



In The Supreme Court of Bermuda

CIVIL JURISDICTION

Nos 2017: 415,416, 417

IN THE MATTER OF XYZ TRUSTS (No.2)

REASONS FOR RULING

(in Chambers)

Perpetuities and Accumulations Act 2009, section 3- exercise of power changing governing law to Bermuda law under trust instruments created prior to enactment of 2009 Act-whether perpetuity rule applies to exercise of power

Date of hearing: December 4, 2017

Date of Reasons: January 10, 2018

Mrs Fozeia Rana-Fahy, MJM Limited, for the Trustees

Introductory

1. On December 4, 2017, in respect of each of the three trusts, I granted a declaration on the Trustees' Ex Parte Originating Summons that:

“

1. Neither

(a) the rule against perpetuities; nor

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

applies or shall apply to the Trust or the property held thereunder.”

2. The application raised a point which appeared to me to be a new point of construction about the meaning and effect of section 3 of the Perpetuities and Accumulations Act 2009 (the “Act”). I was ultimately persuaded, despite some anxiety about deciding a somewhat technical point on an ex parte basis, that it was appropriate to grant the relief sought on the following alternative bases. Either:
 - (1) by virtue of section 3 of the Act, the rule against perpetuities did not apply;
or
 - (2) if I was wrong, I would in any event possessed the jurisdiction to dis-apply the rule against perpetuities under section 4 of the Act.

3. I now give brief reasons for the decision made in relation to these applications.

The factual matrix

The X Trust

4. This Trust was established prior to August, 2009 under Part VIII of the Cayman Islands Trust law and that statute’s Special Trusts Alternative Regime (“STAR”). The Trust Period was defined as a term of years in excess of 100 years. The Trust was not a “pure” purposes trust as it had beneficiaries. The Trust’s governing law was subsequently changed to Bermuda law. The Trustee was at this point advised that the perpetuities rule did not apply to the X Trust under Cayman Islands’ law but might become applicable under Bermuda law. The Trust neither holds nor is intended to hold Bermuda land. The Trustees were concerned whether the common law relation back doctrine had in fact been dis-applied by the relevant provisions of the Act.

The Y Trust

5. The Y Trust was established prior to August 2009 and amended and restated in after August 1, 2009. The Trust Period was defined as a term of years in excess of 100 years. The Trust was not a “pure” purpose trust as it was created for the benefit of both beneficiaries and purposes. In 2016 the Trust’s governing law was changed to Bermuda law. The Trustee understood that prior to this change the perpetuities rule did not apply to it as a Cayman Islands STAR trust, but that afterwards it did under Bermuda law. The Trust neither holds nor is intended to hold Bermuda land.

The Z Trust

6. The Z Trust was established prior to August 2009 and amended and restated after August 1, 2009. The Trust Period was defined as a period of years in excess of 100 years. The Trust was not a “pure” purpose trust as it was created for the benefit of both beneficiaries and purposes. After August 1, 2009, the Trust’s governing law was changed to Bermuda law. The Trustee understood that prior to this change the perpetuity period did not apply to it as a Cayman Islands STAR trust but that afterwards it did under Bermuda. The Trust neither holds nor is intended to hold Bermuda land.

Dynastic wishes of the Settlor

7. The Trusts were established to preserve family wealth for many generations. The dynastic intentions of the Settlor were consistent with the fact that the settlements were initially established on terms that they were not subject to the rule against perpetuities.

Post August 1, 2009 changes of governing law

8. The terms of the Trusts were changed from time to time, explicitly on the terms that new settlements were not created. After August 1, 2009, the governing law of the X, Y and Z Trusts was changed and the Trusts reappointed on amended terms.

The statutory provisions

9. It was pertinent to note that the Trusts are not purpose trusts because if they were it would have been clear that the perpetuity period did not apply to them. Section 12A of the Trusts (Special Provisions) Act 1989 (as amended by the Act with effect from August 1, 2009) provides:

“(4) The rule of law (known as the rule against excessive duration or the rule against perpetual trusts) which limits the time during which the capital of a trust may remain unexpendable to the perpetuity period under the rule against perpetuities shall not apply to a purpose trust.”

10. It was conceded that the construction of section 3 of the Act was for present purposes less than clear. Nevertheless, it was contended that, properly construed, its effect was that any post-August 1, 2009 instrument governed by Bermuda law was not subject to the perpetuity period unless it related to “*land in Bermuda*”. The section provides as follows:

“Application of rule against perpetuities limited to land in Bermuda

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.

