



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2012 No: 231

RE ABC TRUSTS

EX TEMPORE RULING

(In Chambers)

Date of hearing: November 13, 2012

Mr. Adamson, Conyers Dill and Pearman Ltd, for the Plaintiff

Mr. Keith Robinson, Appleby Ltd, for the 1st to 6th Defendants

Mr. Riihiluoma, Appleby Ltd, for 3rd Defendant (as representative of the unborn beneficiaries)

Introductory

1. I am satisfied this is an appropriate case to grant an Order in terms of the draft handed up by Mr. Adamson. The short reasons for this decision are as follows.
2. The Plaintiff, with the support of the adult beneficiaries and the unborn beneficiaries represented by the Third Defendant, seeks the following substantive relief.
3. Firstly, it is sought to amend the trusts to include in all trusts excluding the charitable trust (which is a modern instrument) modern charging clauses. Secondly, a declaration is sought that the Plaintiff be entitled to execute instruments extending the perpetuity periods in respect of the non-charitable trusts. Thirdly, relief is sought in respect of the charitable trust to remove the requirement to consider the law of Prince Edward Island when determining whether or not a particular object is charitable.

Jurisdiction of the Court

4. The Plaintiff’s counsel placed before the Court a Skeleton Argument which set out the jurisdictional principles and also explained the practical reasons as to why the relief was sought.
5. The governing statutory provision is section 47 of the Trustee Act 1975¹ which has previously been considered by this Court in the Judgment of Ground CJ in *GH and IJ-v-KL and Others* [2010] Bda LR 86. In that Judgment Chief Justice Ground held, upon an analysis of section 57 and section 64 of the Settled Land Act 1925 of the United Kingdom Trustee Act 1925, that section 47 of the Bermuda Trustee Act 1975 gives the Court a very broad jurisdiction indeed to authorise transactions in relation to trust property which have the effect of varying the terms a trust deed. This power is actually broader than that conferred by the provisions of section 48 which explicitly deal with variation alone.
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.

Amendment of charging provisions

8. As far as allowing the amendment of the charging provisions to enable modern professional trustees to charge their usual commercial rates is concerned, reference was made to the Royal Court of Jersey decision in *The Regent Trust Company Limited* [2009] JRC 117. I accept that there is nothing controversial about the idea that it is beneficial for a trust for professional trustees to be remunerated on a modern basis.

¹ Section 47 provides: “(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....*” [emphasis added].

9. In this case the amendments to the charging clauses arise in relation to trusts which were set up in the 1950's and the commercial rational for the charging provisions which were created at that time no longer have any practical utility.

Extension of perpetuity provisions

10. As far as the change of the perpetuity provisions is concerned, great reliance was placed on the analysis set out in the Opinion provided to the 3rd Defendant by Mr. Eason Rajah QC that there was a benefit to each of the various trusts as a whole to extending the perpetuity period, so that the trusts would carry on and not effectively come to an end:

- (a) depriving future generations of the benefit of the trusts; and
- (b) potentially ruining the beneficiaries, who are now comparatively young, were they to come into substantial sums of money.

11. The opportunity to extend the perpetuity period in the manner proposed is afforded by the Perpetuities and Accumulations Act 2009². I was told by Mr. Robinson and Mr. Riihiluoma that this sort of extension has been approved in previous cases.

The Charitable Trust

12. As far as the charitable trust is concerned, the Plaintiff essentially seeks approval of the view that the Plaintiff has formed of the construction of the trust. The trust deed does contain in article 19 a power to vary the trust³. Because of the consequences of getting that interpretation wrong, the trustee seeks this Court's approval of its judgment that the relevant amendment is a proper one. I agree that the proposed amendment is clearly an administrative one which makes good practical sense.

Conclusion

13. For these reasons, I grant the Order prayed.

Dated this 13th day of November, 2012 _____
IAN RC KAWALEY CJ

² This Act abolishes the rule against perpetuities save as regards interests in land in Bermuda.

³ An essential precondition for any amendments under article 19 is that the Trust Fund continues to be held for charitable purposes. I was willing to proceed on the basis of the presumption that there was no material difference between Bermudian and Prince Edward Island law so that dispensing with the need for formal consideration of Prince Edward Island law had no practical impact on the validity of the trust purposes.