In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017: 136

IN THE MATTER OF A TRUST (CHANGE OF GOVERNING LAW)

REASONS

(in Camera)

Trust-differential provision for legitimate and illegitimate children-proposed change of governing law from Caymanian to Bermudian law-abolition of legal distinctions between legitimate and illegitimate children by sections 18A to D of the Children Act 1998-application for declaration that change of governing law would not trigger the application to the Trust of the provisions of sections 18A to D of the Children Act 1998

Date of hearing: May 15, 2017
Date of Reasons: May 19, 2017

Mr Brian Green QC of counsel and Mr Jeffrey Elkinson, Conyers Dill and Pearman Limited, for the Trustee (the Plaintiff)

Mr Francis Barlow QC of counsel and Mr David Kessaram, Cox Hallett Wilkinson Limited, for the Unborn and Unascertained Beneficiaries (the 1st Defendant)

Mr Craig Rothwell, Cox Hallett & Wilkinson, for the 2nd Defendant

The Attorney-General, the 3rd Defendant, did not appear

Introductory

1. By an Originating Summons issued on April 24, 2017, the Trustee sought, *inter alia*, the following relief:

> "*1. A Declaration as to whether an exercise by the Plaintiff of the power in paragraph 6 of the Schedule of the* [Trust] *to change the governing law of the* [Trust] *from the law of the Cayman Islands to the law of the Islands of Bermuda:*
>
> *(a) would not or*
> *(b) would*
>
> *cause sections 18A to D of the Children Act 1998 (Bermuda) as inserted by the Children Amendment Act 2002 (Bermuda)-*
>
> *(i)* *thenceforth to apply to the* [Trust] *and*
> (ii) *in the future upon the exercise of any power under the* [Trust] *to apply to any property of the* [Trust] *subject to such exercise.*"

2. On May 15, 2017, I granted a declaration in the negative sense pursuant to paragraph 1(a) of the prayer in the Originating Summons. I now give reasons for that decision.

Factual matrix

3. The Trust was created under Caymanian law in 2007 after the Children Amendment Act 2002 introduced a new Part IIA containing sections 18A-18D into the Children Act 1998 ("the 1998 Act") with effect from January 19, 2004. However it was supplemental to an earlier trust which was settled in 1983. Apart from charitable objects, the beneficiaries included the principal beneficiary and his legitimate issue.

4. The Trustee wished to modernise various provisions of the Trust and to change the governing law to Bermuda so as to be able to upgrade the Trust structure under the flexible jurisdiction conferred by section 47 of the Trustee Act 1975. If the effect of changing the domicile of the Trust from the Cayman Islands to Bermuda was to automatically trigger the application to the settlement of the relevant provisions of the 1998 Act, the change of domicile could not properly be exercised as such a course

would be materially adverse to the interests of the unborn (legitimate issue) beneficiary class.

5. The Trustee's counsel argued, without any opposition from the 1st Defendant's counsel, that the change of governing law power could be exercised without triggering the operation to the Trust and any instruments executed under it of the relevant statutory provisions in the 1998 Act.

The 1998 Act

6. Sections 18A-G of the 1998 Act contain provisions which were enacted by the Children Amendment Act 2002 with effect from January 19, 2004. Section 18A of the 1998 Act provides as follows:

> "**Abolition of distinction between legitimate and illegitimate children**
> 18A (1) Subject to subsection (2), for all purposes of the law of Bermuda a person is the child of his natural parents and his status as their child is independent of whether he is born inside or outside marriage.
>
> (2) Where an adoption order has been made under the Adoption of Children Act 2006 or any previous enactment relating to the adoption of children or the law of any other jurisdiction, the child is in law the child of the adopting parents as if they were the natural parents.
>
> (3) Kindred relationships shall be determined according to the relationships described in subsection (1) or (2).
>
> (4) Any distinction between the status of a child born inside marriage and a child born outside marriage is abolished and the relationship of parent and child and kindred relationship flowing from that relationship shall be determined in accordance with this section.
>
> (5) This section applies 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."[Emphasis added]

7. The first section abolishes the legal distinction between children born in and out of wedlock and explicitly applies to (a) persons born before or after the Act (i.e. January 19, 2004) and (b) persons born outside of Bermuda neither of whose parents are domiciled in Bermuda.

