In The Supreme Court of Bermuda

CIVIL JURISDICTION
2017: 371

IN THE MATTER OF THE G TRUSTS

AND IN THE MATTER OF THE PERPETUITIES AND ACCUMULATIONS ACT 2009

AND IN THE MATTER OF ORDER 85 OF THE RULES OF THE SUPREME COURT

REASONS FOR RULING

(in Camera)

Discretionary trusts-change of governing law-application for declaration that Children Act 1998 provisions abolishing distinctions between legitimate and illegitimate children do not affect settlements established under a foreign governing law and instruments made pursuant to such settlements under Bermuda law-application for an order disapplying the perpetuity rule under section 4 of the Perpetuities and Accumulations Act 2009-application for approval of amendments to trusts to confer on trustees the power to restrict beneficiaries' rights of access to information in defined circumstances – principles governing the making of confidentiality orders in trust cases

Date of hearing: November 6, 2017
Date of Reasons: November 15, 2017

Mr David Brownbill QC of counsel and Mr David Kessaram, Cox Hallett Wilkinson Limited, for the Plaintiffs

Introductory

1. By an Originating Summonses issued on October 16, 2017, the Plaintiff trustees sought substantially the following relief:

   (1) Declarations:

   (A) that sections 18A to D of the Children Act 1998 (as amended by the Children Amendment Act 2002) ("the Children Act provisions") will not apply to the Part I Trusts (as defined in the Originating Summons), if the governing law of these Trusts is changed to the law of Bermuda;

   (B) that the Children Act provisions do not apply to the Part II and Part III Trusts (as defined in the Originating Summons) as a result of any exercise of any power under any of those Trusts before the date of the order; and

   (C) that the Children Act provisions will not apply to the Part I, Part II or Part III Trusts as a result of any exercise of any power under any of those Trusts on or after the date of the order.

   (the "Children Act Applications").

   (2) An order, under s 4(2) of the Perpetuities and Accumulations Act 2009 disapplying the rule against perpetuities to the Part I Trusts (subject to the declaration under paragraph (1) being granted) and Part II Trusts, and varying the Part I and Part II Trusts in the manner provided in the Originating Summons (the "Perpetuities Application").

   (3) An order authorising the Trustees, in respect of each of the Trusts, to execute an appointment, on the terms of the draft deeds of appointment at (the "Restrictions Application").

2. Following a half-day hearing, I granted the relief sought and now give reasons for that decision.

The anonymisation of the present proceedings and the related confidentiality orders

3. Prior to the formal issuance of the present proceedings, which essentially concern the internal administration of a related group of trusts, I made what has become a standard 'Confidentiality Order' for such applications, entailing (a) anonymising the title to the proceedings and (b) sealing the file from public inspection. In a short ex tempore judgment in a previous case, I explained briefly why such an Order was appropriate in *Re BCD Trust (Confidentiality Order)* [2015] Bda LR 108:

> "*1. I should just say briefly that the application [for a confidentiality order sealing the file and anonymising the proceedings] seems to me to be well-grounded.*
>
> *2. I bear in mind that the history of what is essentially Chambers hearings is that they were traditionally private hearings. The notion of a more open approach to Chambers hearings has developed in the public interest within a constitutional framework which specifically blesses the idea of the Court departing from the public hearing principle in the interests of privacy and other countervailing public interests*[1].
>
> *3.It seems to me that in this type of case it is inherently consistent with the public interest and the administration of justice generally that applications such as these should be anonymised and dealt with as private applications, where there is no obvious public interest in knowing about an internal trust administration matter.*"

4. In provisions inspired by article 6 of the European Convention on Human Rights, section 6 (9) of the Bermuda Constitution proclaims the general principle that hearings should be in public while section 6(10) declares that exceptions to this general 'open justice' rule are permitted where it is desired to protect countervailing interests including, *inter alia*, "*the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings*".

5. The release of the so-called '*Paradise Papers*' occurred after I made the Confidentiality Order and shortly before the substantive hearing of the Originating Summons. In the course of the hearing I did very much have in mind whether the

[1] Section 6 of the Bermuda Constitution provides, so far as is material, as follows:

"*(9) All proceedings instituted in any court for the determination of the existence or extent of any civil right or obligation, including the announcement of the decision of the court, shall be held in public.*

(10) Nothing in subsection (9) of this section shall prevent the court from excluding from the proceedings persons other than the parties thereto and their legal representatives to such extent as the court— (a) may be empowered by law so to do and may consider necessary or expedient in circumstances where publicity would prejudice the interests of justice, or in interlocutory proceedings or in the interests of public morality, the welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings…"

popular onshore attacks on offshore 'secrecy' undermined in any way the validity of this Court's previous practice in this regard. Writing the present judgment over the Remembrance Day weekend seems an appropriate occasion to revisit this issue.

