In The Supreme Court Of Bermuda

CIVIL JURISDICTION

2022: No. 302

IN THE MATTER OF THE B TRUSTS

BETWEEN:

A Limited and Anor

Plaintiffs

-v-

C et al

Defendants

Before: The Hon. Chief Justice Hargun

Representation: Mr Ben Adamson of Conyers Dill & Pearman Limited for the Trustees

Ms Claire van Overdjik of Carey Olsen Bermuda Limited for certain adult members of the Exiting Branch of the family

Mr David Kessaram of Cox Hallett Wilkinson Limited for Mr Matthew Watson in his capacity as Guardian ad litem of the Exiting Branch minor and as representative of the unborn children and remoter issue of C and

unascertained possible future husbands, wives, widowers and widowers of C and his children (born or unborn)

Mr Sam Riihiluoma of Appleby (Bermuda) Limited for the members of the Remaining Branches of the family

Ms Fozeia Rana-Fahy of MJM Limited for the Guardian ad litem of the minors in the Remaining Branches and representative of the unborn children and remoter issue of J, U and W and the unascertained possible future husbands, wives, widowers and widows of J, U and W and their children (born or unborn)

Date of Hearing: 15 November 2022

Date of Judgment: 9 December 2022

JUDGMENT

HARGUN CJ

Application for the court's blessing of the trustee's decision under Public Trustee v Cooper (category 2); application for variation of the trust instrument under section 47 and section 48 of the Trustee Act 1975

Introduction

1. In these proceedings, commenced by Originating Summons, two trustee companies incorporated in Bermuda ("**the Trustee companies**"), acting as trustees of two related family settlements governed by Bermuda law ("**the Trustees**" and "**the Trusts**") seek:

   (1) Directions from this Court that the Trustees be at liberty to proceed with Project X (as described below).

   (2) Orders in support of such directions to facilitate the implementation of Project X.

(3) Approval from this Court of the proposed variations of the Trusts and appointments pursuant to sections 47 and/or 48 of the Trustee Act 1975 ("**the 1975 Act**").

2. At the conclusion of the hearing the Court was satisfied that it was appropriate to make a number of orders including the order that the Trustees of the Trusts be authorised to do acts and things they consider necessary or desirable to implement Project X. This judgment sets out the principal reasons for making the orders under sections 47 and 48 of the 1975 Act.

Background

3. The background to these proceedings is set out in an affidavit filed by a director of the Trustee companies ("**the Affidavit**"). In the Affidavit evidence it is explained that in broad terms, the Trusts are discretionary trusts governed by the laws of Bermuda. They are fully managed and administered in Bermuda. As a result of the developments which have taken place, the current position is that the classes of discretionary objects of those Trusts (those expressions including their respective appointments) are identical.

4. In relation to one of the Trustee companies the bye-laws permit each branch of the family to appoint one director. There are also three independent directors. Whilst most decisions are determined by a majority vote and accordingly include the family directors or their representatives, certain reserved matters are subject to weighted voting. Such reserved matters include: distribution of income or capital to beneficiaries of the Trusts; proposals to amend the bye-laws or memorandum of association; proposals to alter the company's share capital; and proposals to terminate any of the Trusts. In relation to these matters, the resolution can be passed only with the unanimous support of all voting independent directors. In relation to the other Trustee company the same independent directors constitute its board of directors without any participation from the family members.

5. The family regards itself as being divided into a number of separate "branches", each consisting of one of the children of the settlor of one of the Trusts, together with each of their respective spouses, children and remoter issue (and any spouses of those children and remoter issue).

6. The most valuable asset of the Trusts, by a significant margin, is an indirect controlling shareholding in a Bermuda registered company which is the ultimate holding company of the "Family Group", a group of companies engaged, *inter-alia*, in the multinational fashion accessory business. The most recent valuation of the Family Group placed its value in the range of many hundreds of millions of USD.

7. In recent years, according to the Affidavit evidence, it has become apparent that one branch of the family (the **"Exiting Branch"**) has wished for funds to be invested otherwise in the business of the Family Group. The Exiting Branch have expressed concerns about that the strategy and anticipated future performance of the Family Group. The other branches of the family (the "**Remaining Branches**"), as well as the independent directors of the Trustee companies, support the continued investment in the business of the Family Group and do not share the Exiting Branch's concerns about the long-term profitability and strategic approach. There has therefore been considerable tension as to the appropriate use of the Trust funds.

