

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 153

2019: No. 154

2019: No. 203

IN THE MATTER of GA Settlement

AND IN THE MATTER of GB Settlement

AND IN THE MATTER of GC Settlement

AND IN THE MATTER of the Trustee Act 1975

AND IN THE MATTER of Order 85 of the Rules of the Supreme Court 1985

Before: Hon. Chief Justice Hargun

Appearances: Mr David Brownbill, QC and Mr Keith Robinson,
Carey Olsen Bermuda Limited, for the Trustees
Mr Nicholas Le Poidevin, QC and Mrs Fozeia Rana-
Fahy, MJM Limited, for the Protectors

Date of Hearing: 5 June 2019

Date of Judgment: 14 June 2019

REASONS FOR RULING

(In Camera)

Application seeking an order for the grant of power to the trustees to vary the terms of the settlements under section 47 of the Trustee Act 1975; application for an order dis-applying the perpetuity rule under section 4 of the Perpetuities and Accumulations Act 2009

Introduction

1. By Originating Summonses issued in each of the above captioned proceedings, the Trustees of the Settlements, as the Plaintiffs, seek substantially the same relief in the following terms:

- (1) An Order pursuant to section 47 of the Trustee Act 1975 that the Trustees may be given power to vary the Settlements by executing a deed of variation in the terms exhibited to the affidavits sworn on behalf of the Trustees; and

- (2) An Order pursuant to section 4 of the Perpetuities and Accumulations Act 2009 that neither (i) the rule against perpetuities; nor (ii) 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 apply to the Settlement or to the property held thereunder.

Application for relief under section 47

2. The Trustees, supported by the Protectors, are concerned that a detailed review of the Settlements has identified numerous instances of Settlement provisions which are obscure, over-elaborate or unsuitable. Part of the difficulty lies in the fact that these particular Settlements were intended to reflect the provisions set out in the earlier foundation (and the sub-foundations) established in Lichtenstein by the Founder. The detailed points of concern are set out in the written advice of Mr Brownbill QC and Mr Le Poidevin QC and these points of concern include excessive beneficiary involvement in the administration of the trusts, the commingling of beneficiaries in some funds, the defective cross-accrual provisions, and the cumbersome protector consent procedure.
3. As a result of the review the Trustees, with the support of the Protectors, took the view that the Settlements needed substantial revision, under which the beneficiaries would retain all of the existing control powers at the level of the sub-foundations but would relinquish their direct powers at the trust level, whilst at

the same time the Protectors' powers under the trusts would be enhanced by the introduction of straightforward powers to appoint and remove trustees. The existing governance structure would be retained but the present individual Protectors would be replaced by a corporate protector and fixed terms of office would be introduced for the directors of the trust company (five years) and the corporate protector (six years).

4. The proposed revised deeds of settlements reflect, *inter alia*, the following changes:
 - (1) The general modernisation of the deeds, with provisions being placed in a more logical and helpful order.
 - (2) The simplification of the dispositive/beneficial trusts, resolving the drafting difficulties, expanding and clarifying the scope of the Trustees' dispositive powers.
 - (3) Bringing the dispositive/beneficial trusts into line with the terms of the sub-foundations and the Founder's wishes, in particular:
 - (a) Distinguishing, in the cross-accruer provisions, between the disposition of the shares in the underlying investment holding company and all other assets.
 - (b) Ensuring that the current beneficiaries were limited to a single generation. The only exception to the "single generation" principle involves the retention of the power of the Trustees (with the consent of the Protector) to add children and issue of a current beneficiary to the respective classes of beneficiaries during the life of the current beneficiary.
 - (c) Except in relation to the shares of the company underlying the structure of the various trusts and foundations, ensuring that the

separate funds were dedicated to each of the Founder's children and, upon their death, their issue, with the siblings, whether whole or half, only benefiting upon the demise of each child's family line.

