

Retirement from Trusteeship - Express and Statutory Powers:
Chan Yun Cheong (trustee of the will of the testator) v Chan Chi Cheong (trustee of the will of the testator) [2021] SGCA 33

I. Executive Summary

This case involved two trustees of a testamentary trust,¹ both of whom alleged that they had resigned as trustees. Trusteeship is a serious appointment that comes with responsibilities. Under the Trustees Act (Cap 337, 2005 Rev Ed) (“**Trustees Act**”), which governs trusts in Singapore, once a person takes up a trusteeship, he cannot simply relinquish his duties at will but must do so in accordance with the law and the terms of the trust instrument.

In this case, Chan Chi Cheong (“**CCC**”) and Chan Yun Cheong (“**CYC**”) were two trustees (out of three) of a trust, which arose out of the will (the “**Will**”) of their late grandfather (the “**Testator**”). CCC sought to retire as a trustee, pursuant to section 40 of the Trustees Act, which deals with the retirement of a trustee without a new appointment. This requires the retiring trustee to execute a deed establishing his desire to retire, to which his co-trustees must consent by deed. Additionally, after the trustee retires, there must either be a trust corporation to act as trustee or at least two trustees remaining. However, CYC refused to sign CCC’s deed of retirement and give his consent. Instead, CYC submitted his own letter of resignation to CCC and the third trustee, and alleged that by virtue of the letter of resignation he was no longer a trustee and could not provide his consent, as this resignation was effective pursuant to an express power to resign conferred by the trust instrument (“**clause 3**”).

CCC in response contested CYC’s resignation, arguing that a trustee may only retire in accordance with section 40 of the Trustees Act. CCC also argued that the court could compel the remaining trustee(s) to consent to a trustee’s retirement under: section 18 read with item 14 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) (“**SCJA**”); or under the inherent powers of the court found in Order 92 rule 4 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) (“**ROC**”). The High Court (“**HC**”) agreed, adding that section 14 of the SCJA also empowered the court to compel consent. The HC then held that CYC had unreasonably withheld his consent and ordered CYC to execute CCC’s deed of retirement.

However, the Court of Appeal (“**CA**”) disagreed, holding that a co-trustee’s decision to give consent is wholly discretionary. Thus, the court had no legal basis to compel a trustee to consent to another trustee’s resignation. It therefore set aside the HC’s orders in this regard. The CA further observed that the conditions in section 40 of the Trustees Act provided trustees with a statutory power of retirement that was separate and independent from an express power of retirement found in a trust instrument. As such, a trustee who sought to retire under an express power need not comply with the conditions in section 40.

II. Material Facts

A. Background

The Testator had at least twelve sons, and through the Will appointed five of them as trustees of his estate (to take effect when he passed away). Over the years, trustees who died or retired were replaced. In March 2009, a trustee named Chan Fatt Cheung (“**CFC**”), resigned from his

¹ Generally, a trust is a way of distributing one’s estate, whereby the appointed trustee manages the estate in the best interests of the beneficiaries of the trust. A testamentary trust is a trust executed by a person’s (i.e. the testator’s) will upon the person’s death.

trusteeship without executing a deed of retirement. By June 2017, Chan Chee Chiu (“**Chan**”) was the only remaining trustee and he appointed CCC and CYC, grandsons of the Testator, as his co-trustees. Since then, there have been three trustees of the estate.

Following disagreements between the trustees regarding the stewardship of the trust assets, CCC’s lawyers wrote to Chan’s lawyers, informing them of CCC’s intention to resign as a trustee and attaching an unsigned draft deed of retirement (the “**Draft Deed**”). Chan’s lawyers advised CCC’s own lawyers that Chan had no objections to his retirement, and they returned the Draft Deed with Chan’s signature appended thereto. The next day, CCC’s lawyers wrote to CYC’s lawyers to state his intention to resign as a trustee, attaching Chan’s consent. Attaching an unsigned copy of the Draft Deed, CCC’s lawyers sought CYC’s consent as well. However, CYC did not sign the Draft Deed. Instead, CYC wrote a letter (the “**Resignation Letter**”) to CCC and Chan, stating that he resigned as trustee with immediate effect due to his inability to effectively discharge his duties (owing to his disagreement concerning a certain fund transfer which allegedly happened without his authorisation, amongst other matters).