8. Relations between the Exiting Branch and other branches of the family had become strained, in part as a result of these differences in opinion about the business of the Family Group, but also as a result of natural personal differences and conflicts that develop over time within an expanded family.

9. The independent directors support the continued investment in the business of the Family Group taking into account the settlor's letters of wishes, the strategic reports that they have

reviewed and their discussions with the board members and key personnel of the main company within the Family Group.

10. Given that there was a clear difference in opinion between the Exiting Branch and the Remaining Branches, the independent directors considered the separation of the notional discretionary interests of the Exiting Branch from the other branches. In May 2022, the independent directors took the decision that it would be in the best interests of the beneficiaries as a whole to take comprehensive advice and prepare detailed plans for the separation of the discretionary interests of the Exiting Branch from the Trusts and, following a final appointment to the Exiting Branch, to enable the Exiting Branch to invest their nominal share of the trust funds separately ("**Project X**").

11. Given that one of the key aspects of Project X is that the Exiting Branch will be excluded from the classes of discretionary beneficiaries of the Trusts, the Trustees will require an express power to exclude an individual from the class of potential beneficiaries, or to change the membership of the beneficial class. However, the Trust instruments, which are governed by Bermuda law, do not grant the Trustees either of these powers. The Trustees therefore seek to vary the terms of the Trusts to add an express power to exclude one or more potential beneficiaries.

12. There are therefore two elements to the applications: an application for blessing of the Trustee's decision to implement Project X and, second, an application for the exercise by the Court of its statutory powers to enable the Trustees to vary the beneficial class, which is a pre-condition of Project X.

Court's blessing of the Trustees' decision to implement Project X

13. The Trustees have decided that Project X is in the interests of the beneficiaries as a whole. They have taken detailed advice from a number of professional advisers in multiple jurisdictions including Conyers Dill & Pearman Limited in Bermuda, Macfarlanes LLP in England, McDermott Will & Emery in the US, Miller Thomson LLP, Fasken Martineau DuMoulin LLP and PricewaterhouseCoopers LLP in Canada; and Oberson Abels SA in Switzerland. The Trustees also instructed Perella Weinberg Partners to provide a valuation and strategic alternative update which explained how the Family Group's business could be valued. It is clear from the Affidavit evidence that Project X is a complex and sophisticated arrangement, which has taken time and care to construct.

14. Given that it is a momentous transaction, the Trustees come to this Court for blessing of their decision. It is to be noted that in so far as the Trustees currently have power to implement Project X, they have not surrendered their discretion in exercising those powers. Accordingly, this is a "*Category 2*" blessing application as analysed by Hart J in *Public Trustee v Cooper* [2001] WTLR 901.

15. The Court's function in the present application (*Category 2*) is summarised in *Lewin on Trusts* (20th Edn) at 39-095 in the following terms:

> *"The court's function where there is no surrender of discretion is a limited one. It is concerned to see that the proposed exercise of the trustee's powers is lawful and within the power and that it does not infringe the trustee's duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of the beneficiaries of the trust estate, that the proposed exercise of their powers is untainted by any collateral purpose such as might amount to a fraud on the power, and that they have in fact formed that view, in other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned*

with the limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed."

16. In *Re the R Trust* [2019] Bda LR 39 this Court followed the analysis of Vos LJ in *Cotton v Earl of Cardigan* [2014] EWCA Civ 1312, where Vos LJ held that the court had to be satisfied, after consideration of the evidence, of the following three matters:
    (1) That the trustees had in fact formed the opinion that they should act in a particular way relevant to that case;
    (2) That the opinion of the trustees was one which a reasonable body of trustees properly instructed as to the meaning of the relevant clause could properly have arrived at; and
    (3) That the opinion was not vitiated by any conflict of interest under which any of the trustees was labouring.

17. The evidence in this case is that the Trustees took advice from a large number of professional advisers in multiple jurisdictions and have decided, in formal board meetings of the Trustee companies, that it is in the interests of the beneficiaries as a whole to implement Project X. The Court also notes that the beneficiaries, all represented (other than the Exiting Branch spouses) by sophisticated advisers, either support or voice no objection.

18. In the circumstances the Court has no hesitation in concluding that the decision of the Trustees to implement Project X is one which a reasonable body of trustees could have made. Accordingly, the Court approves this decision of the trustees, the details of which are set out in the Affidavit evidence.

