



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

2015: 473

### IN THE MATTER OF THE C TRUST

#### REASONS FOR DECISION

(in Camera)

*Trust-extension of duration period- section 4 of the Perpetuities and Accumulations Act 2009-appropriateness of granting ex parte relief-legislative intent to facilitate cost-effective applications*

Date of hearing: April 22, 2016

Date of Reasons: May 16, 2016

Mr. Ben Adamson, Conyers Dill & Pearman Limited, for the Applicant (“the Trustee”)

#### **Introductory**

1. By an Ex Parte Originating Summons filed on April 14 and issued on April 20, 2016, the Trustee applied for the following substantive relief:

*“1. An Order under Section 4 of the Perpetuities and Accumulations Act 2009:*

*(a) to the effect 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 Trust or the property held thereunder; and*

(b) *extending the duration of the Trust to 17 December 3002; and*

(c) *giving the Trustee power in respect of the Trust to insert into that trust a new trust term or extinguish the same as provided for under the Perpetuities and Accumulations Act 2009.*

*2 Further or in the alternative, an Order under Section 47 of the Trustee Act 1975, giving the Trustee power in respect of the Trust to insert into that trust a new trust term or extinguish the same as provided for under the Perpetuities and Accumulations Act 2009...”*

2. On April 22, 2016, I substantively Ordered that:

*“1. Pursuant to Section 4 of the Perpetuities and Accumulations Act 2009, neither*

*(a) the rule against perpetuities; nor*

*(b) 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 Trust or the property held thereunder; and*

*2. The duration of the Trust is extended to 17 December 3002; and*

*3. The Trustee is empowered to amend the Trust by executing [a] deed of variation to replace the current definition of the trust term with the following definition, namely ‘trust term means the period commencing 17 December 2002 and ending on 17 December 3002, and to administer the Trust in accordance with the said deed of variation.’”*

3. Mr Adamson informed the Court that he believed that this was the first Order made under section 4 of the Perpetuities and Accumulations Act 2009 as amended with

effect from December 11, 2015<sup>1</sup> (“the Act”). I now give reasons for the decision to make that Order.

#### **Section 4 of the Act**

4. Section 4 provides as follows:

***“Court order declaring that rule against perpetuities does not apply to certain instruments***

*4. (1) This section applies in relation to an instrument which takes effect—*

*(a) before the commencement day; or*

*(b) on or after the commencement day but to which section 3 does not apply to limit the application of the rule against perpetuities.*

*(2) Subject to subsection (3), the Supreme Court may, on an application made by the trustee or trustees of an instrument to which this section applies, make an order on such terms as it thinks fit declaring that—*

*(a) the rule against perpetuities; or*

*(b) 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 not apply to such instrument and the property held thereunder.*

*(3) An order under subsection (2) may not be made to the extent that it would affect the residual application of the rule against perpetuities as provided by section 3 if the instrument had been one to which section 3 applies (so that the rule against perpetuities will continue to apply to all instruments to the extent that the property is land in Bermuda as provided by section 3).*

*(4) The terms upon which an order under subsection (2) may be made include (but are not limited to), terms—*

*(a) extending the duration of a trust;*

*(b) extending the time within which an interest in property must vest or take effect;*

*(c) extending the time within which certain powers are exercisable;*

*(d) providing that anything done by any person before the order is made on the basis that the instrument was void by virtue of the*

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<sup>1</sup> By the Perpetuities and Accumulations Amendment Act 2015.

*application of the rule against perpetuities or other similar rule of law shall have effect as if the order had not been made;*

*(e)protecting or preserving the interest of any person in trust property where such interest will or may be defeated or its vesting in possession deferred by virtue or in consequence of the terms of any order made under this section;*

*(f) varying or deleting any provision of the trust which restricts (to or by reference to the perpetuity period or limitation on duration applicable to the trust) the exercise of any power arising under or in consequence of the instrument;*

*(g)providing that the order shall be deemed always to have applied to the instrument.” [emphasis added]*

5. In the present case the Court was asked to make an Order extending the duration of the Trust (section 4(2),(4)(a)) making related amendments to the provisions of the Trust instrument (section 4(2),(4)(f)).