6. Bermuda's offshore sector began in the mid-1930's and the concept of offshore companies and offshore trusts were commercially driven, at least in part, by anxieties on the part of far-sighted members of the European moneyed classes about a looming war and the risk the confiscation of their assets (or worse) by populist governments envious of their wealth in recessionary times. The confiscation of assets and worse did in fact occur, and Bermuda fought on the victorious side which introduced the notion of fundamental human rights designed to ensure that untrammelled democracy would not trample on personal and property rights again.

7. The Confidentiality Order made in the present case was, on reflection, not just informed by the privacy rights alluded to in section 6(10) of the Bermuda Constitution, but was also indirectly informed by related fundamental rights. Section 5 of the Constitution ("*Protection of home and privacy of other property*") restricts the ability of public authorities (including representatives from all three branches of Government) from interfering with private premises and property, save to a proportionate extent in service of a qualifying countervailing public interest. Section 13 of the Constitution prohibits the confiscation of private property without due compensation, subject to an even more narrowly defined exception. This Court is also entitled to construe domestic law rules, whether procedural or substantive, so far as possible so as to conform to Her Majesty's international obligations in respect of Bermuda. In this regard, the following provisions of the First Protocol to the European Convention on Human Rights articulates a broad principle which is also relevant to confidentiality orders in trust cases:

> *"**ARTICLE 1***
>
> ***Protection of property***
>
> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
>
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*" [emphasis added]

8. The most common grounds on which confidentiality orders are sought are the following:

- if details of the wealth with which the beneficiaries are linked enters the public domain, the beneficiaries will potentially be subjected to unjustified public attention;

- if minor beneficiaries become aware of the wealth with which they are contingently connected during their minority, their ability enjoy a healthy and normal childhood will likely be impaired;

- (less commonly) if details of the wealth with which the beneficiaries are linked enters the public domain.

9. It is important to add that such orders are made on the implicit understanding that:

- the applicant trustees as regulated persons are subject to an ongoing duty to ensure that the trust itself and, so far as the trustees can reasonably ascertain, the beneficiaries themselves, are compliant with any applicable onshore tax obligations as regards any distributions which they receive;

- the applicant trustees as regulated persons are compliant with their own AML/ATF obligations with respect to any assets received by the trust(s);

- the trust structure is a genuine one and is not on its face being operated in an artificial eye-brow raising manner; and

- should the trustees, beneficiaries or any other persons linked with the trust become subject to foreign criminal, tax or other public investigative proceedings, any confidentiality order initially made will be liable to be set aside.

10. It is also important to note the generic context in which confidentiality orders are made:

- apart from the fact that Court approval is required because of the legal mechanics of trust law to rearrange the basis on which the trust assets are administered, the subject-matter of the proceedings would in all other contexts be regarded as confidential, private and/or subject to legal privilege. The ordinary citizen who consults his solicitor about revising his will is not required to disclose the content of his will and his discussions with his solicitor to the general public;

- the information sought to be kept confidential has not yet lost its confidentiality because it has, to some extent at least, entered the public domain. This is the sort of sharp tension which exists between privacy and open justice in questions where injunctive relief is sought to restrain the press from publishing private information (see e.g. *JIH-v-Newsgroup Newspapers Ltd* [2011] EWCA 42).

11. For the above reasons I had no reticence about tacitly confirming the Confidentiality Order I made at the beginning of the present case when the proceedings reached their conclusion. The present proceedings concern the internal administration of a private trust into which the general public have no right to pry. Persons administering, interested in or settling Bermuda trusts should rest assured that this Court's firmly established practice of making confidentiality orders in appropriate cases, which is merely designed to enable law-abiding citizens to peaceably enjoy their actual and contingent property rights, has a venerable legal basis. The existing practice will continue to be applied in appropriate cases such as the present.

The G Trusts: overview

12. Mr Brownbill QC explained that the Trusts were settled some three decades ago by the head of one branch of a family with the proceeds of his sale of his shareholding in a major commercial enterprise. The Settlor at the outset wished to create a dynastic trust of unlimited duration. The Plaintiffs' Skeleton Argument described the G Trusts in outline as follows:

> "*(1)The Trusts were established primarily for the benefit of* [the Settlor's] *three grandchildren….*
>
> *(2)The Trusts are discretionary, the trustees being given wide powers over capital and income exercisable in favour of the beneficiaries described below (see clauses 7 and 8). These powers are presently exercisable during the existing Trust Period at the end of which (see clause 9) there is a 'backstop' gift to certain surviving family members, on a per stirpes basis, with an ultimate gift to charity.*

(3)The Part I Trusts are subject to Cayman Islands law and the Part II and III Trusts are subject to Bermuda law (having recently been changed from Cayman Islands law).