Application for variation of the Trust instrument under section 47 of the 1975 Act

19. As noted earlier, it is an essential component of Project X that the Exiting Branch of the family would, following the distributions and appointments set out in the Affidavit evidence, be excluded from the classes of discretionary beneficiaries of the Trusts. The Trust instruments do not currently grant the Trustees power exclusion, other than through appointing onto new trusts. Accordingly, the Trustees ask the Court to exercise its section 47 powers to grant the Trustees the power to exclude.

20. Section 47 of the 1975 Act provides as follows:

> ***"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."*(emphasis added)
>
> *(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.*

21. *In the Matter of GA Settlement et al* [2019] SC (Bda) 38 Civ this Court noted that a number of cases have dealt with the ambit of the statutory jurisdiction set out in section 47. The earliest case is *GH v KL* [2011] SC (Bda) Civ (2 December 2010), a judgment of Ground CJ,

confirming that the meaning of the concept of a "*transaction*" in section 47 was very wide indeed and the expression "*expedient*" means expedient for the trust as a whole, contemplating the possibility of the Court sanctioning a transaction which is expedient for one beneficiary and neutral for the others.

22. At paragraph 9 in *GA* this Court held that the essential requirements of section 47 are that (i) there is an absence of necessary power to undertake the proposed action; (ii) the proposed action comes within the broad meaning of "*transaction*" and (iii) the transaction in question is expedient.

23. The Court is satisfied that the implementation of Project X comes within the broad meaning of the term "*transaction*" in section 47 of the 1975 Act. In this regard it is to be noted that the definition of "*transaction*" in subsection (4) expressly includes the concept of a "*partition*".

24. The Court is also satisfied that the proposed changes are indeed "*expedient for the trust as a whole.*" The proposed variations are necessary in order to implement Project X which in turn is necessary, as the Affidavit evidence shows, in order to improve the strained relations between the Exiting Branch and the other branches of the family.

Is the proposed variation forbidden by one of the Trust instruments?

25. One of the Trust instruments potentially contains a restriction on the ability to vary the definition of the discretionary objects which raises the question as to whether the Court can properly grant the power under section 47 of the 1975 Act. Section 47 deals with the situation where "*the same cannot be effected by reason of the absence of any power*" but the problem here is not merely the absence of power, it is the presence of other provisions.

26. Clause 4(e) of one of the Trust instruments provides that the Trustee shall not have the power to take any action which might change the discretionary objects or the beneficiaries. The clause provides as follows:

> *(e)* ***NOTWITHSTANDING*** *anything herein contained the Trustees shall not have the power to take any action which might directly or indirectly result in this Settlement becoming revocable or which might in any way change the discretionary objects or the Beneficiaries.*

27. Clause 4(e) raises the issue whether section 47 of the 1975 Act can be used where, rather than the absence of power, there is an express prohibition. The argument against the use of section 47 where there is an express prohibition is that in those circumstances the "*transaction*" cannot be effected, not because of any "*absence of power*", but due to that express prohibition. In other words, the conditions for the exercise of section 47 would not be met.

28. Mr Adamson, appearing for the Trustees, has rightly brought to the attention of the Court the decision of the Commissioner of Jersey in *V v A* [2020] JRC 220 where, in the context of jurisdictional dispute, the court held that section 47 could not be utilised where there is an express prohibition:

> *"59. ...The trustee of the K Trust does not simply lack the power of rebalancing the assets in favour of the N Trust, it is expressly forbidden from benefiting the two principal beneficiaries of the N Trust. ... Nor did it seem to him [counsel in the case] that simply giving such a power would be sufficient, as the Excluded Persons provisions would still be there, and unless that provision was removed (which would, in his opinion, require a variation of the K Trust under Section 48 as the use of Section 47 to remove the provision would be bound by the provision itself), then in his view it would still control the use of any power conferred under Section 47. He concluded he did not consider it arguable that Section 47 could assist the rebalancing of the trusts.*

60. As Advocate Christie, for Mr D, points out, we know very little about this confidential case in which Mr McIntyre was involved and there is no published judgment. No reliance can, therefore, be placed upon it. In any event, we find the analysis of Counsel to be compelling and accept it."

29. The reasoning set out in *V v A* is indeed compelling, but the Court need not express a concluded view on this issue as it is unnecessary for the Court to do so for the purposes of this case and the fact that the contrary position (alluded to by Mr McIntyre in the *V v A* case) has not been argued in this case.