#### **The appropriateness of granting ex parte relief: legislative history of new section 4 of the Act**

6. The evidence showed that the Settlor was the only current beneficiary; the Settlor’s children (contingent beneficiaries) were all supportive of the application. Mr Adamson submitted that the application was clear cut and that the legislative intent behind the current iteration of section 4 of the Act was avoid the more rigorous and costly procedure than the pre-existing route of applying under section 47 of the Trustee Act 1975.
7. The Trustee’s counsel referred the Court to remarks made by Minister for Economic Development Dr. Grant Gibbons during the second reading of the Bill which resulted in the new version of section 4 of the Act being enacted into law. The Minister stated<sup>2</sup>:

*“Mr Speaker,, for these reasons a more streamlined and cost-effective approach should be adopted ... in addition to providing a clear process to modify the use of the [perpetuity] rule this amendment is intended to:*

1. *lower costs to applicants;*

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<sup>2</sup> Official Hansard Report, December 4, 2015, pages 240-241.

2. *allow the courts to exercise their discretion to act in the best interest of any applicant and any other interested party;*
  3. *establish additional legal flexibility for trusts being governed under Bermuda law and*
  4. *enhance Bermuda's competitiveness and reputation as a quality jurisdiction for international trust business."*
8. The legislative history is relevant for present purposes because it sheds light on the previous state of the law and the mischief the new section 4 was intended to address. Points 1-3 of the quoted remarks by the Minister were of particular pertinence to the decision of the Court to proceed in an abbreviated and cost-efficient ex parte manner, both generally and, in particular, in light of the limited range of interested persons and their consent. The express consent of the Settlor was affirmed through evidence filed in these proceedings. The adult children's interest was rightly described by counsel as merely contingent, because the Trustee was empowered under the Deed, as its sole discretion, to terminate the Trust at any time and transfer the trust property to the Settlor.
9. Had the interests of other, actual, beneficiaries been involved, direct evidence of their consent or other form of agreement or support to the application would likely have been required to justify proceeding without their formal joinder.
10. As far as the default beneficiary, a charity, was concerned, I was persuaded that no notice need be given to them by the following advice from Mr Gilead Cooper QC:

*"The proposed extension of the trust period will not adversely affect this interest, and might indeed improve it..."*

11. However, more broadly, I accepted Mr Adamson's submission that the legislative history of section 4 showed that the main purpose of the provision was to create a more simplified means of extending trust periods than was available under the pre-existing law. In this regard, Mr Cooper QC opined as follows:

*"The test under section 47 was that the court had to be satisfied that the proposed changes to the terms of the trust (which were not limited to changes in the perpetuity period) were 'expedient'. The ambit of that requirement has been considered in a number of cases...But if the new section 4 is to do anything, it must involve a weaker test than 'expediency'."*

12. This was a further general factor supporting the Court's decision to proceed in more economical manner than would have been required in the case of an application under section 47 of the Trustee Act.

### **The merits of the application**

13. The statutory conditions for granting the relief sought were all met. The Trust qualified for relief under section 4(1)(a), having been created by an instrument before the commencement date of the Act. The Trustee had standing to seek relief under section 4(2). The form of relief sought fell within the non-exhaustive list of examples set out in section 4(4) (sub-paragraphs (a) and (f)). The Court's discretion to grant relief was unfettered.
14. The main rationale for extending the duration of the Trust in the present case was the size of the Trust (its assets were said to be worth in the region of \$2 billion) together with the desire to have regard to wishes of the Settlor. She wanted the Trust to be dynastic in duration and to ensure that succeeding generations of beneficiaries would never be 'spoiled' by suddenly coming into great personal wealth. This was neither irrational nor in any way objectionable. How should the Court's unfettered discretion be exercised?
15. I accepted Mr Adamson's invitation to adopt the approach endorsed by Mr Gilead Cooper QC and to approach the present application with the following guiding principles in mind:
  - (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.
16. I saw no need to consider the merits of the application within the context of the more restrictive framework of section 47 of the Trustee Act 1975.

## Conclusion

17. For the above reasons on April 22, 2016 I granted the Trustee's application to extend the duration of the Trust under section 4 of the Perpetuities and Accumulations Act 2009. In making a final Order within eight days after the Trustee filed its Originating Summons, it is to be hoped that this matter was disposed of in a way which was consistent with Parliament's view that "*a more streamlined and cost-effective approach should be adopted*".

Dated this 16<sup>th</sup> day of May 2016 \_\_\_\_\_  
IAN RC KAWALEY CJ