CCC’s lawyers responded to CYC, asserting that CYC remained a trustee until a proper deed of retirement was executed. CYC disagreed and cited the example of CFC retiring without executing a deed of retirement. CYC further stated that he was entitled to resign with immediate effect pursuant to clause 3 of the Will, which stated:

... Upon the death or retirement of any Trustee, the person appointed as his successor in office shall nevertheless be my male descendant through a male line. If any of my Trustees disagree with the others or have to attend to other business, he is at liberty to resign and the vacancy thereby created shall be filled accordingly.

Regardless, CCC executed the Draft Deed. Later, CCC’s lawyers informed CYC that CFC had signed a Deed of Retirement and Confirmation (“**CFC’s Deed**”) and requested CYC to sign the Draft Deed and CFC’s Deed (collectively, “**the Deeds**”). When CYC refused, CCC filed suit.

B. The Claims

CCC argued that a trustee could only resign in accordance with the conditions set out in section 40 of the Trustees Act; therefore, CYC remained a trustee who could consent to the Deeds. CCC claimed that CYC unreasonably refused/withheld his consent and sought an order directing CYC to execute the Deeds. He argued that the court had power to compel CYC to consent to the Deeds, pursuant to section 18 read with item 14 of the First Schedule to the SCJA, or by virtue of the court’s inherent powers found in Order 92 rule 4 of the ROC,² and should exercise this power to grant an order against CYC. If CYC failed to comply with this order, CCC sought an order directing the Registrar of the Supreme Court to execute the Deeds on CYC’s behalf under section 14 of the SCJA.³

CYC disputed these claims, arguing that the Resignation Letter was an effective method of resignation pursuant to clause 3; thus, he was no longer a trustee and could not provide his consent. Alternatively, CYC argued that the court could not compel him to consent to the Deeds.

² Order 92 rule 4 of the ROC allows the court “to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.”

³ Where a relevant party fails to execute the court’s order, section 14 of the SCJA empowers the court to direct the Registrar of the Supreme Court to execute said order.

C. HC Decision

The HC observed that section 40 of the Trustees Act imposed three conditions that must be satisfied before a trustee may retire without the appointment of a replacement trustee: (1) the trustee must declare his desire to retire in a deed; (2) the remaining trustees must consent to the retirement by deed; and (3) a trust corporation or at least two trustees should remain following the retirement. The HC held that under section 2 of the Trustees Act, the provisions of the Trustees Act are imported into the trust instrument unless a contrary intention is expressed. In this case, the HC found that no contrary intention was expressed in clause 3 of the Will. Accordingly, CYC remained a trustee and could provide his consent to the Deeds.

The HC further held that the court had to the power to compel consent under sections 14 and 18 of the SCJA, and under the court's inherent powers pursuant to Order 92 rule 4 of the ROC. To determine whether to exercise this power, the HC applied a "reasonableness test" to CYC's refusal to grant his consent. The HC found his refusal to be "illogical and unreasonable," as CYC was trying to avoid compliance with the section 40 conditions and "the inconvenience of seeking a replacement trustee" by preventing CCC from resigning. Furthermore, from CYC's perspective, the trust would be better managed without CCC. Accordingly, the HC exercised its power and granted the orders sought.

III. Issues on Appeal

The CA decided the following issues on appeal: *first*, whether the court has the power to compel a co-trustee to consent to the resignation deeds of other trustees; and *second*, whether the conditions in section 40 of the Trustees Act must be met before a trustee can retire via an express power to retire found in the trust instrument. Based on the above, the CA then addressed the trusteeship status of the parties.

A. The Court's Power to Compel Consent

The CA first held that section 14 of the SCJA does not empower the court to compel a trustee to consent to another trustee's retirement deed. Specifically, section 14 only operates after the relevant party had already been ordered to execute an order and had not done so.