30. Clause 4(e) raises an issue of construction, namely, whether "*anything herein contained*" is referencing clause 4 or the wider trust instrument. In other words, whether the "*herein*" is clause 4 or something wider.

31. The Court accepts Mr Adamson's submission, for the reasons given by him, that "*herein*" in clause 4(e) is referencing clause 4 itself and not other parts of the Trust instrument. Clause 4(e) cannot provide a general bar on taking any action, directly or indirectly, to change the discretionary objects. Otherwise, it would contradict other provisions of the instrument like the power of appointment expressly allowing the Trustee to appoint onto new trusts and to do so to the exclusion of a members of the Discretionary Trust. Clause 4(e) would therefore contradict the clause which explicitly and clearly allows appointments to the new trusts with amended discretionary objects. The Court accepts that to make sense of the instrument reading it as a whole, clause 4(e) must be referring and only referring to clause 4.

32. The Court also accepts that if clause 4(e) was intended to act as a general prohibition, it would not be placed at the end of the clause specifically dealing with the changes to form an

administration. If it was intended to have wider coverage, it would be in a different, or separate, section.

33. Accordingly, the Court concludes that clause 4(e), on its proper construction, does not constitute a general prohibition against the exclusion of members of the discretionary class of beneficiaries and is not a bar to the exercise of the Court's jurisdiction under section 47 of the 1975 Act.

Application of section 48 of the 1975 Act

34. Even if the Court had concluded the proper construction of clause 4(e) prevented the Court from exercising its jurisdiction under section 47 of the 1975 Act, the Court would have given its consent on behalf of the minors and unborn in relation to the proposed variation, granting the Trustees the power to exclude from the classes of discretionary beneficiaries the Exiting Branch as part of implementation of Project X, under section 48 of the 1975 Act.

35. Section 48 of the 1975 act provides as follows:

Jurisdiction of court to vary trusts

(1) Subject to subsection (2), where property is held on any trusts or settlements arising under any will, settlement or other disposition, the court may if it thinks fit by order approve on behalf of—

(a) any person having, directly or indirectly, an estate or interest, whether vested or contingent, under the trusts or settlements who by reason of infancy or other incapacity is incapable of assenting; or

(b) any person (whether ascertained or not) who may become entitled, directly or indirectly, to an estate or interest under the trusts or settlements as being at a future

date or on the happening of a future event a person of any specified description or a member of any specified class of persons so, however, that this paragraph shall not include any person who would be of that description, or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the court; or

(c) any person unborn; or

(d) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined,

any arrangement (by whomsoever proposed, and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts or settlements or enlarging the powers of the trustees or managing or administering any of the property subject to the trusts or settlements.

(2) Except by virtue of subsection (1)(d) the court shall not approve an arrangement on behalf of any person unless the carrying out of the arrangement would be for the benefit of that person.

(3) ...

(4) Nothing in this section shall be taken to limit the powers conferred by section 47.

36. The terms of section 48 permit the Court, in certain circumstances, to approve variations of trusts on behalf of four categories of beneficiaries who, because of legal disability, are unable to approve those variations on their own behalf. Unless the beneficiary falls within one of the four categories specified in section 48(1) the Court cannot approve the variation on their behalf. The four categories are:

(1) A person with an interest in the trust who cannot consent because they are a minor or lack mental capacity.

(2) A person with a hope or expectation of obtaining an interest in the trust in future.

(3) A person who has not been born.

(4) A person with a discretionary interest under protective trust in which the protected life interest has not ended.

37. The Court accepts the submission that categories (1), (2) and (3) apply here insofar as the Court is being asked to consider the interests of the minor, unborn and remoter issue of the beneficiaries as well as the unascertained possible future husbands, wives and widowers of the beneficiaries and their remoter issue. It is to be noted that the court has no jurisdiction to approve the variation on behalf of anyone who does not fall within the four categories set out above. For the Trustees to vary the Trusts in the way proposed by them, they must separately obtain the consent of each of the adult beneficiaries to the proposed variation and an order from the Court approving the variation on behalf of the persons identified above.

