In The Supreme Court of Bermuda

CIVIL JURISDICTION

Consolidated actions 2012: 32 and 348

IN THE MATTER OF XYZ TRUSTS

REASONS FOR RULING

(in Chambers)

Discretionary trust-application for approval of trustees' decision to develop detailed plans for implementing a proposed restructuring- prospective extension of trustees' powers in relation to an expedient arrangement-section 47 of the Trustee Act 1975-application for approval of trustees' decision to amend company bye-laws to permanently disqualify family director

Date of hearing: 6-7 December, 2017
Date of Reasons: December 12, 2017

Mr Robert Ham QC of counsel and Mr John Riihiluoma, Appleby Global (Bermuda) Limited, for the Plaintiffs (the "Trustees")
Mr Timothy Marshall and Ms Katie Tornari, Marshall Diel & Myers Limited, for the 2nd Defendant
Mr Stephen Moverley Smith QC of counsel and Mr Nathaniel Turner, ASW Law Limited, for the 1st and 3rd Defendant
Mr Delroy Duncan, Trott & Duncan Limited, for the 3rd Defendant in his representative capacity
Mr Ben Adamson and Mr Rhys Williams, Conyers Dill and Pearman Limited, for the 4th, 5th, 7th and 10th Defendants
Mr Jeffrey Elkinson, Conyers Dill and Pearman Limited, for the 8th-9th Defendants (minors, by their Guardians)
Mr Dakis Hagen QC of counsel and Mr Matthew Watson, Cox Hallett Wilkinson Limited, for the 11th-14th, 16th -17th, 19th -20th and 24th Defendants

Mr Craig Rothwell, Cox Hallett Wilkinson Limited, for the 15th, 18th, 22nd -23rd and 25th Defendants
Mr Thomas Seymour of counsel and Mr Jai Pachai, Wakefield Quin Limited, for the 21st Defendant (a minor, by her Guardian) in her personal and representative capacity

Introductory

1. By a Summons dated June 7, 2017, the Trustees sought two broad heads of relief:

   (a) the Court's blessing for their decision to develop detailed plans for the implementation of the Proposed Restructuring of the Trusts, with a facilitative expansion of their powers under section 47 of the Trustee Act 1975; and

   (b) the Court's blessing for their decision to amend the articles of certain companies to provide that any directors who were removed from the boards would be removed for life.

2. By the end of the hearing the first main limb of the application was less controversial than the second. I granted the first main limb of the relief sought, with the form of relief being refined on a consensual basis as a result of helpful and insightful input from counsel on various sides of the initial debate. I granted the second limb of the relief sought in a significantly modified form as a result of persuasive arguments from counsel for the 2nd Defendant (D2) and counsel representing other members of D2's family side.

3. I now give brief reasons for this decision.

Overview of the proceedings

4. The present proceedings cannot be understood without a thumbnail sketch of the family and financial underpinnings of the Trusts. The general picture is not an unfamiliar one. Considerable wealth was created by a patriarch and settled upon trust. With his first wife he created by one family. Later in his life, with a second younger wife, he created a second family. Tensions now exist between the 'First Family' (which provides the overwhelming majority of adult beneficiaries and has itself divided into two separate but allied sub-branches) and the 'Second Family'.

5. There is broad consensus that the trust structure should ideally be divided into three separate sub-trusts, but there is anxiety on the part of the Second Family as to what corporate governance mechanisms can be put in place to ensure that their interests are not trampled on by the majority influence of the First Family over the underlying

companies. Neither surprisingly nor unusually, the Trustees have approached the restructuring process on the basis that they will in the first instance seek to achieve consensus amongst the beneficiaries and only come to Court to resolve any disputes which arise as a last resort. In broad outline, the history of the proceedings may be described as follows:

- **January 2012**: the 'Main Action' was commenced following Family mediations in 2009 and 2010 after a consensus was reached that the Trusts' assets should be divided in three for the respective branches;