(4)There are four main Trusts ("the City Trusts")….

(5)All of the Trusts provide for Primary and Secondary Beneficiaries...

(6)….

(7)The remaining Trusts all derive or were principally funded from the four City Trusts. These Trusts generally reflect the beneficial classes of the original City Trust from which it was derived…

(8)…

(9)In most of the Trusts the Primary Beneficiaries include charitable foundations…."

The Children Act application

The legal issues raised

13. Sections 18A-18D of the Children Act 1998 as amended with effect from 2004 ("the Children Act provisions") prohibit discrimination against children who are born out of wedlock. The Plaintiffs described the concern about the possible application of the Children act provisions to the G Trusts and the relief sought as follows:

"*9… If the Act were to apply, it would mean that illegitimate children and illegitimate issue would be introduced into the classes of Beneficiaries and that would be contrary to the underlying policy of the Trusts under which illegitimate children and issue are not excluded but are to be included only on a case-by-case basis…*

…

13. The plaintiffs seek declarations as to the inapplicability of the Children Act provisions in the three situations set out in the Originating Summons:

(1)Upon the proper law of the Part I Trusts being changed from the law of the Cayman Islands to the law of Bermuda;

(2) In relation to the Part II and III Trusts, in respect of any exercise of powers under those trusts prior to the date of the proposed order;

(3)In relation to all of the Trusts, in respect of any exercise of powers under those trusts on or after the date of the proposed order."

14. Two main legal questions arose. First, would changing the proper law of the Part I Trusts from Caymanian to Bermudian law after the Children Act provisions came into force in 2004 impact on those Trusts? Second, would any exercise of powers under the G Trusts once they became governed by Bermuda law engage the application of the Children Act provisions?

The Children Act provisions

15. Section 18A abolishes the distinction between legitimate and illegitimate children with effect from January 19, 2004 "*in respect of every person whether born before or after this Act comes into force and whether born in Bermuda or not and whether or not his father or mother has ever been domiciled in Bermuda*" (section 18A(4)).This principle is applied as a rule of construction by section 18B, and it is this provision which gives rise to the need for the present application:

> "***Rule of construction***
> *18B (1) For the purpose of construing an instrument or statutory provision, a reference to a person or group or class of persons described in terms of relationship to another person by blood or marriage shall be construed to refer to and include a person who comes within the description by reason of the relationship of parent and child as determined under section 18A.*
>
> *(2) The use of the words "legitimate" or "lawful" shall not prevent the relationship being determined in accordance with section 18A.*" [Emphasis added]

16. However, the crucial provisions are the transitional provisions relating to instruments which provide as follows:

"**Application**

18C This Part applies to—

(a) any statutory provision made before, on or after the day this Part comes into operation; and

(b) any instrument made on or after the day this Part comes into operation, but does not affect—

(c) any instrument made before this Part comes into operation;

(d) *and a disposition of property made before this Part comes into operation.*"

17. There is no problem as regards trusts originally settled prior to January 19, 2004 because, whether governed by Bermuda law or not, section 18C (c) makes it clear that the Children Act provisions' enactment "*does not affect*" them. More problematic is the status of trusts settled after the Children Act provisions became operative and/or powers exercised by instruments executed after January 19, 2004, regardless of the date of the relevant settlement. The posited answer lies in the technical legal meaning of "*a disposition of property*" in the context of the law of wills and trusts, and the legal principle that powers exercised under a settlement are shaped by the character of the originating "disposition".

The Plaintiffs' submissions

18. The Plaintiffs' counsel advanced the following main submissions:

"*14. The plaintiffs respectfully submit that both the decision and the principles in Re A Trust apply here and support the grant of the declarations sought. The essential elements of the decision are as follows:*

(1)Section 18B of the Children Act 1998 ("Children Act"), 'on a straightforward reading requires instruments such as trust deeds to be construed in a manner which, despite purporting to apply only to legitimate children, reflects the abolition of the distinction between children born in and out of wedlock which is effected by section 18A.' (paragraph 9)

(2)Section 18C of the Children Act addresses the scope of these provisions and the essential question raised in the case concerned the proper construction of this section.

(3)The starting point in this respect was that the legislation did not, indeed could not, extend to trusts governed by foreign (i.e. the non-Bermudian) law (paragraphs 12-15).