(2) If an instrument limits property in trust so as to create successive estates or interests, the rule against perpetuities applies to each of the estates or interests only to the extent that the property is land in Bermuda.

(3) If an instrument limits property in trust so as to create an estate or interest which is subject to a condition precedent and which is not one of successive estates or interests, the rule against perpetuities applies to the estate or interest only to the extent that the property is land in Bermuda.

(4) If an instrument limits property in trust so as to create an estate or interest which is subject to a condition subsequent, the rule against perpetuities applies to any right of re-entry exercisable if the condition is broken only to the extent that the property is land in Bermuda.

(5) If an instrument creates a power of appointment, the rule against perpetuities applies to the power only to the extent that it is exercisable over land in Bermuda.

(6) In this section “instrument” does not include a will executed before the commencement day.

(7) For the avoidance of doubt, the reference to land in Bermuda does not include—

(a) the income from any land in Bermuda, or

(b) the proceeds of sale of any land in Bermuda.” [Emphasis added]

11. The difficult question arose was in connection with the doctrine that an instrument exercising a power conferred by a settlement takes its character from the original settlement. Was subsection (5) of section 3 designed to override the effect of that doctrine in relation to instruments which took effect before the commencement of the Act and powers of appointment exercised after the Act came into operation?
12. Mr Richard Wilson QC, in a cautious and careful Opinion, ultimately concluded that this question should be answered in the affirmative but that the question ought to be determined by the Court. The analysis was carried out because it was unclear whether or not the change of governing law of a trust not previously subject to the perpetuity period could have the effect of applying a rule which previously existed under the new governing law. Leading counsel opined as follows:

“23. The effect of s. 3(1), (2) and (5) (the latter in particular) appears to me to modify the common law principle that where a special power of appointment is exercised, for perpetuity purposes, the exercise is ‘read back’ into the original instrument and the original perpetuity period applies (see Lewin 19th Edn g5-123 and the authorities referred to therein). Thus if, for example, a special power of appointment is exercised so as to create a new interest or new power of appointment, no perpetuity period applies to that interest or power, although it would appear that the perpetuity rules would still apply to any interests or powers created by an instrument pre-dating the commencement day.

24. The 2016 Deed is an instrument that was executed after the commencement day. Whilst it might be argued that as it is an instrument executed pursuant to a special power, it should be read back into the original settlement deed, I do not consider that is what s. 3 requires. In view of the wording used, it is hard to see how it would be possible to imply a requirement to ‘read back’ an instrument into the instrument containing the power creating it without doing considerable violence to the wording used by the legislators...

30. As there is no direct authority on the question of what impact s.3 has in circumstances such as these, I do not find this question an easy one on which to reach a conclusion...

31. It therefore seems to me that this is a question which will have to be determined by the Court as part of the application under s.4 of the 2009 Act: in order for the Court to make any such order, it must firstly be satisfied that the trust in question is subject to a perpetuity period. If the Court decides that it is not, then it can be asked to make the appropriate declaration. If it does so, there should not be any obstacle to the trustees then appointing trusts that are perpetual in duration.

32. If, on the other hand, the Court determines that the...Trust is subject to a perpetuity period, it will be necessary to decide whether it ought to make an order under s.4...”

Legal findings

13. Mrs Rana-Fahy, when pressed, adopted as her primary submission the construction of section 3 relied upon by Mr Wilson QC. She adopted his central thesis which was as follows:

- the starting legal assumption is that an instrument which constitutes a power of appointment made under an earlier deed will be subject to the rule against perpetuities if the earlier deed is subject to the rule under the relevant governing law of the trust;
- accordingly, as the Trusts were created by instruments taking effect before August 1, 2009, upon becoming governed by Bermuda law,

albeit by virtue of an instrument made after the Act came into force, they would at common law arguably have become subject to the rule against perpetuities;

- however, section 3 of the Act (and particularly subsection (5)), in providing that the rule against perpetuities would not apply to a power of appointment made under an instrument unless it was exercised over land in Bermuda, was clearly designed to dis-apply this general legal rule.

14. An important aspect of the analysis was carried out by reference to the similar and contrasting provisions of the Perpetuities and Accumulations Act 2009 (UK), which admittedly came into force after its Bermudian counterpart. Section 2 of the Bermudian Act defines “*power of appointment*” in substantially the same way as section 20(2) of the UK Act:

“power of appointment’ includes any discretionary power to create or transfer a beneficial interest in property without the provision of valuable consideration”.

