In The Supreme Court of Bermuda

CIVIL JURISDICTION

2024: No. 238

IN THE MATTER OF THE B TRUST

REASONS
FOR ORDERS AND JUDGEMENT
(In Chambers)

Hearing Date **14 November 2024**
Date of Judgement **20 November 2024**

Appearances: *Sam Riihiluoma* and *Luisa Olander* of Appleby (Bermuda) Limited for the Trustee of the Trusts
John McSweeney of Walkers (Bermuda) Limited for the Representative Beneficiary of the Adult Beneficiaries of the Trusts
Steven White as Guardian ad litem for the minor, unborn and unascertained beneficiaries of the Trusts, together with *Luca del Panta*, both of Walkers (Bermuda) Limited

REASONS of Martin, J

Judgment

1. This matter came on for hearing on 14 November 2024 at which the Court granted the Orders in terms of the Originating Summons, subject to one minor amendment. The Court indicated it would issue its reasons for making the Orders and this is the formal Judgment in this matter.

2. These applications relate to a group of 8 related family Trusts. The Trustee is trustee of all of them. It is a private trust company incorporated specifically to act in that capacity and acts solely for the group of family trusts involved in this application. Seven of the eight trusts were settled in 1996 (the "1996 Trusts"), and one of them was settled by way of appointment out of one of the 1996 Trusts in 2017 (the "2017 Trust", and together with the 1996 Trusts, the Trusts").

3. The relief sought in relation to each of the Trusts is the same.

   (i) An Order under section 47 of the Trustee Act 1975 granting the Trustee power to enter into Deeds of Variation that effect amendments to the Trusts in similar terms and effect;

   (ii) An Order under section 4 of the Perpetuities and Accumulations Act 2009 (the "P&A Act") dispensing with the rule against perpetuities in relation to each of them and extending the duration of the Trusts until 31 December 2124 with power to return to Court to apply for a further extension if the Trustee shall think fit;

   (iii) A Declaration that these changes to the Trusts do not constitute a resettlement of the Trusts.

The brief background facts

4. Seven of these trusts were settled in 1996 by the Settlor to provide a source of funding for the benefit of his family members and the future generations of his family. The 2017 Trust was settled on 2017 by appointment out of one of the 1996 Trusts. They are substantial Trusts and are vehicles for the estate and tax planning of the Settlor's descendants, and so they are "dynastic" in nature and purpose.

5. The Protector of the Trusts was closely involved with the settlement of the Trusts in 1996 and was a close adviser to the Settlor, who died some years ago. The Protector wishes to retire, but the mechanism in the Trusts requires him to appoint a successor. However, in this case, his nominated successor also wishes to retire, and it has not been possible to nominate another.

6. Originally the Trustee was a professional trust corporation, so the Settlor wanted the Protector to be a person in whom the family had confidence and a close connection. Today the Trustee is a private trust company with a close association with the family and its affairs, so it is no longer felt that having a Protector with a close family connection is necessary.

7. The Trustee, in consultation with the senior members of the family, has decided that it is preferable to amend the Trusts to provide a simpler mechanism for the appointment of a new Protector and at the same time to make various changes to the role of the Protector (mainly to reduce the matters in which the Protector's consent is required and to make the role a fiduciary role which it is not at present). It is felt that this will make it easier to find a successor Protector and to make the administration of the Trust easier and more efficient.

8. The Protector will retain key responsibilities such as the power of appointment and replacement of the Trustee, and the Trustee will be under a duty to consult with the Protector on any proposal to dispose of the underlying assets held within the Trusts.

9. At the same time the Trustee wishes to make a number of amendments to update and unify the Trusts so that they all operate on the same model of powers and structure, and that some areas of uncertainty are clarified. These do not need to be itemised in detail, but they are essentially administrative in nature (except the power to transfer to another settlement).

10. In addition, the senior members of the family wish to be able to make donations to charity through four of the 1996 Trusts directly and wish to encourage their children (and in due time) their descendants to do so also. For estate planning and tax reasons it is more efficient for such donations to be made directly by the relevant Trust rather than to pass through the hands of the specific beneficiary on whose behalf the donation is intended to be made. It is therefore proposed to amend four of the 1996 Trusts to include a power for the Trustee to add charities to the beneficial class of each Trust.