(4)The court also found that the legislation did not have retrospective effect and was not intended to interfere with existing property rights (paragraphs 16 and 26).

(5)It was recognised that in various statutory and common-law contexts, an instrument executed under a power in an existing settlement must be viewed with reference to and as part of that settlement (paragraph 20). This is the case in relation to:

> *(A) appointments in exercise of powers of appointment (Muir v Muir [1943] AC 468 at 483* ***[AB / 11]****: the donee of a power of appointment:*
>
> *'... has merely been given the power of saying on behalf of the settlor which of the issue of A shall take the property under the settlement and in what proportions. It is as though the settlor had left a blank in the settlement which B fills up for him if and when the power of appointment is exercised'; and*
>
> *At 481: appointments are 'written into the [trust] which created the power'.*
>
> *(B) advancements (or similar powers) under which property held under the existing settlement becomes held on the trusts of a separate settlement (IRC v Pilkington [1964] AC 612…, where it was stated per Lord Radcliffe at 642 'I think that the important point for the purpose of the rule against perpetuities*

is that the new settlement is only effected by the operation of a fiduciary power which itself 'belongs' to the old settlement.'.

(6)More directly, in the present context of children's legislation, the equivalent legislation in England to the Bermudian Legitimacy Act 1933and Adoption of Children Acts 1963 and 2006…, 'disposition' refers to a settlement creating an appointment and not an appointment made under it. The appointment might be an 'instrument' but it is not a disposition.

(7)Given that these principles have been adopted for some considerable time, it would be odd (or incongruous – see paragraph 18) if 'instrument' in section 18C were to be construed mechanically without regard to these principles. To do so with respect to an 'instrument' such as an appointment under a power created under a pre-January 2004 settlement which did not provide for illegitimate children, would be to re-write that settlement; see Farwell J in Re Hoff [1942] Ch 298 (at page 303)…, concerning the effect of an appointment under a will trust:

'If the will itself is not the disposition the result would seem to be an odd one, because it would come to this, that the power of appointment was exercised in favour of a person who was not a person entitled in default of appointment except by reason of this Act; and to construe in that way the word 'disposition' could only result in the Act having the effect of altering the construction of the will itself, which is the disposition.'

(8)This approach is clearly reflected in the 'ouster' provision in section 18C which provided that Part IIA of the Children Act

'…does not affect—

(c) any instrument made before this Part comes into operation;

(d) and a disposition of property made before this Part comes into operation."

(9)Plainly, if the Children Act provisions were to apply to an instrument executed under a power in a settlement established before the Children Act provisions came into operation, then they would 'affect' the settlement – both to the extent of the exercise of the power and, more generally, by preventing or discouraging the exercise of such powers. Section 18C 'unambiguously provides that Part IIA shall not have such an effect' (paragraph 21).

(10) Further, in the context of an existing settlement presently subject to foreign law, including one established after the Children Act provisions came into operation, for the provisions to apply by virtue alone of the proper law subsequently being changed to that of Bermuda, would (i) materially interfere with the freedom to elect Bermuda law as the governing law; (ii) mean that the legislation had both retrospective and extraterritorial effect, and (iii) thereby interfere with existing property rights. It would require clearer statutory language than that in Part IIA to justify such a construction (paragraphs 25-26).

16. Mr Brownbill QC also relied upon the Opinion of Mr Francis Barlow QC, who appeared before me in *In the Matter of a Trust (Change of Governing Law)* [2017] SC (Bda) 38 Civ to indicate that he could not find any proper basis for opposing a broadly similar application for a declaration that the Children Act provisions would not be engaged by changing the governing law of trusts established after those provisions came into force from Caymanian to Bermudian law. Mr Barlow QC, who was instructed in the present case on behalf of any future persons who might be excluded if the Children Act provisions were held not to apply in the present case, opined that my decision in *Re A Trust* could only reasonably be followed in the present case.

Findings on Children Act application

19. My decision in *Re A Trust* had the following main elements to it:

(1) applying the presumption that colonial legislation is presumed not to have extra-territorial effect, there was no basis for finding that upon enactment the Children Act provisions had any impact on trusts which were at that point governed by a foreign legal system such as Cayman law;

(2) there was no proper legal basis for finding that the Children Act provisions were intended to have direct retrospective effect on a settlement made under a foreign governing law which post-2004 became governed by Bermuda law. It was sonly on this basis that the statutory provisions could possibly apply

upon a change of governing law in relation to a settlement to which the statutory provisions did not apply because it was governed by a foreign governing law when it was created by the original disposition of assets on trust;

(3) there was no proper legal basis for finding that the Children Act provisions were intended to have indirect retrospective effect on a settlement made under a foreign governing law which, post-2004, became governed by Bermuda law via an indirect route. It followed that the Children Act provisions did not apply to instruments made under settlements which were not governed by those statutory provisions when the relevant settlements were made. Such instruments would continue to draw their character from the core structure of the original settlement.