38. Section 48 of the Bermuda Trustee Act 1975 is based upon section 1 of the English Variation of Trusts Act 1958. Section 1 of the 1958 Act has been used to permit variations in the context of partitions and in the context of excluding beneficiaries. Thus, the editors of Lewin (20th Edn.) note at 53-050: "*The above considerations apply in cases where the court is concerned on* ***a proposed partition of the trust fund*** *on behalf the persons who are primary beneficiaries of capital.*" At 53-057 the learned editors state that: "*Sometimes it is desired to* ***eliminate the interests of unborn beneficiaries altogether*** *so as free the trust fund for the living beneficiaries.*"

39. In exercising its discretion under section 48 the Court will not use the power to permit the wholesale *resettlement* of the property on new trusts but only for arrangements which vary or revoke existing trusts (See: *In the matter of AB Settlement* [2022] SC (Bda) 92 Civ 29 November 2022 at [11] citing *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).

40. In *Van Gruisen's Will Trusts* [1964] 1 WLR 449 Ungoed-Thomas J held that in considering whether the power under section 48 should be used the court should (i) be concerned with the whole of the proposed arrangement, rather than merely the aspect said to benefit the relevant class of beneficiary; (ii) scrutinise the arrangement in a practical and businesslike way; and (iii) consider the benefits each party will obtain as well as their respective bargaining strength. The arrangement should be a "*fair and proper one*".

41. The proposed variation is the inclusion of an ability for the Trustees to vary the class of beneficiaries. Whilst this power is sought in the context of implementation of Project X, the power sought is a general one.

42. Having considered the Affidavit evidence and the submissions of Counsel the Court accepts that the variation (in order to implement the Project X) would be in the interests of the minors and unborn. The adult members of the respective branches had consented to the variation (conditional upon Project X then being implemented through the exercise of the new power). The Court accepts the general submission that the interests of the adults are or should be broadly aligned with the position of the minors and unborn within their own branch: if the adult members of the Exiting Branch and the Remaining Branches believe that the variation is in their interests, then the Court should be confident that it is also in the interests of their children and the future members of their respective branches.

43. The Court also considers that Project X prevents family dissension, which is itself a benefit which the court is entitled to take into account (See: *Re Remnant's Settlement Trusts* [1970] 1 Ch 560, where Pennycuick J held that the elimination of potential family dissension justified variation in respect of the beneficial class).

44. Finally, the children and minors are represented before this Court. Their representatives have carefully considered the variation and do not object to the proposed variation.

45. In relation to the general power, the Court accepts the submission that this is in the general interests of the minors and unborn since it provides the Trustees both the ability to implement Project X and administer on a going forward basis in an efficient manner after completion of Project X. In this regard the Court notes that the Trustees must realistically anticipate that at some stage there will be a need to separate the interests of different branches of the family. It is in the interests of the beneficiaries of a whole, and each of them individually, for the Trustees to be able to do so without the need to resettle the Trusts, which can have serious tax consequences.

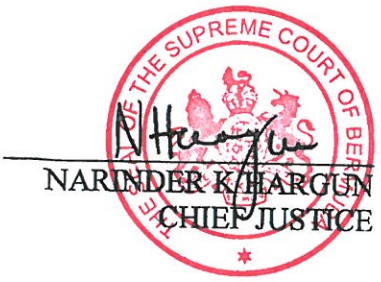
46. The Court also notes that the beneficiaries of the Trusts are resident in a number of different jurisdictions, with their own rules of taxation of trust interests. It may be in the best interests of one or more of the beneficiaries to be excluded to prevent them being taxed on assets that are in fact held by the Trusts.

47. The Court accepts that a general power of exclusion provides benefits for all the beneficiaries, including the minor and unborn. Whilst there is a risk that they could be excluded against their wishes, this risk is also borne by the adult members. If the adult members are prepared to accept the risk this should provide assurance to the Court that it is reasonable and appropriate for the Court to take the risk on behalf of the minors and unborn (See: Dankwerts J in *Re Cohen's Will Trusts* [1959] 1 WLR 865, at 868: "*If people ask the court to sanction this sort of scheme, they must be prepared to take some sort of risk, and if it is a risk that an adult would be prepared to take, this court is prepared to take it on behalf of an infant*").

48. Accordingly, if necessary, the Court would have approved the proposed variation on behalf of the categories of persons identified at paragraph 37 above.

49. It was for these principal reasons that the Court made the order at the conclusion of the hearing of the Originating Summons on 15 November 2022.

Dated this 9th day of December 2022



NARINDER K HARGUN
CHIEF JUSTICE