8. Section 18B is the section which substantively gives effect to section 18A so far as the present application is concerned. It provides:

"***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]

9. Section 18B 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.

10. The most significant provision for present purposes, that is determining what effect changing the governing law of a Caymanian trust settled in 2007 to Bermuda would have in terms of triggering the application of Part IIA of the 1998 Act, was the following transitional provisions of section 18C:

"**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.*"

11. At first blush section 18C would automatically apply to the Trust if it became governed by Bermuda law as it was an "*instrument made on or after the day this Part comes into operation*". This much was expressly conceded in the Opinion of Mr Francis Barlow QC for the unborn beneficiaries within the class expressly defined by the Trust. However, compelling submissions were advanced by Mr Green QC for the Trustee as to why, as a matter of proper legal analysis, this ought not to be the case. And Mr Barlow QC, tasked with opposing these arguments if he could, was unable to do so.

Legal findings

Territorial application of Part IIA of the 1998 Act

12. I agreed that it was obvious that Part IIA of the Children Act could not sensibly be construed as extending to trusts governed by foreign law. In the Plaintiff's Skeleton, it was rightly submitted without reference to authority:

> "*30… Bermuda has no authority to legislate for what can or cannot be done by dispositions made constituting trusts outside the jurisdiction, or under instruments made under such dispositions.*"

13. However, in the course of oral argument this point was fortified by reference to the broadly analogous legislative context of the Human Rights Act 1981, which prohibits discrimination on the grounds of family status. Section 10 prohibits discriminatory covenants in legal instruments in terms which appear clearly to apply to settlements and instruments made under them. In this legislative context, Parliament made it plain that the 1981 Act was not intended to apply to 'international' instruments involving property beneficially owned by persons who were neither Bermudians nor ordinarily resident in Bermuda:

> "*(6) For the purpose of this section "legal instrument" means any instrument, other than an Act or statutory instrument, which relates in any way to the disposition of any property owned beneficially by a Bermudian or by any other person ordinarily resident in Bermuda or any estate, interest or other right therein; and includes the constitution or empowering instrument of any organization or body formed or incorporated for the purpose of administering or giving effect to a trust of any nature affecting any such property.*"

14. There is in any event a general legal presumption that a colonial legislature has no competence to legislate with extra-territorial effect. This may admit of exceptions, but clear language would be required to manifest such legislative intent. The legislative objective sought to be achieved would have to have some nexus with the territorial interests of Bermuda. After all the Bermuda Constitution defines the legislative competence of our Parliament as follows:

> "***Power to make laws***
> *34 Subject to the provisions of this Constitution, the Legislature may make laws for the peace, order and good government of Bermuda.*"

15. It followed that when the Trust was settled in 2007 under Caymanian law, the settlement was not impacted by any inconsistency with sections 18A-18G of the 1998 Act, enactments which were then in force under Bermudian law.

Temporal application of Part IIA of the 1998 Act

16. The crucial question was whether, once a settlement created after sections 18A-18G entered into force in 2004 (such as the Trust) became governed by Bermuda law, the settlement fell to be construed subject to those statutory provisions. Counsel persuaded me that such a result would amount to construing Part IIA of the 1998 Act as intended to have retrospective effect, and that the requisite legislative intent could not be said to have been expressed in the statutory language read in its legislative context.

17. The relevant analysis centred on section 18C. This section clearly applies to "*any instrument made on or after the day this Part comes into operation"* (i.e. on or after January 19, 2004). However, less immediately obvious was the meaning of the 'ouster clause' in the same section, which provides that Part IIA 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.*"

18. Read literally, section 18C appears to provide that Part IIA is engaged not only by settlements or other instruments both governed by Bermuda law and made after January 19, 2004. It potentially applies Part IIA to dispositions of property and instruments which were validly made under a foreign governing law after that date, but which subsequently changed their governing law to Bermuda law. It was submitted that this would lead to results which Parliament cannot be deemed to have intended, for instance:

    (1) it would be incongruous for instruments executed after January 19, 2004 under a settlement made before that date to be governed by the Act while the settlement itself was not. Instruments (in the narrow sense) took their character from the settlements (dispositions of property) under which they were made;

    (2) it would be incongruous for instruments exercised after a settlement became governed by Bermuda law to be required to be construed subject to Part IIA while the settlement itself, validly made under a foreign governing law was not subject to the Children Act provisions, and

    (3) if Part IIA was construed as intended to have retrospective effect, trustees of a trust validly settled abroad under a foreign governing law in terms which offended the 1998 Act's provisions by excluding children born out of wedlock from the class of potential donees could never exercise a power to change the trust's governing law to Bermuda law. Any such exercise would clearly dilute the existing beneficiaries' rights.