20. After engaging with counsel in the course of oral argument to satisfy myself that my earlier legal findings were indeed sound, I accepted the submissions of Mr Brownbill QC that it was appropriate to grant the declarations sought under paragraph 1 of the Originating Summons.

21. I adjourned briefly to allow deeds to be executed changing the governing law of the Part I Trusts to Bermuda law.

The Perpetuities Application

The legal issues raised

22. This application was in legal terms a narrow one. It requested the Court to exercise a statutory discretionary power under section 4 of the Perpetuities and Accumulations Act 2009 ("the 2009 Act") to dis-apply the Bermudian perpetuities period in respect of the Part I and II Trusts. These Trusts were all settled before August 1, 2009 when the 2009 Act came into effect and broadly provided that (save as regards land in Bermuda) the perpetuities rule would not apply to instruments taking effect under Bermuda law after that commencement date.

The key statutory provision

23. Section 4 of the 2009 Act provides as follows:

"*4 (1) This section applies in relation to an instrument which takes effect—*

(a) before the commencement day; or

(b) on or after the commencement day but to which section 3 does not apply to limit the application of the rule against perpetuities.

(2) Subject to subsection (3), the Supreme Court may, on an application made by the trustee or trustees of an instrument to which this section applies, make an order on such terms as it thinks fit declaring that—

(a) the rule against perpetuities; or

(b) any other similar rule of law that may limit or restrict the time under which property may be held in or subject to any trust,

shall not apply to such instrument and the property held thereunder.

(3) An order under subsection (2) may not be made to the extent that it would affect the residual application of the rule against perpetuities as provided by section 3 if the instrument had been one to which section 3 applies (so that the rule against perpetuities will continue to apply to all instruments to the extent that the property is land in Bermuda as provided by section 3).

(4) The terms upon which an order under subsection (2) may be made include (but are not limited to), terms—

(a)extending the duration of a trust;

(b)extending the time within which an interest in property must vest or take effect;

(c)extending the time within which certain powers are exercisable;

(d)providing that anything done by any person before the order is made on the basis that the instrument was void by virtue of the application of the rule against perpetuities or other similar rule of law shall have effect as if the order had not been made;

(e)protecting or preserving the interest of any person in trust property where such interest will or may be defeated or its vesting in possession deferred by virtue or in consequence of the terms of any order made under this section;

(f)varying or deleting any provision of the trust which restricts (to or by reference to the perpetuity period or limitation on duration applicable to the trust) the exercise of any power arising under or in consequence of the instrument;

(g)providing that the order shall be deemed always to have applied to the instrument.

(5) An application under subsection (2) shall be made by originating summons the Rules of the Supreme Court applicable to applications under the Trustee Act 1975 shall, so far as is appropriate, apply.

(6) In subsection (4)(e), 'interest' includes an interest arising by virtue or in consequence of the disposition being void as a result of the application of the rule against perpetuities to that disposition."

24. Section 4(1) makes it clear that the above section only applies where section 3 does not limit the application of the rule against perpetuities. Section 3 essentially provides that the rule against perpetuities only applies in relation to instruments taking effect after the commencement of the 2009 Act to the extent that they deal with land in Bermuda. The headnote ("*Application of rule against perpetuities limited to land in Bermuda*") misleadingly implies that the section only deals with land in Bermuda. On closer analysis, however, it appears that section 3, in a somewhat convoluted way, actually provides that the rule against perpetuities does apply to instruments taking effect before August 1, 2009. Section 3, so far as is material for present purposes, provides as follows:

"3(1) In relation to instruments taking effect on or after the commencement day, the rule against perpetuities applies (and applies only) as provided by this section."

25. Accordingly, putting aside the special case of land in Bermuda (which is addressed in section 4(3)), section 4 empowers this Court to declare that the rule against perpetuities shall not apply, most broadly, in relation to:

- instruments taking effect before August 1, 2009 which are governed by Bermuda law; and

- instruments taking effect under a foreign governing law either before or after the commencement of the 2009 Act, being a foreign governing law which applied a perpetuity period to the relevant instrument.