- **October 2015**: after certain tax issues had been resolved, a Project Director was appointed to lead the restructuring process;

- **June 9, 2016**: the Trustees issued a Summons seeking the Court's approval for developing a plan to implement the Proposed Restructuring. Thereafter various without prejudice negotiations took place in relation to the proposed plan;

- **February 8, 2017**: the Trustees presented their Initial Trustee Proposal at a Family meeting. This did not achieve consensus;

- **April 14, 2017**: the Trustees circulated their Updated Trustee Proposal and invited comments from the beneficiaries;

- **May 18, 2017**: the Trustees advised the beneficiaries at a Family meeting that in view of the lack of consensus they would seek approval for the Proposed Restructuring from the Court;

- **June 7, 2017**: the present Summons was issued by the Trustees.

6. I considered it to be self-evident that, bearing in mind that all parties were represented by sophisticated and not inexpensive legal and other advisers, it was in the best interests of the Trust and beneficiaries as a whole that the Trustees should act decisively and use their best endeavours to bring this protracted process to a final conclusion. The uncontroversial evidence disclosed that the main purpose of the Proposed Restructuring was to reduce (if not eliminate altogether) the opportunities for the continuation of the costly historic tensions between the First and Second Families.

The decision to develop detailed plans for the implementation of the Proposed Restructuring

<u>The controversy in outline</u>

7. The Trustees' substantive decision to develop detailed proposals for the Proposed Restructuring, guided by two broad principles, was uncontroversial. Those principles were (a) the creation of three sub-trusts, and (b) an equal allocation of the underlying assets to each sub-trust. There were three main objections initially raised:

    (1) the application was premature in the sense that more time should be taken to seek a consensus;

    (2) the application was premature in the sense that it was wrong to obtain the Court's blessing for adopting a structure the viability of which depended upon factors, notably corporate governance structures, which were not presently known. In particular, it was wrong to shut out arguments based on facts not presently known which made the assumed new trust superstructure non-viable;

    (3) the extension of powers sought under section 47 was legally premature and impermissible because the Court lacked sufficient information about the transaction it was being asked to approve.

<u>More time should be taken to pursue a consensus</u>

8. I summarily rejected the suggestion that more time should be expended by the Trustees seeking to achieve a consensus. The history of the matter suggested that the Trustees had used their best endeavours to achieve a consensus and were, on proper analysis, merely seeking to obtain approval for their decision to move forward to tackle those issues (tax obligations and corporate governance) which could not yet be agreed.

<u>The proposed trust superstructure and the underlying corporate governance structures should be approved at the same time so as to preserve the right to object to both elements of the Proposed Restructuring</u>

9. Mr Ham QC for the Trustees made it clear in his opening submissions that it was possible that subsequent events (notably tax advice) might raise the need to change course in terms of the present triple sub-trust proposal. Response submissions, notably by Mr Moverley Smith QC and Mr Seymour, made it apparent that the Second Family was concerned not so much about the principle of the Trustees

developing detailed proposals. Rather the anxiety was that the right to challenge a structure which was subsequently (from that branch's perspective) shown to be unjust would be lost. These concerns were understandable but effectively fell away when the Trustees eventually agreed that paragraph 7 of the Order sought should include permission for the Defendants to file evidence at the final approval hearing specifying, *inter alia*:

> "*(d) whether it is said that the Court should not approve the Butterfield Trustees' final Detailed proposals on some other (and if so what) ground*".

<u>The legal requirements for making an Order under section 47 of the Trustee Act 1975 were not met</u>

10. The significance of the technical legal objections to the Order sought appeared to me to fall away once the more substantive concerns of the objecting Defendants were largely met. The details of what might be described as the proposed new trust superstructure were set out in the Schedule to the draft Order under the following headings:
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    - "*Enlargement of powers of appointment*" (including the power to create new trusts and dis-apply the perpetuity period in applicable to the Trust conferring the relevant power);
    - "*Core asset allocation*"; and
    - "*Non-Core assets*".

