In The Supreme Court Of Bermuda

CIVIL JURISDICTION

2022 No. 258

IN THE MATTER OF THE AB SETTLEMENT AND IN THE MATTER OF SECTION 9 OF THE TRUST (SPECIAL PROVISIONS) ACT 1989

AND IN THE MATTER OF SECTION 47 OF THE TRUSTEE ACT 1975

AND IN THE MATTER OF SECTION 4 OF THE PERPETUITIES AND ACCUMULATIONS ACT 2009

AND IN THE MATTER OF ORDER 85 OF THE RULES OF THE SUPREME COURT

BETWEEN:

BUTTERFIELD TRUST (BERMUDA) LIMITED et al

Plaintiffs

-and-

MATTHEW WATSON
(Representative of such of the beneficiaries as are minors, unborn or unascertained)

Defendant

Before: The Hon. Chief Justice Hargun

Representation: David Brownbill KC and Keith Robinson of Carey Olsen Bermuda Limited for the Plaintiffs

Nicholas Le Poidevin KC and David Kessaram of Cox Hallett Wilkinson Limited for the Defendant

Date of Hearing: 1 November 2022

Date of Judgment: 29 November 2022

JUDGMENT

Whether change of the governing law of a trust from English law to Bermuda law and an order under section 4 of the Perpetuities and Accumulations Act 2009 disapplying the perpetuities rule to the trust and extending the duration of the trust, results in a resettlement of the trust

HARGUN CJ

Introduction

1. The Plaintiffs are trustees of a Settlement ("**Trust" or "Settlement**"), established under English law. At the conclusion of the hearing on 1 November 2022 the Court granted the following relief:

   (1) A declaration that (i) a change of governing law of the Trust from English law to Bermuda law; (ii) the Court making the orders described below under section 4 of the Perpetuities and Accumulations Act 2009 and under section 47 of the Trustee Act 1975; and (iii) the Plaintiffs exercising the powers of variation under section 47 will not constitute a resettlement of the Trust or otherwise effect to create a new settlement; and will not cause section 18A to D of the Children Act 1998 as inserted by the Children Amendment Act 2002 to apply to the Trust.

(2) An Order under section 4 of the Perpetuities and Accumulations Act 2009 (i) disapplying the perpetuities rule to the Trust and extending the duration of the Trust to August 2127 and (ii) making consequential variations to the terms of the Trust.

(3) An Order under section 47 of the Trustee Act, authorising the Plaintiffs to execute a deed of variation in the form scheduled to the Order varying the terms of the Trust.

(4) An Order under Order 15, rule 13(1) the Defendant, Matthew Watson, to represent in these proceedings the interests of all persons who are or may at any time in the future become interested under the Trust as are minors, unborn or unascertained.

2. This judgment sets out briefly the reasons for granting the relief at the conclusion of the hearing on 1 November 2022.

3. The terms and background to the Trust are set out in the first affidavit of John Richmond dated 21 October 2022 and helpfully summarised in the written submissions of the Plaintiffs. The Trust establishes a discretionary trust with dispositive powers, exercisable during an 80 year "Trust Period", for the benefit of the "Specified Class", coupled with a power to accumulate income over a 21year period (which has expired).

4. The application made to the Court is the result of a detailed strategy review undertaken by the trustees with their various advisers. The trustees concluded that it would be advantageous to the beneficiaries for (i) the life of the Trust to be extended substantially beyond its present termination date in 2047; (ii) the class of beneficiaries to be narrowed so as to remove therefrom those who are unlikely ever to benefit under the Trust and the spouses of future generations of beneficiaries; and (iii) to vary the Trust so as to modernise its terms, enable provision to be made for charity, and increase flexibility in relation to the beneficiaries.

5. The extension to the life of the Trust necessitates a change of governing law to that of Bermuda and the application of section 4 of the Trust of the Perpetuities and Accumulations Act 2009. The modernisation and other changes contained in the Deed of Variation requires authority from the Court and an application under section 47 of the Trustee Act 1975.

