] In *Leong*, where the beneficial entitlements were already determined, and a permanent trustee was very likely to be appointed anyway, it seemed sensible for the court to take the convenient step of appointing a judicial trustee right from the beginning.

Besides, s 63 of the Trustee Ordinance does not expressly exclude such an appointment. On the contrary, it may have impliedly authorised it, in that by allowing an application to be made by someone who is 'intending to create a trust,' s 63(1) does not require the relevant trust to have been effectively set up. And 'trust' under this ordinance includes the administration of an estate.[6]

Moreover, the chief reason for the appointment, namely to save the parties from further costly litigation, accords with the well-recognised purpose of s 63. As stated by Jenkins J in *Re Ridsdel*, it 'was to provide a middle course in cases where the administration of the estate by the ordinary trustees had broken down and it was not desired to put the estate to the expense of a full

3 *Steer v Steer* (1864) 2 Dr & Sm 311; *Nothard v Proctor* (1875) 1 Ch D 4; *Blackett v Blackett* (1871) 24 LT 276; Williams, Mortimer, and Sunnucks, *Executors, Administrators and Probate* (London: Sweet & Maxwell, 1993), p 846.

4 s 63, Trustee Ordinance.

5 Snell's *Principles of Equity* (London: Sweet & Maxwell, 29th ed 1990), pp 689–92. Although the court has power to displace executors by appointing a receiver (*Middleton v Dodswell* (1806) 13 Ves 266; *Barkley v Lord Reay* (1843) 2 Hare 306; *Anon* (1806) 12 Ves 4; *Bainbridge v Blair* (1835) 4 LJ Ch 207), the modern practice is to appoint a judicial trustee of a substitute personal representative. See Snell (note 5 above), p 696.

6 s 63(2), Trustee Ordinance.

HeinOnline -- 27 Hong Kong L.J. 132 1997

administration.'[7] More recently, in *McDonald v Horn*, where the plaintiff-employees of an occupational pension trust had limited means to pursue a claim for breach of trust, Hoffmann LJ noted that the appointment of an independent judicial trustee with power to investigate the alleged breach was the most economical alternative to a full-scale trial.[8]

The existence of a power of appointment under s 37

Until *Leong*, there has not been a decision which clarifies the relationship between s 37 and s 63. In particular, where someone is entitled under s 37 to appoint trustees, and is able and willing to act, will the court decline to appoint under s 63? Professor Hayton took the view that it would not.[9] He referred to *Douglas v Boham*[10] in support. However, on closer examination, this decision does not support his proposition. The settlement in *Douglas v Boham* provided that the plaintiff, the tenant for life, could 'exercise any statutory power of appointing a new trustee.' The plaintiff applied under s 1(1) of the Judicial Trustees Act, which is equivalent to s 63(1) of the Trustee Ordinance, for the appointment of a Mr Brewis as judicial trustee, but the trial judge appointed another person instead. The plaintiff argued that, under s 1(3) of the Judicial Trustees Act, if the court was not satisfied with the person nominated by the applicant it should appoint an official trustee. The court held that it was not so restricted. It should be noted that the statutory power enjoyed by the plaintiff in *Douglas v Boham* was equivalent to s 63(1), not s 37. Section 63(1) only grants a very limited 'power' to certain individuals to make an application[11] and to nominate someone to the court to be appointed;[12] whereas s 37 grants power to certain individuals to appoint new trustees themselves. Hence, even though *Douglas v Boham* held that the court would not defer to the plaintiff's statutory power under s 63(1), it sheds no light on what may be the case if the wider power in s 37 is concerned.

In the absence of any prior authorities on the point, *Leong Fook-ho* provides the first judicial confirmation of Professor Hayton's proposition. The court held that the presence of a person entitled under s 37 was only one factor in the

7 [1947] 1 Ch 597, 605. In *Re Ridsdel* it was held that a judicial trustee was entitled to rely on the power to compromise under s 15 of the Trustee Act 1925 without first seeking the court's direction, so that the administration by the judicial trustee would not be reduced to the same position as where the estate was administered by the court.

8 [1995] 1 All ER 961, 975. The judicial trustee was appointed by Vinelott J: The Times, 12 October 1993. The appointment was not contested at the Court of Appeal. The appointment of a judicial trustee in *Re Diplock, Diplock, Diplock v Winter* [1948] Ch 465 (CA), affd *sub nom Chichester Diocesan Fund v Simpson* [1951] AC 251 also appeared to be based on the reason of cost-efficiency. See Underhill & Hayton, *Law Relating to Trusts and Trustee* (London: Butterworths, 15th ed 1995), p 765. See also *Re Wells* [1967] 3 All ER 908 and *Re Martin* [1900] WN 109. In both cases an application to appoint a judicial trustee was rejected because, inter alia, it would add to the cost of the administration of the estate.

