In The Supreme Court of Bermuda

CIVIL JURISDICTION

2019: No. 203

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 of Carey Olsen Bermuda Limited for the trustees.**
Mr. Nicholas Le Poidevin, QC and Mrs. Fozeia Rana Fahy of MJM Limited for the Protector

Date of Hearing: **15 December 2020**

Date of Ruling: **25 January 2021**

REASONS FOR RULING
(In Camera)

Jurisdiction of the Court to set aside the flawed exercise of a fiduciary power conferred by section 47A of the Trustee Act 1975; application for the grant of power to the trustees to vary the terms of the settlement under section 47 of the Trustee Act 1975

Introduction

1. Following the hearing of the application by the trustee of the GC Settlement ("**the Trustee**"), the Court made, inter alia, the following orders on 15 December 2020:
    a. the deed of variation executed by the Trustee or before 4 November 2019, pursuant to the Order made by this Court on 16 July 2019 ("**Deed of Variation**"), be set aside provided that neither (i) the exercise of any power by the Trustee, nor (ii) the grant of any consent by the protector of the GC Settlement ("**the Protector**") shall be invalidated by the setting aside of the Deed of Variation and shall remain as valid after the Order as before.
    b. There is conferred upon the Trustee, a power to vary the trusts, powers and provisions of that trust by executing a deed substantially in the form of the deed shown in the schedule to the draft order.
    c. Without prejudice to the proviso in sub-paragraph (a) above, the Protector shall be entitled to be paid or reimbursed out of the assets of the GC Settlement, as the protector thereunder, all fees and expenses to which it would have been entitled to be paid or reimbursed but for the setting aside of the Deed of Variation in accordance with sub-paragraph (a) above.

2. I set out below brief reasons supporting the orders made on 15 December 2020.

Background

3. At the conclusion of the earlier hearing on 5 June 2019, the Court made an Order that the Trustee shall have the power, under section 47 of the Trustee Act 1975, to vary the terms of the trusts by executing the Deed of Variation. Brief reasons which led the Court to make that order are set out in my Ruling dated 14 June 2019. The reasons included the fact that, as a result of the review by the Trustee, with the support of the then Protectors, the Trustee took the view that the GC Settlement needed substantial revision, under which the beneficiaries would retain all of the existing control powers at the level of the sub-foundation but would relinquish their direct powers at the trust level, whilst at the same time the Protector's powers under the trusts would be enhanced by the introduction of a straightforward power 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 (5 years) and the corporate protector (6 years).

4. The proposed revised deed of settlement was intended to reflect, inter alia, the following changes:
    a. The simplification of the dispositive/beneficial trusts, resolving the drafting difficulties, expanding and clarifying the scope of the Trustee's dispositive powers.
    b. Bringing the dispositive/beneficial trusts into line with the terms of the sub-foundation and the Founder's wishes, in particular:
        (i) Distinguishing, in the cross-accruer provisions, between the disposition of the shares in the underlying investment holding company ("**the Investment Holding Company**") and all other assets.
        (ii) Ensuring that the current beneficiaries were limited to a single generation. The only exception to the "single generation" principle involved the retention of the power of the Trustee (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.

(iii) 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.

5. The GC Settlement had until recently two sub-funds: one for the Founder's son and the other for the Founder's daughter. Both sub-funds held shares in the Investment Holding Company. Some of the shares were acquired by the sub-funds, in equal number of shares, in 2008 from the mother's sub-fund ("**the Mother's shares**")

6. The revised default/accruer provisions in the Deed of Variation had effect to continue each child's sub-fund (comprising the original shares in the Investment Holding Company allocated in respect of each child, any accumulated/capitalised income from those shares, and the Mother's shares) until that child's family line expired. At that point, the shares in the Investment Holding Company held in each sub-fund were to be divided by reference to the surviving whole and half siblings of the child whose family line had just expired with the remaining assets in the fund (comprising accumulated/capitalised Income from the Investment Holding Company shares) being divided, first, by reference to his/her surviving whole siblings and, secondly, if there are no surviving whole siblings, by reference to the half siblings.

7. It appears that the full implications of these provisions were not appreciated in relation to the Mother's shares held in the sub-funds and the result was that all the shares in the Investment Holding Company, including the Mother's shares, would pass immediately to the funds of the whole and half siblings.

8. The unexpected death of the son of the Founder has highlighted this issue. I accept that the sworn evidence filed in support of this application provides ample support for the proposition that it was always intended by the Founder that the Mother's shares should stay

within the family until the family line expires and, only then should the shares pass to the trusts of the other families. This has been referred to, in the affidavit evidence, as "the Mother's Fund principle": on the death of a child of the Founder, the original shares of the Investment Holding Company held in the child's fund should pass to the remaining funds of the child's whole and half siblings but any shares emanating from the child's mother's fund should pass to the remaining fund or funds of his whole siblings. Only if there are no such extant funds should the shares of the Investment Holding Company emanating from the mother's fund pass to the remaining funds of the child's half siblings. The supporting evidence included an affidavit by the chairman of the Trustee company; an affidavit by the lawyer who advised the Founder and was directly involved in the establishment of the original trusts and the foundation documentation; an affidavit by a director of the Protector company; and a report from a Swiss law expert giving his opinion in relation to the issue of whether the proper construction of the relevant provisions of the foundation led to the conclusion that the shares of the Investment Holding Company received from the mother's fund and held in the son's sub-fund should have passed to the sub-fund of his full sibling.

