

BERMUDA SUPREME COURT

IN THE MATTER OF XYZ TRUSTS (No.2) REASONS FOR RULING [2018] SC (Bda) 2 Civ (10 January 2018) – KAWALEY CJ

PERPETUITIES AND ACCUMULATIONS ACT 2009 – EXERCISE OF POWER CHANGING GOVERNING LAW TO BERMUDA LAW UNDER TRUST INSTRUMENTS CREATED PRIOR TO ENACTMENT OF 2009 ACT – WHETHER PERPETUITY RULE APPLIES TO EXERCISE OF POWER

Background

On December 4, 2017 the Chief Justice granted an application by the Trustees of the X, Y and Z Trusts for declarations that the perpetuity period did not apply to those Trusts. He was persuaded that it was appropriate to grant the application on the following alternative bases. Either:

- (1) by virtue of Section 3 of the *Perpetuities and Accumulations Act 2009* (“the Act”), the rule against perpetuities did not apply; or
- (2) if he was wrong, he in any event possessed the jurisdiction to dis-apply the rule against perpetuities under Section 4 of the Act.

The X, Y and Z Trusts were established to preserve family wealth for many generations.

- They were established prior to August 2009 under Cayman Islands Trust law’s Special Trusts Alternative Regime (“STAR”).
- The Trust Period was defined as a period of years in excess of 100 years.
- They were not “pure” purpose trusts as they had beneficiaries. This is pertinent as the law is already clear that the rule against perpetuities does not apply to purpose trusts.
- The Trusts’ governing law was changed to Bermuda law after 1 August, 2009.
- The Trustees understood that prior to this change the perpetuities rule did not apply to them as Cayman Islands STAR trusts, but that afterwards it did, or might, apply under Bermuda law.
- The Trusts neither hold nor are intended to hold Bermuda land.

Reasons for Decision

The application raised a point of construction about the meaning and effect of Section 3 of the Act. Section 3, headed “Application of rule against perpetuities limited to land in Bermuda”, states:

(1) In relation to instruments taking effect on or after the commencement day, the rule against perpetuities applies (and applies only) as provided by this section.

(2) If an instrument limits property in trust so as to create successive estates or interests, the rule against perpetuities applies to each of the estates or interests only to the extent that the property is land in Bermuda.

...

(5) If an instrument creates a power of appointment, the rule against perpetuities applies to the power only to the extent that it is exercisable over land in Bermuda.

The difficult question which arose was in connection with the doctrine that an instrument exercising a power conferred by a settlement takes its character from the original settlement. Was subsection (5) of Section 3 (above) designed to override the effect of that doctrine in relation to instruments which took effect before the commencement of the Act and powers of appointment exercised after the Act came into operation?

The Chief Justice found that in the final analysis the position was clear. Section 3 of the Act does not merely dis-apply the rule against perpetuities in relation to instruments creating trust interests taking effect after the commencement of the Act (assuming land in Bermuda is not involved). Subject to the same assumption that Bermuda land is not affected, this provision also dis-applies the rule against perpetuities in relation to instruments made post-August 1, 2009 in the exercise of a power created by a pre-August 1, 2009 instrument.

In an alternative finding, the Chief Justice also said there was a clear case for dis-applying the perpetuity period under Section 4 of the Act. If his primary findings were wrong, he would instead have granted relief in those alternative terms.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.