



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017: 158

IN THE MATTER OF A TRUST (SURVIVAL OF OVERRIDING POWER OF APPOINTMENT DESPITE VESTING OF BENEFICIAL INTERESTS)

REASONS

(in Chambers)

Trust-construction-whether vesting of beneficiaries' interests extinguishes overriding power of appointment

Date of hearing: May 25, 2017

Date of Reasons: May 26, 2017

Mr Christian Luthi, Conyers Dill and Pearman Limited, for the Trustee (the Plaintiff)

Introductory

1. By an Originating Summons issued on May 16, 2017, the Trustee sought an Order disapplying the perpetuity rule pursuant to section 4 of the Perpetuities and Accumulation Act 2009 and extending the duration of the Trust by 1000 years.
2. Although the application was unopposed, Gilead Cooper QC through his Opinion, made the following submission which Mr Luthi adopted:

“Unless the court is satisfied that the overriding power of appointment does survive any vesting of capital and income under clause 3.4.4, there will be no

point in making the order sought. The arguments have therefore been set out in some detail in this Opinion so as to enable the court to consider the issue, and the court will be invited to grant the Trustee's application only if it is satisfied that the power does survive."

3. Mr Luthi did satisfy the Court that this legal requirement was met in all the circumstances of the present case, based on an analysis of the relevant clauses in the Trust deed, the Opinion of leading counsel and the main persuasive authority on the point. Because there was no local authority on a point which might well recur, I now deliver the brief reasons which I promised to give for my ruling on this issue.

Howell & Others-v-Lees-Millais & Others [2009] EWHC 1754 (Ch)

4. Mr Gilead Cooper QC opined that the most pertinent case for present purposes was the Chancery Division case of *Howell-v-Lees-Millais* (Sir John Lindsay). The point of construction which arose in that case was concisely and clearly explained in the opening paragraph of the judgment in that case:

"1. If, by a trustees' exercise of an overriding power of appointment, a gift, vesting upon attainment of a specified age, is given, is the power still exercisable to defeat the gift even after attainment of the age? If the gift is, in addition, expressed as "absolute", would it then be indefeasible once it had vested, even if it would not have been without that word? Cannot other parts of the context override whatever force the word "absolutely" might otherwise have to bar the defeasibility of the gift by a later exercise? There is, as I shall come on to, no authority which binds me on these questions, nor would I expect any upon matters which are ones of construction of the relevant documents. I am told there is nothing to be found on the points in Farwell on Powers 3rd edition, nor is the case chiefly relied on in argument referred to in Thomas on Powers, 1st edition, 1998. Like the parties, I must glean what I may from cases not on, but not wholly removed from, the point."

5. The question asked in the first sentence of the quoted passage is essentially the question which arose in the present case. Where a beneficiary's interest had vested, did the power of appointment in respect of that interest cease to exist? The second question did not, in light of the distinctive wording of the instrument under present consideration, arise. In those circumstances, the decision of *In re Sharp's Settlement Trusts* [1973] 1 Ch 331, which was distinguished in *Howell* and involved construing a statutory provision in any event, did not need arise for consideration. Here, the vested gift was not expressed to be absolute and was found in a deed. Amongst the passages to which Mr Luthi expressly referred in the *Howell* case, I found the following to be of greatest general assistance:

“25. If one deploys the common sense which Lindley LJ required should be available in this area, it becomes plain, in my judgment, that the Appointors should not be taken to have lost the power further to appoint, even after a vesting under clause 3. Even then an enjoyment of the Trust Fund of a kind which the Appointors might then think most accorded with their wishes or with their view of what had been the Settlor's wishes might require a further appointment. The ability of the Appointors so to appoint should, on the authorities, be denied them only if that is clearly provided by express provision or necessary implication.”

The terms of the Trust construed

6. On careful analysis, the Trust instrument in the present case was skilfully drafted and effectively avoided the legal conundrum which was contentious in the *Howell* case. Clause 3.4 provided that upon qualifying conditions being met:

“3.4.4 Subject thereto the Share shall be held in trust as to both capital and income for such of the Beneficiary's children as attain the age of 25 years before or on the Perpetuity Date...”

7. The general articulation of the overriding power of appointment was found in the following clause:

“6.2 The Trustees may at any time or times not later than the perpetuity Date with the prior or contemporaneous written consent of the Protector but not otherwise by any deed or deeds revocable or irrevocable appoint the Trust Fund and the income thereof (or any share or part thereof) upon such trusts in favour of all or any one or more of the Specified Class exclusive of the other or others of them and if more than one in such shares and proportions and with and subject to such powers and provisions for their respective maintenance education advancement or other benefit and in such manner generally as the Trustees think fit.”

8. Not only did clause 3 not vest the beneficial interest in explicitly absolute terms. Mr Luthi pointed out that the beneficial interests in question expressly took effect “*subject to*” the overriding power of appointment in clause 6. The introductory words of clause 3 read as follows:

“In default of and subject to and until any exercise of the power conferred on the Trustees by clause 6 below the Trustees shall until the Perpetuity Date hold the...Fund and the income thereof upon the following trusts and with and subject to following powers and provisions...”

9. I was accordingly satisfied that any overriding power of appointment which the Trustee proposed to exercise under clause 6 of the Trust had not been extinguished when the beneficial interests created by clause 3 vested upon, *inter alia*, the beneficiaries attaining 25 years of age.

Conclusion

10. For the above reasons on May 25, 2017 I granted the relief sought by the Trustee on its Ex Parte Originating Summons.

Dated this 26th day of May, 2017

IAN RC KAWALEY CJ