

In The Supreme Court of Bermuda

CIVIL JURISDICTION

BETWEEN:

**GH
IJ**

Plaintiffs

- and -

**KL
& ORS.**

Defendants

Date of Hearing: 29th November 2010
Date of Judgment: 2nd December 2010

Jeffrey Elkinson and Ben Adamson for the Plaintiffs; and
Craig Rothwell for the Defendants.

JUDGMENT

1. This application concerns the will trusts of a testator who had three children. The will establishes separate trusts of the residue for each of them and their issue. The application is made by the executors of the will, who, together with the first defendant, are also the trustees of the trusts established by the will. The remaining defendants are all the living beneficiaries.

2. By the application I am asked to exercise the jurisdiction conferred by section 47 of the Trustee Act 1975. That section 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.”

3. That provision appears to be an amalgam of two English provisions, being section 57 of the Trustee Act 1925 and section 64 of the Settled Land Act 1925, one effect of which is to remove the limitation to administrative matters contained in the former. I have no doubt, and in any event it must be presumed, that this was deliberate on the part of the legislature.

4. In this case the trustees have various proposals in mind, being –

- (i) the addition of a successor professional trustee to replace a person who is unwilling to act; a power for members of the family to select a successor family trustee; various powers of appointment for successor investment and legal trustees, and of an administrative trustee; and a variation in respect of the remuneration of the family trustee.
- (ii) a variation of the beneficial provisions to permit (a) income to be accumulated; and (b) a payment out of each settled share of an amount of money to the children of the current life tenant.
- (iii) a variation to permit one son to resettle his share of residue, subject to the consent of an independent third party.
- (iv) a variation of the investment powers to those contained in paragraph 2 of the schedule to the Trusts (Special Provisions) Act 1989, to meet changed circumstances.

5. In order to implement these proposals it is not proposed to give the trustees the necessary powers for the particular purpose. Indeed, while it may have been possible to frame powers to fit (i), (ii) and (iv) above, the proposal at (iii) is less easy to frame in terms of a power to be conferred on the trustees rather than on the beneficiary concerned. What is instead proposed is that I confer upon the trustees the power to apply the capital of the estate by executing a Deed of Declaration declaring that they will continue to hold the estate on the will trusts *with certain specified variations*. Is that within the section?

6. “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. I think that the proposal is a transaction within this very broad definition. I am guided in that by the way the English courts have interpreted the expression in the similar context of s. 64 of the Settled Land Act 1925: see e.g. Raikes v Lygon [1988] 1 WLR 281; and Hambro v Duke of Marlborough [1994] 3 WLR 341.

8. Are the proposals expedient? That expression derives from section 57 of the English Trustee Act 1925 (the equivalent phrase in section 64 of the Settled Land Act is “for the benefit of the settled land”). ‘Expedient’ has been held to mean “expedient for the trust as a whole”: see In re Craven’s Estate [1937] 1 Ch. 431 at 436, per Farwell J. However, I also think that that is qualified by the context, which is as follows:

“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.”

In my view that at least contemplates the possibility of the Court sanctioning a transaction which is expedient for one beneficiary and neutral for the others (which was not the case in the Craven’s Estate case itself).

9. I think that the provisions concerning the appointment of trustees are plainly ‘expedient’ and call for no further consideration. As to the variations in the beneficial provisions, these are expedient for tax reasons. While it may be that Evershed MR in the English Court of Appeal in Chapman v Chapman [1953] 2 WLR 94 at 128 expressed a trenchant view that “it is no part of the functions of her Majesty’s courts to recast settlements from time to time merely with a view to tax avoidance,” I think, with respect, that that is essentially *obiter*. In my judgment, if the proposal is otherwise plainly expedient, then there is no limitation in the statute which prevents its sanction simply on the grounds that it is designed in the interests of tax efficiency, and nothing to justify my importing such a restriction. That is particularly so where, as here, the trustees and all the adult beneficiaries support the proposal.

10. In this case I consider that the proposals are expedient. Indeed, I consider the benefits overwhelming and the status quo inexpedient. It may be that the proposal in respect of one son only benefits his share, but it is not detrimental to the interests of the others, and is part of a package of arrangements which enjoys the support of the whole family. In any event each of the stirpital shares is held upon a separate trust, and although there are provisions for the share of a child of the testator who dies without issue to be divided between the other stirpes, each of the testator's children now has issue. I think, therefore, that it is permissible to consider the question of expediency in relation to each stirpital share in isolation.

11. I therefore hold that the statutory preconditions of section 47 are fulfilled in respect of all the components of the proposed transaction. In the exercise of my discretion I confer the necessary power upon the trustees to execute the proposed Deed of Declaration.

Dated this 2nd day of December 2010.

Richard Ground
Chief Justice