26. On the face of the provisions, a generous ambit of discretion is granted to this Court in this regard.

The Plaintiffs' submissions

27. Mr Brownbill QC, after noting the breadth of the discretion conferred on the Court by section 4 of the 2009 Act to dis-apply the rule against perpetuities (or any similar rule) reminded the Court that the statutory discretion nevertheless had to be exercised judicially. Of the various authorities he cited by way of illustration of what exercising a discretion judicially means, I found the following statement to be most helpful. In *Breadner v Granville-Grossman* [2006] WTLR 411 at 419C-D, Park J held:

> "*Under that provision I need first to decide who the unsuccessful party before me was. I need secondly to decide whether I wish to make an order which differs from an order that the unsuccessful party should pay the costs of the successful party. It is at that second stage that an element of discretion comes in. I accept that it is a discretion which must be exercised judicially. I cannot range at large, and I must have regard to principle and authority.*" [Emphasis added]

28. As to the principles which governed the exercise of the specific discretion engaged by the present application, the Plaintiffs' counsel submitted as follows:

> "*32. There is only one reported case in which section 4 of the 2009 Act has been considered: Re The C Trust [2016] SC (Bda) 53 Civ… In this case (at para 7) the Court considered the legislative history of the section, noting the remarks made by Minister for Economic Development, Dr. Grant Gibbons, during the second reading of the Bill which resulted in the present version of section 4 of the Act being enacted into law:*
>
> > *'Mr Speaker, for these reasons a more streamlined and cost-effective approach should be adopted … in addition to providing a clear process to modify the use of the [perpetuity] rule this amendment is intended to:*

1. lower costs to applicants;

2. allow the courts to exercise their discretion to act in the best interest of any applicant and any other interested party;

3. establish additional legal flexibility for trusts being governed under Bermuda law and

4. enhance Bermuda's competitiveness and reputation as a quality jurisdiction for international trust business.'

33. The Court concluded that it should exercise its discretion with these guiding principles in mind:

(1)the Court should not act as a 'rubber stamp';

(2)the Court should have regard to the best interests of all interested parties, broadly defined and looked at as a whole;

(3)the fact that extending the duration of a trust will dilute the economic interests of existing beneficiaries will ordinarily be an irrelevant consideration.

34.The first of these echoes Sir Andrew Morritt in Tamlin v Edgar [2011] EWHC 3949…in which he stated that, where trustees seek the court's blessing of a decision, under the well-known "momentous decision" category in Public Trustee v Cooper [2001] WTLR 901… the court should not act simply as a rubber stamp. In an application under section 4 of the 2009 Act this may not be wholly apt as there is, of course, no decision of the trustees which the Court could "rubber stamp". The true concern here would appear to be that indicated earlier, that the Court should exercise its discretion in a principled way, upon a consideration of all of the facts.

35. The second principle reflects the remarks of the Minister for Economic Development, noted above. It also reflects the approach of the Court in the exercise of its discretion under section 47 Trustee Act 1975 to authorise

transactions relating to trust property which are, in the opinion of the Court, "expedient". In Re GH and IJ v KL and others [2010] Bda L.R. 86 (at para 8)… the Court accepted the view (expressed in Re Craven's Estate [1937] 1 Ch 431 at 436…) that "expedient" in section 47 meant "expedient for the trust as a whole", as distinct from the situation where a transaction might be expedient for one beneficiary but inexpedient for other beneficiaries. The Court went on to say that this at least contemplates the possibility that a transaction may be sanctioned where it is expedient for one beneficiary and neutral for the others.

36. If an order under section 4(2) would, in this sense, be in the interests of 'the beneficiaries as a whole', that would undoubtedly justify the Court granting the order. But, it is submitted, that would not be a necessary requirement in every instance. As indicated above, the Court's discretion under section 4 is unfettered. It does not impose any specific requirement or standard. The legislature could have imposed such a requirement or standard, whether that of "expedient" contained in section 47, or some other standard. However, it did not do so and, instead, left the discretion completely open. This very point was made, and accepted, in Re The C Trust (see paragraph 11 of the judgment).

37. The court's unfettered discretion is, it is submitted, crucial to the maintenance of the flexibility which the statutory power was intended to provide. There may, for example, be a case where a beneficiary or group of beneficiaries might be prejudiced by the making of an order. In such a case the detriment might be minimal or very remote (and therefore of little relevance) or counterbalanced by other, substantial, benefits. In other cases it may be that any detriment can be addressed by making an order on terms which repairs or compensates for the detriment, albeit in a broad rather than a strict accounting sense. With the discretion being unfettered, the range of possibilities is substantial and offers great scope. For example, an order under section 4 could be made on terms conditional on the exercise of a power of the trustees, including one granted under section 47, an application which could possibly be made in conjunction with an application under section 4.