11. The Trustees sought a direction in the following terms:

> "*THE COURT CONFIRMS that the Trustees have power to carry out the Proposed Restructuring and, if and so far as necessary, CONFERS on the Trustees pursuant to section 47 of the Trustee Act 1975 the enlarged powers set out in paragraphs 2 and 3 of the Schedule hereto.*"

12. Mr Moverley Smith QC raised three objections to the Court making the direction sought:

(1) the Court could not properly approve the Proposed Restructuring in the absence of the Detailed Proposals;

(2) it was not possible at this juncture to determine precisely what the Trustees would be doing and so their authority to act could not at this juncture be properly ascertained; and

(3) the section 47 jurisdiction could not be exercised because it was impossible for the Court to determine either:

   (a) expediency, or

   (b) that the limits of the Trustees' powers would be exceeded.

13. Section 47 of the Trustee Act 1975 provides as follows:

> "*(1) Where any transaction affecting or concerning any property vested in trustees,* is in the opinion of the court expedient, *but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the instrument, if any, creating the trust, or by any provision of law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.*
>
> *(2)The court may, from time to time, rescind or vary any order made under this section or may make any new or further order.*
>
> *(3)An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.*
>
> *(4)In this section, "transaction" includes any sale, exchange, assurance, grant, lease, partition, surrender, reconveyance, release, reservation, or other disposition, and any purchase or other acquisition, and any covenant, contract, or option, and any investment or application of capital, and any compromise or other dealing, or arrangement.*"

14. This Court has previously described the section 47 jurisdiction as being a broad one, both as regards what proposals qualify as "*any transaction*" and what constitutes "*expedient*". Ground CJ in *GH and IJ-v-KL and others* [2010] Bda LR 86 rightly described the definition of "*transaction*" in section 47(4) as a "*very broad definition*".

In the same case, Ground CJ approved the following *dictum* of Farwell J in *In Re Craven's Estate* [1937] 1 Ch 431 at 436:

> "*It cannot mean that however expedient it may be for one beneficiary if it is inexpedient from the point of view of the other beneficiaries concerned the Court ought to sanction the transaction. In order that the matter may be one which is in the opinion of the Court expedient, it must be expedient for the trust as a whole.*"

15. *In re ABC Trusts* [2012] Bda LR 89, another case where admittedly final approval for specific proposals was also sought, I observed:

> "*6. Mr Adamson described the dominant safeguard in section 47 as being the requirement that the relevant transaction or variation of trustee's powers had to be shown to be "expedient" to the trust. That seems to me to be broadly consistent with the essence of English trust law in which the Court's equitable jurisdiction seeks to be flexible and do justice in individual cases and not stand on the sort of formalities which may require more technical analysis in the context of dealing with common law documents.*
>
> 7. *The cases which indicate the breadth of this jurisdiction even in the context of the narrower English statutory provisions to which he referred included Hambro-v-Duke of Malborough [1994] 3 WLR 341 and In re Craven's Estate [1937] 1 Ch 431.*"

16. Mr Ham QC invited the Court to follow a similar approach. I was unable to see any proper legal basis for concluding that section 47 could not be deployed to approve the first stage of a transaction which would in the second stage be more fully fleshed out. As the Trustees' counsel submitted, the sub-trust concept was a well-known one. Also it seemed clear on the face of section 47(2), that the section is intended to be used to make interim orders.

17. Nor did the complaints that it was impossible to identify at this stage what was within or without the Trustees proposed powers withstand scrutiny. The need for this Court to make any such determination was neatly sidestepped by the form of Order sought. This Court was asked to confirm that the Trustees could implement the Proposed Restructuring but, "*if and so far as necessary*", to supplement their powers to a defined extent via section 47. The Trustees did in fact identify the powers which they thought might not, in respect of one or more of the various settlements, exist. The draft Order specified a power which would be lacking in all relevant cases, disapplying any perpetuity period prescribed.