Declaration that there is no resettlement

6. The decision of the House of Lords in *Roome v Edwards* [1982] AC 279 remains the leading authority on the question whether a new or separate settlement has been created. In that case Lord Wilberforce considered at 292H-293G the indicia which may help to show whether a settlement, or a settlement separate from another settlement, exists:

> *"There are a number of obvious indicia which may help to show whether a settlement, or a settlement separate from another settlement, exists.* ***One might expect to find separate and defined property; separate trusts; and separate trustees. One might also expect to find a separate disposition bringing the separate settlement into existence. These indicia may be helpful, but they are not decisive****. For example, a single disposition, e.g., a will with a single set of trustees, may create what are clearly separate settlements, relating to different properties, in favour of different beneficiaries, and conversely separate trusts may arise in what is clearly a single settlement, e.g. when the settled property is divided into shares.* ***There are so many possible combinations of fact that even where these indicia or some of them are present, the answer may be doubtful, and may depend upon an appreciation of them as a whole.***
>
> *Since "settlement" and "trusts" are legal terms, which are also used by businessmen or laymen in a business or practical sense,* ***I think that the question whether a particular set of facts amounts to a settlement should be approached by asking what a person, with knowledge of the legal context of the word under established doctrine and applying this knowledge in a practical and common-sense manner to the facts under examination, would conclude****. To take two fairly typical cases. Many settlements contain powers to*

appoint a part or a proportion of the trust property to beneficiaries: some may also confer power to appoint separate trustees of the property so appointed, or such power may be conferred by law: see Trustee Act 1925, section 37. It is established doctrine that the trusts declared by a document exercising a special power of appointment are to be read into the original settlement: see Muir (or Williams) v. Muir [1943] A.C. 468. ***If such a power is exercised, whether or not separate trustees are appointed, I do not think that it would be natural for such a person as I have presupposed to say that a separate settlement had been created: still less so if it were found that provisions of the original settlement continued to apply to the appointed fund, or that the appointed fund were liable, in certain events, to fall back into the rest of the settled property.*** *On the other hand, there may be a power to appoint and appropriate a part or portion of the trust property to beneficiaries and to settle it for their benefit. If such a power is exercised, the natural conclusion might be that a separate settlement was created, all the more so if a complete new set of trusts were declared as to the appropriated property, and if it could be said that the trusts of the original settlement ceased to apply to it. There can be many variations on these cases each of which will have to be judged on its facts."* (emphasis added)

"If the original settlement survives and continues to apply to the appointed part, it must follow that no separate settlement has been created." *(at 294D emphasis added).*

"It seems in fact clear how the parties to the settlement of 1944 and the 1955 appointment viewed the matter. In the first place, although the wife had divested herself of her life interest, it remained in existence for the purpose of enabling the trustees, during her life, to accumulate the income...So the intention throughout seems clearly to have been to treat the 1955 fund as being held upon the trusts of the 1944 settlement as added to and varied by the 1955 appointment." (at 294G and 295C)

7. Lord Wilberforce's judgment in *Roome v Edwards* requires the Court to approach the question of whether a particular set of facts amounts to a settlement (i) by asking what a person, with knowledge of the legal context of the word under established doctrine and applying this knowledge in a practical and common-sense manner to the facts under examination, would

conclude; (ii) the intention of the trustees, as objectively ascertained, is relevant and of assistance in determining whether or not a resettlement has taken place; (iii) there is likely to be a single settlement where, following an appointment, the provisions of the original settlement continue to apply to the appointed fund; (iv) the existence of separate and defined property, separate trust, separate trustees, and separate disposition establishing the trusts, may be indicative of a separate settlement; (iv) no single factor is decisive and it is necessary to consider all the facts of a particular case.

8. In *Bond v Pickford* [1983] STC 517 (CA) Slade LJ considered at 522 h/j that a separate settlement will exist if there is a complete new set of trusts such that the trusts of the original settlement ceased to apply to it.

9. In the present case, following the proposed variation, the principal trusts of the main settlement remain fully operative, and those trusts of the main settlement remain fundamentally the same - being held on discretionary trusts and for essentially the same class of beneficiaries. The administrative provisions are to be enhanced and provision made for a protector. However, none of these provisions change the fundamental nature. All the instruments (the settled advances, the proposed Deed of Change of Governing Law and the proposed Deed of Variation) make clear the trustees' intention that they do not intend to create a separate settlement. I accept Mr Brownbill KC's submission that having regard to these considerations, looking at the matter in a practical and commonsense manner, it cannot realistically be said that the proposed actions constitute a resettlement.