The CA then discussed whether section 18 of the Trustees Act read with item 14 of the First Schedule of the SCJA gave the court the power to compel a co-trustee to consent to a trustee's retirement. Section 18(2) gives the court the "[p]ower to issue to any person or authority any direction, order or writ for the enforcement of any right conferred by any written law or for any other purpose." While the CA agreed with the HC that this power was wide-ranging and could theoretically encompass the power to compel a co-trustee to consent to a trustee's retirement, the CA did not think that this power could or should be exercised as such.

As a condition for retirement under section 40 of the Trustees Act, the consent of co-trustees was an essential element for an effective discharge. Further, as section 40 does not direct the co-trustees as to how to make their decision to give or withhold consent, it is a decision that is wholly within their discretion. The HC cited no authority to show that the power under section 18 of the SCJA had ever been exercised to compel consent, in a situation where it is clear that the decision to give consent was wholly discretionary. Indeed, on a plain reading of the statute, there was no basis for imposing any form of limitation on the required consent.

The CA further noted that the HC had cited no authority, and gave no explanation, for imposing a "reasonableness test," and itself found that there is no basis for imposing such a test. Finally, nothing in the Trustees Act conferred power on the court to compel such consent. Thus, the

CA held that section 18 of the SCJA does not confer the court power to compel a co-trustee's consent.

The CA then addressed whether the court's inherent powers under Order 92 rule 4 of the ROC allowed it to compel such consent. Two conditions must be met for the court to exercise its inherent power: (1) there must be no statutory exclusion of the inherent power; and (2) there must be exceptional circumstances where there is need for the court to use its inherent powers in order for justice to be done or injustice to be averted. Here, neither condition was met.

The present situation was contemplated by and provided for by the Trustees Act, which prohibits trustees from retiring except in accordance with the law. As compelling consent reduces it to being less than purely discretionary, it is contrary to the proper statutory interpretation of section 40 of the Trustees Act. Thus, there is statutory exclusion of the court exercising its inherent power. In addition, there were no exceptional circumstances in the present case. Thus, the CA decided that the court cannot exercise its inherent power to compel consent.

B. Whether the conditions in section 40 of the Trustees Act must be met before a trustee can retire via an express power to retire found in the trust instrument

The CA first observed that there is no material difference between resigning and retiring from a trusteeship, as both involve the trustee's voluntary termination of his role. The CA held that the statutory power to retire under section 40 of the Trustees Act is merely "in addition" to any express power to retire conferred by the trust instrument. These powers are "two independent and alternative schemes" under which a trustee can retire; thus, the three conditions only apply where a trustee seeks to retire pursuant to section 40 of the Trustees Act.

This was supported by the plain wording of section 40, which does not provide that the three conditions are universal conditions which apply to all powers to retire; and section 38(1)(c) of the Trustees Act, which sets out a universal condition that a trustee may only be discharged from his appointment if there are at least two trustees or a trust corporation remaining. If the three conditions in section 40 were universal conditions, section 38(1)(c) would serve no purpose as the same universal condition would be set out twice in the Trustees Act. Furthermore, there would be an inconsistency in the law because section 40 is absolute, whereas section 38(1)(c) provides for an exception, namely, where only one trustee was originally appointed and that sole trustee is able to give valid receipts for all capital money.

Therefore, where a trustee seeks to retire via an express power to retire found in the trust instrument, he need only satisfy the condition under section 38(1)(c) of the Trustees Act and any other conditions necessary to invoke this power as stipulated in the trust instrument. As such, the three conditions set out in section 40 are not universal and need not be satisfied when a trustee seeks to retire under an express power to retire, unless the conditions were incorporated by the settlor.

As the court did not have the power to compel consent by the co-trustee, no order could be made against CYC to compel his consent to CCC's retirement. Accordingly, no order could be made on the basis of section 14 of the SCJA, which operates only after a failure to comply with the court's original order. Thus, the CA set aside the HC's orders.