18. It was in my judgment difficult to see any valid technical legal objection to the form of Order the Trustees sought in the context of an interlocutory application which expressly contemplates further judicial approval of more detailed proposals. The essence of the "transaction" proposed to be developed further was, after all, agreed by all concerned to be a sound one. That consensus was inconsistent with the notion that any serious doubts existed about the Trustees' legal ability to implement it. And at the end of the day the authority this Court was being asked to confirm the Trustees possessed either fell within their existing powers or required the deployment of powers which could be conferred on them under the flexible jurisdiction provided by section 47.

Conclusion

19. For the above reasons I granted the primary relief sought by the Trustees.

The decision to permanently remove D2 as a director

The controversy in outline

20. The controversy surrounded the Trustees' decision to amend the articles of certain companies they controlled to provide that any director who had been removed should be permanently excluded. This was admittedly aimed at D2. The basis for this decision was in part historic conduct which had resulted in D2 being removed from certain boards and what was criticised as an "ultimatum" from the First Family that they would not support the Proposed Restructuring unless assured that D2 would never again serve as a director.

21. The Trustees' need to maintain, so far as possible, a stance of neutrality in Family disputes resulted in this aspect of the Trustees' application being advanced with some delicacy. Mr Hagen QC for a leading member of the First Family was not subject to such constraints. However, somewhat surprisingly (but very encouragingly), at the end of the day, in the face of powerful submissions by Mr Marshall (for D2) (which were ably supported by Mr Moverley Smith QC and Mr Seymour), Mr Hagen made important concessions on the scope of the proposed amendments to the articles. The Court had, it must be said, made it clear that only a less blunt amendment would be approved.

22. Instead of a provision in the articles of certain companies on whose boards Family directors were expected to serve which would prohibit any director who has been removed from ever serving again without the possibility of reprieve, I approved the decision of the Trustees to permanently exclude, in effect, D2, unless the unaffiliated professional directors, in their absolute discretion, decided otherwise.

The legal approach to conferring or withholding the Court's blessing

23. Controversy centred on the application of the principles governing the Court's approach to whether or not to 'bless' the Trustees' decision, not the content of those principles. This was by common accord a Category 2 case following the classification established in *Public Trustee-v- Cooper* [2001] WTLR 901; a momentous decision which the Trustees were empowered to make but did not wish to implement without the Court's confirmation that it did not entail an improper exercise of the relevant power. Hart J framed the governing principles governing the approach to the evidence in such a case as follows in concluding that objections to the Court conferring its blessing had not been made out in that case in the following way:

> "*The evidence relied on does not, however, in my judgment, succeed in establishing the case that there was no material on which the Provident Settlement trustees could reach their conclusion or that that conclusion was manifestly unreasonable.*"

24. Other subsidiary principles were relied upon in seeking to persuade the Court to withhold its approval. Mr Marshall relied heavily upon the following observations of Vos LJ in *Cotton and Another-v-Brudenell-Bruce, Earl of Cardigan* [2014] EWCA Civ 1312:

> "*61…In order to succeed in such an application, the trustees must, as Sir Andrew Morritt made clear in Tamlin v. Edgar supra, put the court in possession of all relevant facts so that it may be satisfied that the decision of the trustees is proper and for the benefit of the beneficiaries. Moreover, it must be demonstrated that the exercise of their discretion is untainted by any collateral purpose. This process could be seen as one of "disclosure", but I would prefer to regard it as an evidential exercise. The trustees have the burden of proof and must, therefore, give the court all the information and disclosure that it requires to be satisfied that approval can be granted. If they fail to do so, they will not obtain the approval they seek. But the court may, in such a case, send the trustees away to produce more evidence. Whilst the process is not inquisitorial, it is part of the inherent jurisdiction of the court to supervise trustees.*"