10. The Court turns to consider specifically whether the change of the governing law and the extension of the trust period affects the position that on the facts as outlined above there is no resettlement.

11. It is clear from the authorities that the English court's jurisdiction under the Variation of Trusts Act 1958 to approve arrangements varying trusts is subject to the limitation that only *variation*

of a trust can be approved and that the court has no authority to approve the *resettlement* of a trust: see *Re T's Settlement Trusts* [1964] Ch 158 at 162 per Wilberforce J (as he then was) and *Re Ball's Settlement Trusts* [1968] 1 WLR 899 at 905 B-C and F-G.

12. On the clear understanding that the court has no power to approve a resettlement of the trust, the English court has approved arrangements under the Variation of Trusts Act 1958, changing the governing law of trusts. The English court could only have done so on the basis that the changing of the governing law of the trust did not result in the resettlement of the trust. Thus, in *Re Windeatt's Will Trusts* [1968] 1 WLR 692, the Court approved an arrangement under which the trusts of the English settlement were varied by the appointment of trustees in Jersey followed by the trust fund to them to be held on trusts of a new declaration of trust, the terms of which were essentially the same as those of English settlement but subject to Jersey law. I accept Mr Brownbill KC's submission that the English court would only have approved the changing of the governing law on the basis that it constituted a variation of the trust and not a resettlement.

13. The English court has also approved arrangements providing the wholly new perpetuity periods to apply from the date of the arrangement on the basis that the new perpetuity period constitutes a variation and not a resettlement of the trusts. Thus, in *Re Holt's Settlement* [1969] 1 Ch 100 and arrangement was approved varying a trust by substituting a new statutory period of eighty years in place of the existing common law period and a new 21-year accumulation period.

14. *Re Holt's Settlement* was followed in *Wyndham v Egremont* [2009] EWHC 2076 (Ch) where an arrangement was approved which comprised a completely new common law perpetuity period, commencing with the date of the arrangement. Blackburne J specifically addressed the issue of jurisdiction to approve such arrangements at [17] and [20]:

*"**[17]** The first concerns the propriety of inserting a new perpetuity date into the trusts of the Fund. As to this, it is well established that an arrangement under s 1(1) enables the court to approve a variation which includes a new perpetuity period applicable to the settlement in question. In Re Holt's Settlement [1969] 1 Ch 100, [1968] 1 All ER 470, [1968] 2 WLR 653 Megarry J approved an arrangement which substituted in place of a common law period a new statutory period of eighty years and also added a new twenty-one year accumulation period, both of which were made possible by the Perpetuities and Accumulations Act 1964 ("the 1964 Act") and neither of which was available under the settlement that was being varied, since it took effect prior to the commencement of the 1964 Act on 15 July 1964. At p 120, Megarry J observed that:*

> *"Any variation owes its authority not to anything in the initial settlement but to the statute [ie the 1958 Act] and the consent of the adults coming, as it were, ab extra. This certainly seems to be so in any case not within the Act where a variation or resettlement is made under the doctrine of Saunders v Vautier by all the adults joining together; and I cannot see any real difference in principle in a case where the court exercises its jurisdiction on behalf of the infants under the Act of 1958 . . . ."*

Megarry J then went on to consider whether it was permissible to insert a new perpetuity period into the settlement by reference to the statutory period made available by s 1(1) of the 1964 Act. This turned on whether a variation approved by the court in exercise of the jurisdiction conferred by s 1(1) of the 1968 Act constituted an "instrument" within the meaning of s 15(5) of the 1964 Act. Megarry J held that it did and therefore that it was open to the court to approve the arrangement in that case.

...

[20] Here, there is no wish to insert a new perpetuity period by reference to s 1(1) of the 1964 Act but to introduce what is, in effect, a new common law period by reference to stated lives in being measured as at the date of approval of the arrangement, plus twenty-one years. In my judgment, there is ample power to do so just as there is, in appropriate cases, to insert a new perpetuity period by reference to the statutory period made available by the 1964 Act.