- (d) A requirement that each beneficiary should be a beneficiary of the relevant sub-foundation.
 - (e) In conjunction with the changes to the cross-accruer provisions, introducing simplified ultimate distribution provisions at the end of the trust period.
 - (f) Simplifying the protector consent procedures and removing the requirements for the consent of certain beneficiaries.
 - (g) Replacing the complex and overlapping procedures for the appointment and removal of the Trustees with straightforward powers of appointment and removal provided to the Protector.
 - (h) Simplifying the administrative powers, removing duplicative and obsolete provisions.
5. In considering these proposals, the Protectors have sought independent legal advice from their legal advisors including Mr Le Poidevin QC. The Protectors have found that there is broad support for the proposals amongst the beneficiaries.
6. Section 47 of the Trustee Act 1975 provides:

“Power of court to authorise transactions relating to trust property

47 (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.”

“Transaction” is defined in section 47(4) as: “(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.”

7. A number of cases have dealt with the ambit of the statutory jurisdiction set out in section 47. The earliest case is *GH v KL* [2011] SC (Bda) Civ (2 December 2010), a judgment of Ground CJ, confirming that the meaning of the concept of a “*transaction*” in section 47 was very wide indeed and the expression “*expedient*” means expedient for the trust as a whole, contemplating the possibility of the Court sanctioning a transaction which is expedient for one beneficiary and neutral for the others.
8. *GH v KL* has been followed in *Re ABC Trusts* [2012] SC (Bda) 65 Civ (13 November 2012), *In the Matter of A Trust (Change of Governing Law)* [2017] SC (Bda) 38 Civ (19 May 2017), and *In the Matter of G Trusts* [2017] SC (Bda) 98 Civ (15 November 2017), decisions of Kawaley CJ and my own decision in *In the Matter of the H Trust* [2019] SC (Bda) 27 Com (30 April 2019).
9. The essential requirements of section 47 are that (i) there is an absence of necessary power to undertake the proposed action; (ii) the proposed action comes

within the broad meaning of “*transaction*” and (iii) the transaction in question is expedient.

10. The Trustees in this case do not have the power to effect the proposed changes to the deeds of settlement and the proposed changes clearly come within the wider meaning of the term “*transaction*”.
11. I am satisfied that the proposed changes are indeed “*expedient for the trust as a whole*”. In this regard I accept the Trustees’ submission that the proposed variations are advantageous to the beneficiaries of each of the trusts as a whole, both present and future. Under each trust, the variations will enhance the beneficiaries’ tax and regulatory position, will substantially improve the day-to-day administration of the trusts and will clarify the dispositive provisions applicable to each of the principal beneficiaries.

Relief under section 4(2) of the Perpetuities and Accumulations Act 2009

12. The exercise of the discretion under section 4(2) was considered by the Court *In the Matter of the G Trusts* [2017] SC (Bda) Civ (15 November 2017) and following the earlier decision in *Re The C Trust* [2016] SC 9Bda) 53 Civ. Kawaley CJ accepted the Court should exercise its discretion with the following guiding principles in mind:

- (i) The Court should not act as a “rubber stamp”;
- (ii) The Court should have regard to the best interests of all interested parties, broadly defined and looked at as a whole; and
- (iii) The fact that extending the duration of the trust will dilute the economic interests of existing beneficiaries will ordinarily be an irrelevant consideration.

13. I accept that dis-applying the perpetuities rule to the trusts and making a consequential variation to the definition of the “Trust Period” in the trusts is likely to provide the trusts with the greatest flexibility. It will then be open to the Trustees at any point in the future, if they thought fit, to decide to declare a date upon which the trust period will end but until that time, the trust period will indeed be indefinite. I consider this flexibility to be in the best interests of all interested parties, broadly defined and looked at as a whole.

14. For these reasons, at the conclusion of the hearing on 5 June 2019, I made the Orders that (i) the Trustees of the above captioned Settlements shall have the power, under section 47 of the Trustee Act 1975, to vary the terms of the trusts referred to in the Originating Summonses by executing deeds of variation; and (ii) neither the rule against perpetuities, nor 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 apply to the Settlements or to the property held thereunder as prayed in the Originating Summonses.

Dated 14 June 2019

NARINDER K HARGUN

CHIEF JUSTICE