11. In order to ensure that there is no risk of depleting all the assets available for the existing class of family beneficiaries and their descendants, a limit on the amount which can be donated to charity in any one year has been imposed, equal to 10% of the cash income and capital receipts of the relevant Trust in the prior accounting period. It is felt that this will balance the desire to give back to the community through charity against the need to preserve the wealth for the benefit of the family and future generations.

12. In addition, and at the same time, the Trustee has decided that it would also be sensible to disapply the rule against perpetuities under the P&A Act because these Trusts are all very substantial and dynastic in nature and are expected to continue for generations to come. The Trusts do not hold Bermuda real property so that the restriction against disapplying the perpetuity period in relation to trusts that hold Bermuda real property is not engaged. In order to provide a single date, it has been decided that each of the Trusts should be extended until 31 December 2124. Further, it is thought to be sensible to retain the ability to come back to Court in the future to extend the duration further if need be.

13. Although the 2017 Trust was settled after the effective date of the P&A Act, to ensure that the perpetuity restriction that would otherwise be read back into the 2017 Trust is also removed, a similar application is made in respect of the 2017 Trust.

14. All of the adult beneficiaries except one have been consulted by the Representative Beneficiary of the adult beneficiaries and approve of the plan to make these amendments. The one adult beneficiary who has not been consulted has not been consulted in order to avoid the risk that such consultation might equate to some form of influence or control over the decision which might attract adverse tax consequences. This was felt to be both unfair to that beneficiary and unnecessary for the purposes of making this application.

15. Similarly, the Guardian *ad litem* for the minors, unborn and unascertained beneficiaries of the Trusts has reviewed the proposals and has given his approval and support to the applications. This is for the reasons *inter alia* that (i) the addition of the power to add charities is in line with the desire of the adult beneficiaries to use their wealth for

philanthropic purposes and is a value the family wishes to instil in future generations; (ii) the Trusts are sufficiently substantial, in conjunction with the limit described above, that there is no real risk of the donations to charity undermining the ability of the Trusts to fund very comfortable lifestyles to all the members of the family and their descendants from the assets of the Trusts; and (iii) on established authority, the risk of dilution of the beneficiaries' interests is not regarded as relevant when removing the perpetuity period[1].

Applications under section 47 of the Trustee Act

16. It is well established that the test the Court applies when considering whether to grant the Trustee a power that it does not have under the Deed to enter into a transaction is whether the transaction is "expedient" for the Trust as a whole[2].

17. In this case all the changes are purposeful and beneficial to the Trusts as a whole in that they improve the administration of the Trusts, they remove present obstacles to the appointment of a successor Protector and promote the desires of the family to benefit charity without impinging on the Trusts' respective resources to provide generously for the beneficiaries, both present and future.

18. The fact that one adult beneficiary has not been consulted does not mean that the Court should decline to exercise the power if it is satisfied that the power to enter the transaction is expedient for the Trust "as a whole" in the particular case of the Trust of which that person is a beneficiary.

19. The existing Trusts do not have the power to enter into the Deeds of Variation and the Court is satisfied that the Deeds of Variation are a transaction within the wide meaning of that term.

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[1] **C Trust** [2016] SC (Bda) 53 Civ (16 May 2016) per Kawaley J and **G Trusts** [2017] SC (Bda) 98 Civ (15 Nov 2017) per Kawaley CJ.
[2] **GH v KL** [2011] SC (Bda) Civ (2 Dec 2010) per Ground CJ and numerous cases following that decision, most recently **Butterfield Trust (Bermuda) Limited v Watson** [2022] SC (Bda) 92 Civ (29 Nov 2022) per Hargun CJ.

20. In addition, having considered the background circumstances, and weighing the considerations mentioned above, the Court is satisfied that the proposed amendments are expedient to each of the Trusts as a whole, for the reasons briefly given by the Trustee, the Representative Beneficiary of the adult beneficiaries and the Guardian *ad litem*.