15. At [20] Blackburne J held that the introduction of the new perpetuity period constituted a variation and not a resettlement of the trusts:

> *"**[24]** With that guidance in mind I have no doubt that the alterations to the pre-arrangement trusts contained in the arrangement which I have approved constitute a variation of those trusts and not a resettlement. The trustees remain the same, the subsisting trusts remain largely unaltered and the administrative provisions affecting them are wholly unchanged. The only significant changes are (1) to the trusts in the remainder, although the ultimate trust in favour of George and his personal representatives remains the same, and (2) the introduction of the new and extended perpetuity period."*

16. Mr Le Poidevin KC has fairly pointed to factors in this case which could be said to favour a conclusion that the change of governing law of the Trust from English law to Bermuda law and the extension of the perpetuity period in this case amounts to a resettlement. Mr Le Poidevin KC accepts that much of the Bermuda trust law mirrors trust law that is closely similar to English trust law but contends that the change is nonetheless a radical one because it substitutes an entirely new set of legal rules to govern the Trust. He argues that if the trustees' application succeeds, the Trust will be subjected to fresh and, on important points, very different rules. Mr Le Poidevin KC points to the following significant differences:

(1) Bermuda now has "statutory Hasting-Bass" relief, in section 47A of the Trustee Act 1975, so that a decision of the trustees may be set aside if they acted under a misapprehension even though they were not in breach of duty. English law does not.

(2) Section 47 of the Trustee Act 1975, the jurisdiction invoked here, permits a variation of the dispositive provisions of the Trust to which none of the beneficiaries need have consented. The English Variation of Trusts Act 1958 requires the consent of all adult beneficiaries of full capacity.

(3) The Bermuda "firewall" legislation, sections 10 and 11 of the Trusts (Special Provisions) Act 1989, will have the effect that an English judgment will not be enforced in Bermuda - even though all of the present beneficiaries are resident in England - if, say, it gives effect to forced heirship rights or property rights arising on marriage.

(4) The change will expose the Trust to all future alterations in Bermuda law.

17. In relation to the extension of the perpetuity period Mr Le Poidevin KC does not contend, in light of the English decisions holding that the extension of the perpetuity period does not have the effect of creating a new settlement, that here the extension sought would alone create a new settlement. The long extension, he argues, is nonetheless a factor to take into account in deciding whether the changes proposed would amount in the aggregate to a resettlement.

18. In considering Mr Le Poidevin KC's submissions it is to be noted that the English courts have clearly held that neither the mere change of governing law nor the mere change in the perpetuity period amounts to a resettlement of the trusts. It is doubtful whether it is a useful exercise to compare and contrast the differing provisions of different systems of governing law for the purposes of determining whether the change in governing law of a trust amounts to a resettlement of the trust. In any event, even if it is a legitimate exercise, the Court does not consider that the differences in English and Bermuda trust law, as outlined above, are of such magnitude so as to make the change in governing law from English law to Bermuda law, a resettlement of the trusts.

19. It was for these reasons that the Court made a declaration that (i) the change of the governing law of the Trust from English law to the Bermudian law; (ii) the Court making the orders under section 4 of the Perpetuities and Accumulations Act 2009 and under section 47 of the Trustee Act 1975; and (iii) the Plaintiffs exercising the power of variation under section 47 will not constitute a resettlement of the Trust or otherwise have effect to create a new settlement. Same is true in relation to the extended perpetuity period under Bermuda law.

20. Before leaving this issue the Court briefly mentions the position advanced by Professor Paul Matthews in a monologue: *Trusts: Migration and Change of Proper Law* (Key Haven, 1997). Professor Matthews argues that the change of governing law may amount to a resettlement:

> *"16.2 ... If a trust exists under the law of state A, then it is A's legal system that gives it life, as opposed to say, that of the state B, under which the same facts would not amount to a trust. How can a particular trust, which exists only as a viewpoint of certain facts by a given legal system, pass out of the legal system and into another, whilst remaining the same trust? As the original legal system ceases to have anything to do with the matter, surely the original trust ceases to exist, to be replaced (perhaps) by a similar trust under a new proper law, which law, viewing the same set of acts, regards a trust as in existence?...*
>
> *16.3... The argument for the "new trust" is broadly that set out above: a trust is the creation of a given legal system, and therefore it cannot change its governing law to another legal system, because then it would no longer be the creation of the original legal system, but the product of the new."*

21. For purposes of this judgment, it is sufficient to note that Professor Matthews' thesis concerning the change of governing law of the trust does not appear to have been adopted in

any of the decided authorities. As noted, English authorities accept that the governing law of the trust can be changed without necessarily entailing the creation of a new trust.