25. Mr Ham QC in reply emphasised the following sentence in the same passage:

> "*The court would be unwilling, I think, to countenance the refusal to approve a proper, and momentous, transaction on some technical ground based upon an incidental failure to produce adequate material to the court.*"

26. In my judgment, it was important to remember that what quality of evidence is required to be placed before the Court depends on the circumstances of the particular case and the nature of the facts in controversy. In *Public Trustee-v- Cooper* [2001] WTLR 901, Hart J stated (at page 12):

> "*What then are the duties of the court in considering a category (2) case? They will depend on the circumstances of each case.*"

<u>Would a reasonable trustee have made the impugned decision?</u>

27. It was ultimately clear that a reasonable trustee, possessed of the information which the First Family placed before the Court, could properly have decided to permanently exclude D2 from a future role as a director. The relevant legal test required me to put aside my personal sympathy for the archetypical young rebel whom D2 seemed to represent. It also required me to put aside my intuitive attraction to the argument that the underlying companies would benefit from the diversity of viewpoints which D2 'brought to the table'. It was impossible to fairly conclude that the alternative view was "manifestly unreasonable". The proposition that a former director who had arguably placed their own personal philosophy ahead of the primary legal duties the director of a profit-making company owes to its shareholders and, as a result, was not fit to serve in such a capacity again represented an orthodox 'mainstream' commercial stance.

28. What levels of loyalty are required on company boards and how much homogeneity of approach is required are in any event multi-layered questions capable of generating a dizzying array of potentially valid answers. Even in the context of a family corporate group which is subject to a clear starting assumption that family members should be entitled to serve on the board, such questions cannot be analysed in a binary fashion and do not yield clear-cut answers which are either "right "or "wrong". The fact that the Trustees could equally have chosen to respond in a more liberal and tolerant manner was beside the point in legal terms. In these circumstances, I found, it was not necessary for the Trustees to spell out explicitly the process of reasoning which led them to decide to implement the permanent exclusion decision. It was enough for them to confirm through counsel, who undertook to file a confirmatory Affidavit (and has now done so), that the facts and matters advanced by Mr Hagen QC were in fact known to the Trustees before they reached their decision.

29. I was accordingly satisfied that the proposed permanent exclusion amendment was, subject to an important *caveat*, one which a reasonable trustee might properly make. The history of the present proceedings made it obvious, to my mind, that it was also reasonable to pivotally take into account the threat of the First Family (to which the majority of adult beneficiaries belong) not to cooperate in the restructuring process if the permanent exclusion was not adopted. The response to this so-called ultimatum would only have fallen outside the range of reasonable responses which were fairly available had the underlying misconduct complained of been so trivial that the proposed 'penalty' for it was itself manifestly unreasonable.

30. The important *caveat* to this finding was the following qualification. I found that it was impossible to identify a reasonable basis for the Trustees to conclude that D2 should be excluded for life without any possibility of a reprieve. Neither Mr Ham QC nor Mr Hagen QC was able to advance any cogent justification for such an extreme response to the actions of a young former director whom experience suggested would likely become less obstreperous in their more mature years. In the event, each of the two main proponents for an unconditional lifetime ban ultimately conceded that the proposed amendment to the articles should leave open the possibility that independent non-Family directors might allow D2 to be reappointed as a director at some future date.

31. In effect I ultimately approved the amendment of the relevant bye-laws to permit the imposition of an indefinite rather than permanent ban on D2 serving as a director. It was clearly possible to foresee that with the passage of time D2 would become by common accord a suitable director, but impossible to predict when (if at all) that new consensus might emerge. The answer in many ways probably lies largely in D2's own hands. In business, in sports and in life generally, every individual player must not merely demonstrate that they have something of value to offer the team. They also must demonstrate that they appreciate that the team as a whole is more important than any one player.

Conclusion

32. For the above reasons, I granted in diluted form the approval sought by the Trustees to amend the articles of certain companies to permanently exclude D2 as a director.

Dated this 12th day of December, 2017 ___________________________

IAN RC KAWALEY CJ