21. Accordingly, the Court hereby confirms the grant of the relevant powers to the Trustee to enter into the Deeds of Variation in the terms proposed in each of the respective Trusts.

The removal of the perpetuity periods and the extension of the duration of the Trusts under section 4 of the P&A Act

22. The P&A Act removed the requirement for settlements settled after August 2009 to include a perpetuity period, except where the Trust holds Bermuda real property. The public policy of Bermuda is therefore that modern trusts do not need to have such a limitation.

23. In cases where dynastic wealth is concerned, where it is expected they will last for the full perpetuity period that would otherwise have applied, or in older trusts which had to have such a period included, this means that at some point in the future there will be a forced distribution of the assets to the then beneficial class of objects of the trust. It is generally regarded as being unsatisfactory to force the distribution on beneficiaries who may be young adults and for whom it may not be in their wider best interests to receive large distributions of wealth at one time. There are also tax and estate planning considerations that make such an event both unwise and potentially punitive. Therefore, the conventional wisdom is that it is better to extend the trust period to minimise the impact or get rid of a fixed term of duration altogether, depending on the tax consequences that may be involved.

24. In this case, the Trustee seeks an extension of the duration of the Trust to 31 December 2124 and asks for the Court's permission to return at a later date to seek a further extension if it is appropriate to do so.

25. The legal test for the removal of the perpetuity period are described in earlier cases which say that the Court must not act as a rubber stamp and must have regard to the interests of the parties, broadly defined and looked at as a whole, remembering that the dilution of the economic interests of existing beneficiaries is (normally) irrelevant[3].

26. Applying those tests to the present circumstances, I am satisfied that the removal of the perpetuity period and the extension of the duration of the Trusts (in each case) is in the interests of the beneficiaries looked at as a whole, and taking into account the factors that have been mentioned by the Trustee, the Representative Beneficiary of the adult beneficiaries and the Guardian *ad litem*, is in the best interests of the respective Trusts.

27. I also regard the extension of the duration of the Trusts as being in the best interests of each of the respective Trusts as a whole for the reasons above stated. I therefore grant the Order in the terms sought. The fact that one of the beneficiaries has not been consulted does not impact the Court's view of what is in the best interests of the particular Trust involved as a whole.

No Resettlement

28. A resettlement may be deemed to occur when the nature of the trust has been so altered or reorganised that it is no longer in substance the same in its effect or no longer reflects the same relationship that was created under the original settlement. There is no fixed criterion for determining whether a resettlement has occurred. The court has held that the question should be approached *"...by asking what a person, with knowledge of the legal context of the word [settlement] under established doctrine and, applying this knowledge in a practical common-sense manner to the facts under examination, would conclude.[4]"*

29. The Court can also derive assistance by looking at factors which have shaped the decisions of other courts in previous cases. In **Butterfield Trust (Bermuda) Ltd v**

[3] See **Re G Trusts** [2017] SC (Bda) Civ 15 November 2017
[4] **Roome v Edwards** [1982] AC 279, 292H to 293G per Lord Wilberforce.

Watson[5] the court held that the removal of a perpetuity period does not of itself constitute a resettlement. It follows that nor can the extension of the trust period do so. The main question is whether the substance of the Trusts has been altered to such an extent that it is no longer the same relationship between the Trust and the beneficiaries. In this case the changes to the provisions dealing with the appointment of the Protector and the changes to the responsibilities of the Protector are not such a change, nor are the changes to the administrative provisions. The addition of the power to add charities to the beneficial class is also not (in my view) such a change because the fundamental purpose behind the Trust is to benefit the various branches of the families involved, and to provide a mechanism by which the beneficiaries can ask the Trustee to consider making donations to those specified charities on their behalves.

30. In conclusion, I am satisfied that these changes do not constitute a resettlement of the Trusts and I grant the declarations sought to that effect.

Dated 20 November 2024

THE SEAL OF THE SUPREME COURT OF BERMUDA

THE HON. ANDREW MARTIN
PUISNE JUDGE

[5] Cited above at pages 6-12.