22. Further, article 10 of the Hague Trusts Convention (applicable in both England and Bermuda) provides that "*The law applicable to the validity of the trust shall determine whether that law or the law governing a severable aspect of* ***the trust*** *may be replaced by another law.*" Section 6(2) of the Trust (Special Provisions) Act 1989 provides that "*A Bermuda trust may provide terms to change the law governing* ***the trust*** *from the law of Bermuda to a new governing law*". Both article 10 of the Hague Convention and section 6(2) of the Trust (Special Provisions) Act 1989 refer, in terms, to the law of "***the trust***" being changed. There is no suggestion either in article 10 or in section 6(2) of the creation of a new trust as a consequence of the change of governing law of the trust. Accordingly, the Court is satisfied that it is appropriate to make the declaration set out in paragraph 19 above.

Declaration with respect to section 18A of the Children Act 1998

23. Section 18A of the 1998 Act provides that:

> *"**Abolition of distinction between legitimate and illegitimate children***
>
> *18A(1) Subject to subsection (2), for all purposes of the law of Bermuda a person is the child of his natural parents and his status as their child is independent of whether he is born inside or outside marriage.*
>
> *(2) Where an adoption order has been made under the Adoption of Children Act 2006 or any previous enactment relating to the adoption of children or the law of any other jurisdiction, the child is in law the child of the adopting parents as if they were the natural parents.*
>
> *(3) Kindred relationships shall be determined according to the relationships described in subsection (1) or (2).*

(4) Any distinction between the status of a child born inside marriage and a child born outside marriage is abolished and the relationship of parent and child and kindred relationship flowing from that relationship shall be determined in accordance with this section.

(5) This section applies in respect of every person whether born before or after this Act comes into force and whether born in Bermuda or not and whether or not his father or mother has ever been domiciled in Bermuda."

24. Section 18C dealt with the application of section 18A and provided that:

"**Application**

18C This Part applies to—

(a) any statutory provision made before, on or after the day this Part comes into operation; and

(b) any instrument made on or after the day this Part comes into operation, but does not affect—

(c) any instrument made before this Part comes into operation;

(d) and a disposition of property made before this Part comes into operation."

25. The effect of these provisions was considered by Kawaley CJ *In the matter of A Trust (Change of Governing Law)* [2017] SC (Bda) 38 Civ (19 May 2017); and *In the matter of the G Trusts* [2017] SC (Bda) 98 Civ (15 November 2017). The effect of these decisions is summarised in paragraph 19 of the judgment of Kawaley CJ in the *G Trusts*:

"19. My decision in Re A Trust had the following main elements to it:

(1) applying the presumption that colonial legislation is presumed not to have extra-territorial effect, there was no basis for finding that upon enactment the Children Act

provisions had any impact on trusts which were at that point governed by a foreign legal system such as Cayman law;

(2) there was no proper legal basis for finding that the Children Act provisions were intended to have direct retrospective effect on a settlement made under a foreign governing law which post-2004 became governed by Bermuda law. It was only on this basis that the statutory provisions could possibly apply upon a change of governing law in relation to a settlement to which the statutory provisions did not apply because it was governed by a foreign governing law when it was created by the original disposition of assets on trust;

(3) there was no proper legal basis for finding that the Children Act provisions were intended to have indirect retrospective effect on a settlement made under a foreign governing law which, post-2004, became governed by Bermuda law via an indirect route. It followed that the Children Act provisions did not apply to instruments made under settlements which were not governed by those statutory provisions when the relevant settlements were made. Such instruments would continue to draw their character from the core structure of the original settlement." (emphasis added)

26. Based upon the decisions in *Re A Trust* and the *G Trusts* the Court would have concluded that the Children Act 1998 provisions did not apply to the Trust as the present settlement was made under a foreign governing law prior to 2004.

27. In 2020 amendments were made to the Trusts (Special Provisions) Act 1989 and the Children Act 1998 in an attempt to provide clarity to the application section 18A of the Children Act 1998 to trust instruments. Section 1A(2) (inserted by 2020: 44 and which became effective on 5 August 2020) provided that:

"A reference to a child or children in a trust instrument shall be construed as provided under section 18A of the Children Act 1998, unless an express contrary intention appears in the trust instrument."