C. The trusteeship status of the parties

The CA then decided on the trusteeship status of CYC and CCC. As both CYC and CCC failed

to satisfy the three conditions set out in section 40 of the Trustees Act, neither of them had validly retired under section 40 of the Trustees Act. Instead, whether they had validly retired from their respective trusteeships depended on whether section 38(1)(c) of the Trustees Act, and the substantive and procedural requirements of clause 3, were satisfied. In so deciding, the court would give effect to the testator's intention, as expressed through the trust instrument. The testator's intention was to be ascertained from an examination of the will in its entirety, with the aid of all admissible extrinsic evidence.

The CA held that the words of clause 3 reflected the Testator's intention for any trustee to retire if he wanted to, *and* if there was a replacement trustee who was the Testator's male descendant through a male line. Further, the Testator originally appointed five of his sons to be trustees, demonstrating the importance he placed on having several trustees to manage the trust assets. Accordingly, it could not have been his intention to allow the trustees to retire in a manner that would leave vacancies behind. Additionally, the Testator had at least twelve sons and, thus, likely did not foresee any difficulties in finding a replacement trustee. Thus, the CA found that the Testator intended that the retiring trustee would have to find a replacement trustee before he would be allowed to retire.

Finally, the CA disagreed with the HC that section 40 of the Trustees Act applied where a trustee sought to retire under clause 3 of the Will. As the Testator intended for retirement with a replacement, the CA held that the Testator did not intend to incorporate the conditions set out in section 40 of the Trustees Act, which is entitled "Retirement of a trustee without a new appointment".

With regard to the *mode* of resignation, while a testator can specify the mode of resignation, the Testator here did not do so. As such, the CA inferred that the Testator was content for the mode of resignation to be that prescribed by the law then in force. In this respect, clause 3 dovetailed with the statutory provisions regarding the replacement of a retiring trustee, specifically section 37(1) of the Trustees Act.⁴ Section 37(1) states that the continuing trustee(s) may, by writing, appoint a new trustee to the trust and thereby replace the outgoing trustee, without any action on the part of the retiring trustee.

Accordingly, to retire under clause 3 of the Will, CYC had to find a male descendent of the Testator (from a male line) as his replacement, and request CCC and Chan to appoint this replacement by writing in accordance with section 37(1) of the Trustees Act. If CYC was unable to find a replacement, he could not retire under clause 3 of the Will. In that event, the only recourse available to him was to retire in accordance with the three conditions of section 40 of the Trustees Act. In other words, mere communication of a trustee's intention to retire is insufficient to effect retirement. As both CYC and CCC had failed to find replacements and satisfy section 40 of the Trustees Act, neither of their attempts to resign had any effect.

It could be contended that CFC's retirement (prior to CCC and CYC's appointment) was also invalid for failure to appoint a replacement trustee and satisfy the conditions set out by section 40 of the Trustees Act, as he retired without executing a deed of retirement. However, the CA held that CYC and CCC would likely be prevented from contending that CFC was still a trustee as a substantial length of time had passed since CFC's attempted retirement, and they had acted

⁴ When the Will was executed in 1947, the relevant provision was section 37(1) of the Trustees Ordinance (Cap 59, 1936 Rev Ed) and/or section 37(i) of the Trustee Enactment (Cap 61, Act 36 of 1933) (Federated Malay States). These provisions are substantially the same as section 37 of the current TA and, therefore, the CA used section 37 of the Trustees Act in their analysis.

as if CFC had validly retired. Therefore, CFC should be treated as having validly retired from the date of his letter of resignation. The CA nonetheless cautioned that this should be treated as an exception rather than the norm, and trustees who retire improperly cannot expect to be entitled to retrospective validation.

IV. Lessons Learnt

This case highlights the gravity of a trusteeship appointment. It is not a position that one may easily resign from, and any desire to resign must be effected in accordance with the law and the trust instrument. To save future time and costs, would-be testators/settlors, as well as the lawyers advising them, should take care to ensure: (1) the testator/settlor's intention is clearly expressed within the trust instrument; and (2) there are no ambiguities as to the mode and requirements of retirement from trusteeship.

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