9. I accept that the Deed of Variation contains a serious error in the way the shares of the Investment Holding Company in the son's fund, which emanated from the mother's fund are dealt with. It is in these circumstances that the Trustee invokes the jurisdiction of the Court to set aside the flawed exercise of a fiduciary power conferred by section 47A of the Trustee Act 1975. As the judgment of Kawaley CJ holds in *In the Matter of the F Trust* [2015] SC (Bda) 77 Civ (13 November 2015), at paragraphs 12-13, section 47A was enacted in Bermuda to introduce the rule in *Re Hastings-Bass* as it was understood and applied in England (and other common law jurisdictions) in and prior to 2011. It confers a discretionary jurisdiction on the Courts to intervene in certain limited circumstances in relation to the exercise of fiduciary power. Section 47A provides:

"(1) If the court, in relation to the exercise of a fiduciary power, is satisfied on an application by a person specified in subsection (5) that the conditions set out at subsection (2) are met, the court may—

(a) set aside the exercise of the power, either in whole or in part, and either unconditionally or on such terms and subject to such conditions as the court may think fit; and

(b) make such order consequent upon the setting aside of the exercise of the power as it thinks fit.

(2) The conditions referred to in subsection (1) are that—

(a) in the exercise of the power, the person who holds the power did not take into account one or more considerations (whether of fact, law, or a combination of fact and law) that were relevant to the exercise of the power, or took into account one or more considerations that were irrelevant to the exercise of the power; and

(b) but for his failure to take into account one or more such relevant considerations or his having taken into account one or more such irrelevant considerations, the person who holds the power—

(i) would not have exercised the power;

(ii) would have exercised the power, but on a different occasion to that on which it was exercised; or

(iii) would have exercised the power, but in a different manner to that in which it was exercised.

(3) If and to the extent that the exercise of a power is set aside under this section, to that extent the exercise of the power shall be treated as never having occurred."

10. Section 47A contemplates that two conditions have to be satisfied before the court can exercise its jurisdiction to set aside the flawed exercise of a fiduciary power.

11. First, that "*the person who holds the power did not take into account one or more considerations (whether of fact, law, or a combination of fact and law) that were relevant to the exercise of the power*" (sub-section (2)(a)). I accept that the evidence filed in support of the application establishes that the Trustee was unaware at the time of the Deed of Variation, or the Order which authorised it, that there was a need to distinguish between

the shares of the Investment Holding Company which had always been part of the son's sub-fund and those which had been added to it later from his mother's sub-fund.

12. Second, the Court has to be satisfied that "*but for his failure to take into account one or more such relevant considerations…, the person who holds the power (i) would not have exercised the power;…; or (iii) would have exercise the power, but in a different manner to that in which it was exercised."* I accept that the evidence filed in support of the application shows that the Trustee would not have effected the Deed of Variation as it now stands but would instead have sought and exercised a power to effect a variation which left the shares derived from the mother's fund within the GC Settlement.

13. In the circumstances I am satisfied that the conditions for the application of section 47A are satisfied and it is appropriate that the Deed of Variation should be set aside. In coming to this conclusion, I also note that the application is supported by the Protector and the beneficiaries of the trusts (half siblings) do not oppose the order sought by the Trustee.

14. Consequent upon the setting aside of the Deed of Variation, the Trustee seeks a simultaneous order granting to the Trustee a power to vary the trusts, powers and provisions of the GC Settlement by the execution of the deed of variation in the form annexed to the draft order.

15. The requested power is, to all intents and purposes, the same as that which was originally sought, and granted, on 5 June 2019. It is sought for precisely the same reasons and on the basis of the same evidence, as the Order made on 5 June 2019. The differences between the power granted on that occasion and the power presently sought are:

(a) the power sought provides for the implementation of the Mother's Fund principle and, thereby, deals more accurately with the shares of Investment Holding Company in the son's fund emanating from his mother;

(b) address some additional factual circumstances that may arise in the future concerning the general requirement that beneficiaries of the GC Settlement must be, or remain, beneficiaries of the underlying foundation.

16. In my earlier Ruling dated 14 June 2019 I reviewed at paragraphs 7 – 10 the legal requirements for the exercise of the jurisdiction under section 47 of the Trustee Act 1975. For the reasons set out in that Ruling, I confirm that I am satisfied that the proposed changes are indeed "*expedient for the trust as a whole*" and in the circumstances grant the power sought to execute the deed of variation in the form annexed to the draft order.

17. Finally, between the date of the Deed of Variation in 2019 and the date of the present application, the Trustee has exercised its powers (for example to make distributions) with the consent of the Protector. Further, the present Protector was appointed pursuant to the terms of the Deed of Variation. In the circumstances it is clearly desirable that the setting aside of the Deed of Variation should not invalidate those exercises retrospectively. In the circumstances, the Court exercises its power under section 47A(1)(a) to declare that the setting aside of the Deed of Variation shall not invalidate the exercise of any power by the Trustee or the grant of any consent by the Protector.

18. It was for these reasons, at the conclusion of the hearing on 15 December 2020, the Court made the orders referred to in paragraph 1 above.

Dated this 25 January 2021

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NARINDER K HARGUN
CHIEF JUSTICE