29. As far as the grounds for exercising the discretion in the present case, the following important arguments were advanced:

"*39…. (3) In addition to the preservation of existing and future tax benefits, important family wishes and objectives will also be attained.*

(A) The family looks upon its wealth as dynastic in nature and wish the Trusts to continue in perpetuity, or at least so long as the family line continues. These sentiments are entirely genuine and have already been put into practice…

(B) The family is also concerned to avoid what, under the Trusts, will be an enormous distribution being made to the generation which happens to be in existence at the end of the present perpetuity period, when the "backstop" gift takes effect. Absent the abolition of the perpetuity period, the only alternative to this forced distribution will be an equally forced restructuring of the Trusts, potentially in circumstances which could be detrimental in other respects, most likely taxation.

(C) Such a distribution would, by definition, be to the detriment of any subsequent generations, the distributed funds being no longer available to them. It would also do the recipient generation few favours, in at least two respects.

(i)First (and absent the above mentioned forced restructuring to avoid the distribution), suddenly putting into their hands such an enormous amount of wealth could, of itself, be detrimental. It is a common concern of many wealthy parents to avoid their children being spoiled or being deprived of the motivation to better themselves. This was the very basis of the application in Re The C Trust (see paragraph 14 of the judgment) and also in Re ABC Trusts [2012] Bda LR 89, at paragraph 10.

(ii)Secondly, with the trust assets being held by the recipient generation, absolutely, the assets will not only be subject to the

rigours of taxation noted above, but will also be exposed to claims of the recipient's creditors, spouses and others.

(4)Overall, it is clear that the assets will be dissipated far more quickly and among a smaller group of beneficiaries, in the event of an outright distribution at the end of the present trust period, than if the assets remain held in trust for the benefit of, what are likely to be many, future generations…

(8) The charitable foundations (see paragraph 6(9) above) are in the same interest as the individual Principal Beneficiaries. The foundations will benefit from the disapplication of the perpetuities rule in the same way as the individual beneficiaries: the longer the assets remain within the Trusts, the greater the potential benefit to the foundations..."

30. In his oral submissions, Mr Brownbill QC informed the Court that significant charitable donations had been and were being made through the charitable foundations in the 'onshore' jurisdiction where most beneficiaries presently reside.

Findings

31. I accepted the above submissions, both as to the correct approach to the exercise of the discretion to dis-apply the perpetuity period under section 4 of the 2009 Act and as regards the merits of the application. I accordingly granted the primary relief sought and the consequential drafting changes relief sought in respect of the Part I and Part II Trusts.

The Restrictions Application

The legal issues raised

32. The Plaintiff Trustees sought the Court's approval in relation to a 'momentous decision'. This was whether the Trusts should be amended to enable the Trustees to restrict the beneficiaries' access to information rights in relation to the Trusts. The application involved an assessment of the extent to which the proposed changes were not only useful in trust administrative terms, but also were acceptable because they did not impermissibly impair the Court's important jurisdiction to supervise the due administration of the Trusts.

The proposed restrictions

33. The proposed restrictions were on their face elegantly crafted in a proportionate manner, justified by sensible reasons which were easily understood. The circumstances covered by the proposed restrictions were summarised in the Plaintiffs' Skeleton Argument (at paragraph 50) as follows:

> "*(1)where there is a vulnerable beneficiary who is or may fall under the influence of a third party;*
>
> *(2)where a beneficiary takes on an office or employment where a 'blind trust' (such as for politicians) may be advisable;*
>
> *(3)where a beneficiary moves to a place where risks of corruption in public offices is high;*
>
> *(4)where a beneficiary wishes to "step back" from the trusts for whatever reason; and*
>
> *(5)in relation to a beneficiary who is unlikely (at least for some considerable time) to benefit from a trust.*"

The Plaintiffs' submissions

34. It was submitted that there was no legal objection to the proposed restrictions for the following reasons:

> "*54. The validity and operation of provisions in trusts restricting rights to information were considered in detail by the Court, and by the Court of Appeal, in Re an Application for Information about a Trust [2013] Bda LR 16; [2014] Bda LR 5 (CA)... The case concerned a trust which restricted the provision of information to beneficiaries except to the extent that the trustees with the consent of the protector decided to provide information. In the Supreme Court, before the Chief Justice, it was found:*
>
> > *(1)That the clause was not 'invalid on its face for violating the irreducible core content requirements for a valid trust. The information control mechanism of the Trust neither eliminates the Trustee`s duty to*

account altogether nor purports to oust the jurisdiction of this Court to order appropriate disclosure.' (para 27)