9 Underhill & Hayton (note 8 above), p 729, n 18.

10 [1900] 2 Ch 749.

11 s 63(1), Trustee Ordinance.

12 s 63(3), ibid.

HeinOnline -- 27 Hong Kong L.J. 133 1997

exercise of the discretion under s 63. It then emphasised that the personal representative's statutory power under s 37 was subject to an overriding duty to act in the interests of the beneficiaries. If there was good reason seriously to doubt that this duty was complied with, the court would intervene under s 63. In the present case, the court held that it should intervene because there was a serious doubt that the defendant had mixed up trust money with his own, withheld material information, and failed to render proper accounts.

Central to the court's reasoning is the proposition that the personal representative's power under s 37 is subject to an overriding duty to act in the interests of the beneficiaries. This proposition, though novel, can be justified in terms of both principle and authority. In terms of principle, it may be argued against this proposition that the wording of s 37 contains no such limitation. It may also be said that the rationale of s 37 is that, by giving priority to those who are in a better position to choose their successors, a smooth succession of trustees is ensured so as to render unnecessary judicial intervention under s 63 or s 42.[13] However, these reasons at most call for caution in overriding the wishes of the trustees. They cannot justify deferring to those wishes, no matter how detrimental they are to the interests of the beneficiaries. Besides, whatever power a trustee holds under s 37, he holds it as a fiduciary, and should therefore be subject to the overriding fiduciary duty to exercise it in the interests of the beneficiaries.[14]

Moreover, the qualification of statutory powers of appointment is not new. Article 13 of the Trusts (Jersey) Law, which gives power to the existing trustee to appoint a new or additional trustee, also allows the court to remove a trustee who fails to exercise this power.[15] It is submitted, therefore, that the limitation imposed by *Leong* upon the statutory power of appointment under s 37 is justified.

In terms of authorities, it is admitted that the decision in *Leong* contrasts greatly with the court's exercise of its power to appoint private trustees under s 42 of the Trustee Ordinance. A considerable number of authorities have established that the court would not intervene under s 42 if someone had power to appoint under s 37 and was able and willing to act.[16] The cases had not further

13 The ranking of the people or institutions entitled to appoint is: (1) the person nominated in the trust instrument to appoint new trustees; (2) the surviving or continuing trustee or trustee for the time being; (3) the personal representatives of the last surviving or continuing trustee; (4) the court. See Parker & Mellows, *The Modern Law of Trusts* (London: Sweet & Maxwell, 6th ed 1994), pp 367–8.

14 If a person is entitled under s 37 qua someone who is nominated in the trust instrument to appoint new trustees, and this person is not a trustee, it is submitted that he should not be subject to any overriding duty.

15 Trusts (Jersey) Law, 1984. See Matthews and Snowden, *The Jersey Law of Trusts* (London: Key Haven Publications Plc, 3rd ed 1993), pp 101–2.

16 *Re Higginbottom* [1892] 3 Ch 132; *Re Hodson's Settlement* (1851) 9 Hare 118; *Re Gibbon's Trusts* (1882) 30 WR 287, 45 LT 756; *Re Sutton* (1885) 28 Ch D 464; *Re Gadd* (1883) 23 Ch D 134; *Re Sales* (1911) 55 SJ 838. The only exception to this strong line of authorities is *Middleton v Reay* (1849) 7 Hare 106, where the court held that the power of appointment was only one circumstance to be considered in the exercise of s 41. In this case, the court did not appoint the person nominated by the donee of the power of appointment because he failed to act in time.

HeinOnline -- 27 Hong Kong L.J. 134 1997

required that the power be exercised in the interests of the beneficiaries. The only, and ultimate, sanction lies in the court's power to remove trustees in breach.[17] Once removed, recalcitrant trustees will lose their power under s 37. However, the judicial power to remove trustees in breach is rather narrow. The breach 'must be such as to endanger the trust property or to show a want of honesty.'[18] Failure in exercising s 37 has never been held to warrant removal. Perhaps a better approach is to apply the limitation in *Leong* equally where s 42 is concerned, unless the difference between these two sections warrants separate treatment. The major difference is that private trustees are appointed under s 42 and judicial trustees under s 63. Yet this relates to the nature of the person to be appointed, and should not be relevant to the issue at stake, that is, whether to override the wishes of the existing trustee.[19]

Surely, even if we adopt a streamlined approach to both s 42 and s 63 - that the court should appoint trustees under both sections if there is a serious doubt that an existing trustee has failed to comply with his overriding duty under s 37 - the most difficult question will be when such a doubt exists. The answer awaits future judicial development. Nonetheless, *Leong* has provided a workable guideline.