28. It is reasonably clear that the policy of section 1A(2) is that if a contrary intention appears in the trust instrument then the statutory instrument should prevail over the provisions set out in section 18 of the Children Act 1998.

29. A corresponding amendment was made to the Children Act 1998 which appears as section 18B(3) (inserted by 2020: 44 and which became effective on 5 August 2020) which provided:

> "*Section 18A shall not apply to a* ***trust instrument made under the Trusts (Special Provisions) Act 1989*** *in the case where the trust instrument expressly states a contrary intention to section 18A, as provided under section 1A(2) of that Act.*" (emphasis added)

30. A degree of uncertainty is introduced by the words "*trust instrument made under the Trusts (Special Provisions) Act 1989*". The position is that trusts are not made under the Trusts (Special Provisions) Act 1989 but certain provisions of the Trusts (Special Provisions) Act 1989 may apply to a trust. It is clear from the Explanatory Memorandum to the Trusts (Special Provisions) Amendment (No. 2) Bill 2020 that the amendments to the Trusts (Special Provisions) Act 1989 and the Children Act 1998 in 2020 were intended to have a consistent and identical effect. The Explanatory Memorandum states:

> *"Clause 2 amends the Trusts (Special Provisions) Act 1989... The clause inserts a new subsection (2) to section 1A to provide that a reference to a child or children in a trust instrument shall be construed as provided under section 18A of the Children Act 1998, unless an express contrary intention appears in the trust instrument.*
>
> *Clause 3 amends section 18B of the Children Act 1998 to exclude the application of section 18A to a trust instrument in the case where the trust instrument expressly states a contrary intention as provided under section 1A(2) of the Trusts (Special Provisions) Act 1989."*

31. The Explanatory Memorandum makes it clear that the amendments in 2020 which appeared as 1A(2) of the Trust (Special Provisions) Act 1989 and section 18B(3) of the Children Act 1998 were intended to have an identical effect. The intended effect of section 18B(3) of the Children

Act 1998 is achieved if the words "*a trust instruments made under the Trust (Special Provisions) Act 1998*" are construed to mean "*a trust instrument to which the Trust (Special Provisions) Act 1998 applies*".

32. It was for these reasons that the Court made the declaration in relation to the application of section 18A of the Children Act 1998 as set out at paragraph 1(1) above.

Application under Section 4 of the Perpetuities and Accumulations Act 2009

33. For the reasons set out at paragraphs 14, 15, 34 and 35 of Mr Richmond's first affidavit the Court determined that this was an appropriate case to exercise its discretion to grant the application under section 4 of the Perpetuities and Accumulations Act 2009 in terms of paragraph 2 of the draft order.

34. The Court noted that by paragraph 2(4) of the draft order, permission is sought for the trustees of the Trust for the time being to reapply to the court, from time to time, for a further extension to the duration of the Trust. The Court notes that under section 4(2) of the Perpetuities and Accumulations Act 2009 the court may, on an application made by the trustee, "*make an order on such terms as it thinks fit*" declaring that the rule against perpetuities shall not apply. The Court is satisfied that that it has the power under section 4(2) to make an order such as that sought in paragraph 2(4) of the draft order, permitting applications for further extensions to the duration of the Trust to be made.

Application under section 47 of the Trustee Act 1975

35. The trustees also sought an order under section 47 of the Trustee Act 1975, in the form of the draft order, conferring upon the trustees the power to vary the trusts by executing a deed in the form scheduled to the draft order.

36. The Court was satisfied that the requirements for the grant of relief under section 47, as set out in *Re H Settlement* [2019] SC (Bda) 27 Com (30 April 2019) at paragraph 19 (namely that the trustees wish to undertake a "transaction"; the absence of the power to undertake the transaction; and the transaction is expedient) had been complied with. The reasons for taking that view are set out in Mr Richmond's first affidavit at paragraphs 13-25 and 38-41.

Mr Matthew Watson

37. The Court also determined that Mr Matthew Watson be appointed to represent the interests in these proceedings of all persons who are or who may at any time in the future become interested under the Settlement as are minors, unborn or unascertained.

38. It was for these reasons that the Court made the Order, set out at paragraph 1 above, at the conclusion of the hearing on 1 November 2022.

Dated this 29th day of November 2022

NARINDER K HARGUN
CHIEF JUSTICE