15. I had little difficulty in accepting the submission that the instrument which, *inter alia*, changed the governing law of the two Trusts to Bermuda law, was a “power of appointment” for the purposes of the Act. ‘*Lewin on Trusts*’, Nineteenth Edition at paragraph 5-113, speaks to the breadth of this definition as being sufficient to encompass conventional and non-conventional discretionary powers. However, the same paragraph also points out that powers of appointment thus defined under the UK 2009 Act are expressly made subject to the rule against perpetuities.

16. Section 1(6) of the UK 2009 Act also states: “*If an instrument creates a power of appointment the rule applies to the power.*” In stark contrast, section 3(5) of the Bermudian Act provides: “*If an instrument creates a power of appointment, the rule against perpetuities applies to the power only to the extent that it is exercisable over land in Bermuda.*” I ultimately found compelling the argument that section 3(5) read in its wider context can only sensibly be read as intended to achieve the following legal result. Where an instrument creating trusts and taking effect before the Act became operative on August 1, 2009 creates a power of appointment (as defined by the Act), the exercise of that power after August 1, 2009 is unaffected by the rule against perpetuities unless it is exercised in relation to land in Bermuda.

17. On superficial analysis one might be inclined to think that section 3(1) makes it plain that this section is not concerned at all with instruments taking effect before the Act itself comes into operation. But if this superficial judgment was right, there would be no need for section 3(5) at all. Where the instrument creating the power of appointment is itself made after the Act come into force, no question of a power of appointment created by such instrument being subject to the rule against perpetuities would of course arise. Subsection (5) only has any easily discernible practical utility if it is construed as dis-applying the general common law rule that the exercise of a

power of special appointment entails the exercise of a “*fiduciary power which itself ‘belongs’ to the old settlement*”: *Underhill and Hayton, Law of Trusts and Trustees*, Nineteenth Edition, at paragraph 63.19.

18. I therefore found that by virtue of the application of section 3 of the Act, the execution of post-August 1, 2009 deeds (which, *inter alia*, changed the governing law of the Y and Z Trusts to Bermuda law) did not result in the rule against perpetuities applying to the Trusts because the exercise of the power did not relate to “*land in Bermuda*”. Section 3 (1) expressly provides that the rule against perpetuities does not apply to instruments made after the commencement date of the Act, which is August 1, 2009, except as provided by that section. Although section 3 does not abolish the perpetuities rule as regards instruments creating trust interests which took effect prior to August 1, 2009, section 3(5) provides that where a power of appointment is exercised after this date (by necessary implication under an instrument creating trust interests taking effect before the commencement date), such a power is only subject to the rule against perpetuities if it “*exercisable over land in Bermuda*”.
19. I found that while the construction of section 3 and its impact on the Trusts was initially not free from doubt, in the final analysis the position was clear. Section 3 of the Act does not simply dis-apply the rule against perpetuities in relation to instruments creating trust interests taking effect after the commencement of the Act (assuming land in Bermuda is not involved). Subject to the same assumption that Bermuda land is not affected, this provision also dis-applies the rule against perpetuities in relation to instruments made post-August 1, 2009 in the exercise of a power created by a pre-August 1, 2009 instrument.

Alternative findings

20. There was little doubt that, if my primary findings were wrong, a clear case for dis-applying the perpetuity period under section 4 of the Act was made out and I would instead have granted relief in those alternative terms. Mrs Rana-Fahy referred in this regard to this Court’s recent decisions in *Re C Trust* [2016] SC (Bda) 53 Civ (16 May 2016) and *Re G Trusts* [2017] SC (Bda) 98 Civ (15 November 2017). In the latter case, without any meaningful analysis of section 3 at all, I noted that section 4 provided relief in cases to which section 3 did not apply:

“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.”

21. The guiding principles to making an order under section 4 of the Act are set out in sufficient detail in the latter case, but are expressed most concisely in the following paragraph of my judgment in *Re C Trust* (at paragraph 15):

“(1) the Court should not act as ‘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.”

Conclusion

22. For these reasons on December 4, 2017 I granted the Trustees’ applications for declarations that the perpetuity period did not apply to the (X) Y and Z Trusts.

Dated this 10th day of January, 2018 _____
IAN RC KAWALEY CJ