Of course, that the trustees have failed to comply with their duty under s 37 is but one factor in the exercise of the respective discretions. The court will also take into account, under s 63, the wishes of the settlor[20] and beneficiaries,[21] the proper and economical execution of the trust, as well as the legitimacy and seriousness of the complaints levelled against the trustee.[22] *Leong Fook-ho* supplements this picture by providing an example where the wishes of the settlor will be ignored if there is serious doubt that the trustee has mixed trust money with his own, withheld material information, and failed to render proper accounts. The court did not find it necessary to establish whether the breaches were dishonestly committed.

Significantly, even where the court decides not to appoint a judicial trustee it may appoint a private trustee instead. This is because the two statutory

17 *Re Henderson, Henderson v Henderson* [1940] Ch 764.

18 *Letterstedt v Broers* (1884) 9 App Cas 371 at 386. See also *Re Wrightson* [1908] 1 Ch 789.

19 Of course, if s 42 is invoked to appoint a private trustee to act jointly with the existing trustee, there is a greater need to respect the wishes of the existing trustee. Even so, his wishes should be only one factor in the exercise of the discretion. The court would also take into account the wishes of the settlor, the interest of the beneficiaries, and the effective execution of the trust: *Re Tempest* (1866) 1 Ch App 485.

20 *Re Ratcliffe* [1898] 2 Ch 352, 355 (Kekewich J decided not to appoint a judicial trustee because the settlor did intend the sole executrix to have control of the estate).

21 *Re Martin's Trust* (1887) 34 Ch 618 (all the beneficiaries except the applicant were opposed to the appointment of the judicial trustee); *Re Chisolm* (1898) 43 Sol Jo 43 (North J queried, rhetorically, what right the applicants had a mortgagee of only one-fifth of the reversion to ask for an appointment).

22 *Re Ratcliffe* (note 20 above). (Kekewich J thought that it was not serious enough to complain that old age precluded the executrix from attending the estate and that she was averse to any change being made in the existing insecure investments.)

HeinOnline -- 27 Hong Kong L.J. 135 1997

discretions perform different functions. Section 63 is useful where full administration by the court is appropriate but, to save expenses on the trust, the court decides to appoint someone to work under its close supervision. On the other hand, s 42 is a back-up power given to the court to ensure the continuity of trustees. The range of its application is naturally wider. In *Re Ratcliffe*, where Kekewich J decided not to appoint a judicial trustee, he nonetheless gave an order for appointing an ordinary trustee so that someone would act jointly with the sole executrix.[23] He took the same view in *Re Martin*, where there was a sole trustee.[24]

Conclusion

Leong Fook-ho is important for several reasons. It shows how s 63 of the Trustee Ordinance can be used to replace a recalcitrant personal representative. It is the first judicial pronouncement on the limits to the power of appointment under s 37. It also bears wider significance for other judicial powers of appointment like s 42 of the Trustee Ordinance. Finally, it reveals the inadequacies of the existing provisions concerning the appointment of trustees. In England, the relevant provisions have recently been amended to give more power to the beneficiaries to appoint new trustees.[25] *Leong* is a similar step in the same direction, in that, by being more ready to appoint replacement trustees in place of those who are likely to abuse the statutory power of appointment under s 37, the beneficiaries' interests are better protected. Nonetheless, in the long run, a systematic overhaul by the legislature is needed.

*Lusina Ho**

The Continuity of Laws and Legal Rights and Obligations in the SAR

Introduction

In this paper I examine arrangements in the Basic Law for the continuity of laws and rights and obligations, including the Decision of the Standing Committee of the National People's Congress (NPCSC) under Article 160. These issues need careful consideration when there is a change of sovereignty to ensure certainty and clarity in the new legal regime and that vested rights are

23 Note 20 above, p 357.
24 Note 21 above.
25 Sections 19 and 20 of the Trusts of Land and Appointment of Trustees Act 1996 allow beneficiaries who are of full age and capacity, and (taken together) are absolutely entitled to the trust property, to require the trustee to retire from the trust or to nominate a new trustee.

* Assistant Professor, Department of Law, University of Hong Kong.

HeinOnline -- 27 Hong Kong L.J. 136 1997