

Offshore Cases

Bermuda

Supreme Court

In the Matter of GA Settlement, In the Matter of GB Settlement, In the Matter of GC Settlement, and In the Matter of the Trustee Act 1975 RULING [2019] SC (Bda)38 Civ (14 June 2019)

Application to vary the terms of Settlements under section 47 Trustee Act 1975 and for an order under section 4(2) Perpetuities and Accumulations Act 2009

The Trustees of Settlements as Plaintiffs sought to vary the terms of the Settlements under section 47 Trustee Act 1975. In addition they sought an order under section 4(2) *Perpetuities and Accumulations Act 2009* dis-applying the perpetuity period under the Settlements.

Background: the proposed changes to the Settlements

The proposed revised deed of settlement reflected the following changes:

1. General modernisation of the deeds, with the provisions placed in a more logical order.
2. Simplification of the dispositive/beneficial trusts and both expanding and clarifying the Trustees' dispositive powers.
3. Bringing the dispositive/beneficial trusts in line with the terms of the sub-foundations 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 and all other assets.
 - ii. Ensuring the current beneficiaries were limited to a single generation.
 - iii. Ensuring that the separate funds were dedicated to each of the Founders' children and, upon their death, their issue, with the siblings only benefitting upon the demise of each child's family line.
 - iv. A requirement that each beneficiary be a beneficiary of the sub-foundation.
 - v. In conjunction to the changes with the cross-accruer provisions, introducing simplified ultimate distribution provisions at the end of the trust period.
 - vi. Simplifying the protector consent procedures and removing the requirements for the consent of certain beneficiaries.

vii. Replacing the complex and overlapping procedures for the appointment and removal of the Trustees.

viii. Simplifying the administrative powers, removing duplicative and obsolete provisions.

Statutory jurisdiction under section 47

Section 47 of the Trustee Act provides as follows:

Power of the Court to authorise transactions relating to 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.

"Transaction" is defined in section 47(4) as: *"(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"*.

Guiding legal principles

A number of cases have dealt with the statutory jurisdiction under section 47. *GH v. KL* [2011] SC (Bda) Civ is the earliest. This has been followed in *Re ABC Trusts* [2012] SC (Bda) 65 Civ (13 November 2012), *In the Matter of A Trust (Change of Governing Law)* [2017] SC (Bda) 38 Civ (19 May 2017), *In the*

Matter of G Trusts [2017] SC (Bda) 98 Civ (15 November 2017) and *In the Matter of H Trust* [2019] SC (Bda) 27 Com (30 April 2019).

There are three essential requirements of section 47: (i) there is an absence of necessary power to undertake the proposed action; (ii) the proposed action comes within the broad definition of “transaction” and (iii) the transaction in question is expedient.

Analysis and findings

It was decided that the Trustees did not have the power to effect the proposed changes, that the proposed changes came within the meaning of “transaction” and that the changes were “expedient for the trust as a whole”.

Relief under section 4(2) Perpetuities and Accumulations Act 2009

The exercise of the discretion under section 4(2) was considered in *In the Matter of the G Trusts* [2017] SC (Bda) Civ (15 November 2017) which applied the earlier decision in *Re The C Trust* [2016] SC 9 (Bda) 53 Civ. The test under section 4(2) is a lower threshold test than under section 47: the perpetuity period will be dis-applied if the Court thinks fit. In determining this question, the following principles apply:

1. The Court should not act as a rubber stamp.
2. The Court should have regard to the best interest of all interested parties.
3. The fact that extending the duration of the trust will dilute the economic interests of the existing beneficiaries will usually be an irrelevant consideration.

The Court accepted that dis-applying the perpetuities rule and making a consequential variation to the definition of the “Trust Period” would provide the trust with the greatest flexibility and that this would be in the best interests of all of the parties applied as a whole.

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.