19. I found the first two of these three hypothetical undesirable legislative results to be more significant than the third. This is because it is ultimately clear that the distinction made between "instruments" and "dispositions" in section 18C(c),(d) reflects a special legal meaning being assigned to those words. Part IIA of the Children Act 1998 was enacted and the Legitimacy Act 1933 was repealed. Section 1 of the 1933 Act provided:

> "*'disposition' means an assurance of any interest in property by any instrument, whether inter vivos or by will…*"

20. The word "disposition" in the corresponding English statutory context has been held to mean the will of the testator, and not an appointment made under the will: *In re Hoff* [1948] 1 Ch.298. The local draftsman must have intended to distinguish between these two types of instrument by using the distinct terms "instrument" and "disposition" in section 18C(c) and (d). The draftsman having made that distinction, it makes no sense to adopt an interpretation of section 18C which results in a different legal status for a settlement and an instrument executed under it. As Mr Green QC and Mr Elkinson submitted in the Plaintiff's Skeleton, and Mr Barlow QC agreed:

> "*27. There is a sound and long established jurisprudential basis for this view. As a matter of principle, the exercise of powers of appointment under discretionary trusts take their authority and character from the trusts themselves-that which is appointed is to be treated as 'written into the [trust] which created the power' (Muir v Muir [1943] AC 468, 481)…*"

21. Accordingly, although this point did not arise for formal determination, an instrument making an appointment after Part IIA entered into force under a settlement made before the relevant date would, quite clearly, not be caught by section 18A-18G. Because, in a case in which an appointment would be potentially invalidated by Part IIA, any such invalidity would unarguably "affect" the pre-January 2004 "disposition". Section 18C unambiguously provides that Part IIA shall not have such an effect.

22. In the instant case, where both the disposition and the proposed instrument made under it post-dated the coming into force of the abolition of distinctions between legitimate and illegitimate children under Bermuda law, the position was less clear-cut. This required analysis of more than the temporal application of Part IIA according to its terms.

The application of Part IIA to dispositions validly made under a foreign governing law which provide for differential treatment of children born within and without wedlock: the impact of a choice of Bermuda law as a new governing law

23. What made the central argument of the Plaintiff initially somewhat difficult to digest was the fact that section 18C did not expressly address the present scenario at all. Did Part IIA automatically apply to a settlement which was inconsistent with it, but which

was originally validly created under a foreign governing law? Although the position was not free from ambiguity on a literal reading of section 18C, I was ultimately satisfied that Part IIA would not apply to an instrument executed in the pertinent circumstances of the present case, which crucially involved:

(1) a disposition apparently validly made under a foreign governing law after January 19, 2004, in terms which would have been inconsistent with Bermuda law (if the disposition had been governed by Bermuda law at the time); and

(2) an instrument made under the same disposition after its governing law had been changed to Bermuda law.

24. I confess that I was unable to fully evaluate the merits of the argument that the power to change the governing law to Bermuda could never be exercised, if the operation of Part IIA was automatically triggered by electing to have Bermuda law govern a post-2004 settlement created under a foreign governing law. It seemed possible to imagine circumstances, perhaps improbable, where a foreign law-created settlement might be inconsistent with Part IIA but all beneficiaries in a narrowly defined class were alive and capable of consenting to have their interests diluted. This point was not dispositive of the application.

25. It was sufficiently clear that the freedom to elect Bermuda law as a governing law would be materially interfered with in the case of a settlement inconsistent with sections 18A-18G if the 1998 Act was construed as automatically applying once the change of governing law power was exercised. In my judgment, clearer statutory language would have been required to justify construing section 18C as intending to retrospectively interfere with rights under dispositions originally made under a foreign governing law (after Part IIA entered into force) merely because the trustees of such settlements choose to have the settlement governed by Bermuda law.

26. This conclusion might fairly be viewed as simply adding a further gloss to the preliminary finding that Part IIA is not intended to have extra-territorial effect. However, it is also reflective of adopting a purposive construction of statutory provisions in the context of a legal scenario which the enactment does not expressly address. This purposive approach engaged longstanding canons of statutory construction which require the interpreter to apply, *inter alia*, a starting presumption that Parliament does not intend to interfere with existing property rights, or indeed to legislate with retrospective effect.

Conclusion

27. For the above reasons on May 15, 2017 I granted the declaration sought by the Trustee that changing the governing law of the Trust to Bermuda law from Caymanian law would not trigger the application of sections 18A to 18G of the Children Act 1998 to the Trust.

Dated this 19th day of May, 2017 _____
IAN RC KAWALEY CJ