(2)'As I have already found above, there is nothing repugnant about the concept of the Protector receiving information from the Trustees about the Trust and being conferred a power to veto the supply of information to other persons including beneficiaries. But this assumes that this power is, by necessary implication, intended to be used for the benefit of the beneficiaries." (para 40)

(3)In the exercise of its inherent jurisdiction, the court should take the clause into account: 'the Court must show due deference for the terms of the Trust Deed and only order disclosure if this is shown to be necessary in the proper exercise of this Court's supervisory jurisdiction over the Trust.' (para 44)

(4)Thus, the court's intervention is based on "the threshold test of whether or not such intervention is required in order to hold the Trustees accountable for the due administration of the Trust. For the reasons indicated above, I find that the appropriate test is not whether P can show that something has gone wrong (e.g. a capricious use of the Protector's veto power) or whether P can show a cause for substantive concern about the due administration of the trust.' (para 48)

55. The Court of Appeal upheld these propositions (paragraph 45), although, in relation to the "threshold" question, the Court of Appeal stated:

'(g) the Court has power to order disclosure to an individual beneficiary which it considers justified in the circumstances of the particular case, taking account of the terms of the Trust Deed;

(h) there is no defined "threshold" which the Applicant must cross before the Court`s power can be exercised: the beneficiary`s right is defined by reference to the Court`s willingness to make the order sought, and it follows from this that the burden on the Applicant is to show that the order should be made in the circumstances of the case; as the Chief Justice put it, he must establish a prima facie case that the order should be made;

(i) further to (g), the Court`s power is not limited to reviewing a decision made by the trustees or by the Protector; and

(j) the Court`s power may be exercised when the trustees or the Protector have discriminated between beneficiaries without authority from the settlor or other proper grounds for doing so."

56. The proposed power of the trustees to introduce restrictions necessarily operates at a stage before any restriction has been imposed and, therefore, does not directly engage the factors described above applicable to a restriction. That will happen if, and when, the power is exercised.

57. It is, however, clear that there is no necessary objection to the introduction of a clause restricting information rights; the decision in Re an Application for Information about a Trust, both of first instance and on appeal, puts this beyond doubt. There can, therefore, be no objection to the introduction of a power enabling restrictions to be introduced. Furthermore, as explained at paragraph 52 above, the critical factors identified above have been taken into account in the framing of the proposed power."

35. The present application was rightly placed within category two of the categories of trustee application listed in *Public Trustee-v-Cooper* [2001] WTLR 901…at 922H (quoting from an unreported 1995 judgment of Robert Walker J, as he then was). Counsel appreciated that this Court was familiar with that jurisdiction, which had been recently considered in *Re ABC Trusts* [2014] Bda LR 117 (at para 7). The following principles were distilled from the case law and commended to the Court in light of the circumstances of the present case:

"*71. In the result where trustees seek the Court's blessing to an exercise of their powers, the Court (i) will act cautiously and (ii) will need to be satisfied, on the basis of full disclosure, that:*

(1)the exercise is within the scope of the trustees' powers and in accordance with the terms of their powers;

(2)the trustees' decision to exercise their powers is one which ordinary, reasonable and prudent trustees might make;

(3)in making their decision the trustees have ignored irrelevant, improper or irrational factors;

(4)the decision is untainted by any collateral purpose such as might amount to a fraud on the power, or a conflict of interest that might prevent the Court from approving the trustees' decision;

(5)the trustees can properly form the view that the proposed transaction is for the benefit of the beneficiaries or the trust estate, and

(6)the trustees have in fact formed that view.

72. These requirements are fully satisfied in this case:

(1)The trustees' powers of appointment are discussed above.

(2)The object of the proposed variations is, plainly, reasonable and sensible.

(3) and (4) There is nothing in the evidence to suggest the trustees have been influenced by any irrelevant, improper or irrational factors or that they have been motivated by or seek to achieve an improper, collateral purpose.

(5) and (6) There is no doubt, on the evidence, that the trustees have concluded that the proposed variations are for the benefit of the beneficiaries and the trust estate, and that this conclusion is a proper one."

Findings

36. I accepted that a clear case for this Court approving the exercise of the Trustees' power to amend the Trusts by making the proposed appointments had been made out for the reasons submitted by counsel. I accordingly granted the Restrictions Application.

Summary

37. For the above reasons, on November 6, 2017 I granted the relief sought by the Plaintiffs on their Originating Summons.

Dated this 15th day of November 2017 _____
IAN RC KAWALEY