It’s About Time: Bermuda’s Approach to the Rule against Perpetuities

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For how long should the dead be able to exert control, from beyond the grave, over the living? This question has arisen in the context of the “rule against perpetuities”, a rule that developed from the seventeenth century to ensure that property could not be bound up in private trusts long beyond the lives of the people living when the trust was created.

The rule originated from *the Duke of Norfolk's Case* of 1682, which, in the Shakespearian flavour of the time, “concerneth a Great and Noble Family”, namely the Earl of Arundel, who tried to create an estate plan that would endure for many generations. The House of Lords felt that he should not be able to bind his estate with his conditions indefinitely.

Subsequent case law developed on the basis that, after a certain period of time (traditionally twenty-one years after the last to die of certain people who were living at the time of creation of the trust, known as the “perpetuity period”), the property should be released from trust absolutely so that future generations could deal with it unencumbered by the so-called “dead hand” of their ancestors. For many centuries, the rule served this purpose.

Bermuda changes its approach

However, in recent years some offshore trust jurisdictions have revisited the rule, which can have negative consequences, particularly for families where there is significant wealth held in trust and the desire for that wealth to be used to benefit many future generations, i.e. for the trust structure to be dynastic.

Different jurisdictions have dealt with these competing policy considerations in different ways. The rule against perpetuities still applies in the UK (subject to complex statutory modifications). Different US states adopt different approaches.

In Bermuda, the Perpetuities and Accumulations Act 2009 (the “2009 Act”) (operative from 1 August 2009) abolished the rule against perpetuities for Bermuda trusts established on or after that date (“new trusts”) (except to the extent they own Bermuda real estate). The rule continues to be an issue for trusts:

a) created before 1 August 2009 (“old trusts”); or

b) holding Bermuda real estate.

The rule also continues to affect new trusts receiving appointments from old trusts or overseas trusts subject to a perpetuity limitation (in such cases those assets must vest within the perpetuity period applying to them in the originating trust).

The Perpetuities and Accumulations Amendment Act 2015 created an express jurisdiction under section 4 of the 2009 Act to apply to the Supreme Court by originating summons to disapply perpetuity periods for (i) old trusts, (ii) overseas trusts (if they are now governed by Bermuda law) or (iii) new trusts which have received transfers of assets from such trusts.

Conyers has made many applications under section 4 and has considerable experience with the application process. We successfully worked on 13 applications over the last year for one family alone.

The approach that the Court should take to applications under section 4 was explained in the case of *In the matter of the C Trust [2016] SC (Bda) 53 Civ, which* established that, in such cases:

(1) the Court must act in the best interests of the applicant and interested parties;

(2) the Court should not act as a “rubber stamp”; and

(3) the fact that some beneficiaries will have their economic interests diluted by the Court extending the duration of a trust will usually be an irrelevant consideration.

In practice, this means that the impact of section 4 applications on beneficiaries needs to be carefully considered. Such applications can:

(i) provide the trustees with the flexibility to make appointments long into the future, enabling the trust to fulfil a dynastic purpose;

(ii) prolong the period before an appointment giving rise to a tax charge has to be made;

(iii) provide the family with the asset protection and professional management advantages of a trust structure over a longer period of time; and

(iv) importantly, prevent great wealth falling into the hands of beneficiaries who do not have sufficient maturity to deal with it. Some young beneficiaries may struggle with finding the motivation to work hard and make a life for themselves if given great wealth when they are still forming a sense of purpose in life. In other cases, having large personal wealth directly held may put young people at risk of kidnap. Retaining the money in trust allows adults, often including long-standing professional advisors and family friends, to manage the funds by permitting distributions for medical expenses, education, housing and sensible business pursuits but avoiding large capital payments at an immature age. Many wealthy families sincerely believe this is of upmost importance and in the best interests of their children.

Considerations for beneficiaries

In all cases where these applications are made, the parties need to consider which of the existing beneficiaries might “lose out” if the trust period is extended. This is not always simple where a trust is discretionary and it cannot be said to whom distributions would be made if the trust were to terminate on its existing termination date. For example one cannot know, in relation to beneficiary A, if she will live to the termination date, or if perhaps the trustees may appoint the trust’s assets to beneficiary B, defeating A’s interest - so it may be hard to make a case for A being disadvantaged by a proposed extension of the trust term.

Further, simply extending a trust’s duration does not necessarily disadvantage beneficiary A, because the existing distributive powers will continue to be capable of exercise to benefit A after the former termination date.

Also, as alluded to above, A may not wish to receive a large distribution from the trust which she does not need, exposing her to potential tax liability – she may prefer the funds to remain in trust and be available to benefit later generations of her family.

In appropriate cases therefore, where the family is in agreement, it is generally fairly straightforward to persuade the court to grant the desired order. This is usually done via an affidavit sworn by a trustee, often supported by a QC opinion.

The beneficiaries are not commonly joined to these applications, nor asked to consent, since this may create difficulties for them from an onshore tax point of view. Rather, they are generally informed of the proposed application and given an opportunity to make representations. The person swearing the affidavit setting out the rationale for the application then commonly notes to the court that the adult beneficiaries have been informed of the application and have not raised any objections.

Key takeaways

Disapplying the perpetuity period of a trust can allow deceased settlors to extend their influence down many future generations, almost indefinitely. However, the hand of the deceased settlor can be seen as benign and protective rather than oppressive for trusts that are tax efficient and beneficial from an asset protection perspective, and where vast wealth can be managed by professionals and used to benefit many generations sensibly over time. There is no public policy reason, in our opinion, for such benign intent to be frustrated and for such trusts to be forced to terminate if this is not in the interests of the family the trust structure is designed to serve.

In Bermuda, we are fortunate that not only can the duration of such trusts be extended in a tax efficient way without beneficiary consent, but the terms of such trusts can be amended where provisions imposed by the settlor turn out to be anachronistic (again without the requirement for beneficiary consent, as long as the adult beneficiaries have been informed and the amendments are expedient). Such applications can be made under section 47 of the Trustee Act 1975.

The two complementary jurisdictions of section 47 and section 4 enable Bermuda trust structures which not only can endure over a dynastic time period, but which can adapt to changing family circumstances. This compares favourably with some other jurisdictions where trusts can neither endure nor easily adapt to changing circumstances. In this way, in the context of the Bermuda trust, it is possible for the hand of the deceased settlor to continue to safeguard the settled property within a trust, but at the same time the needs of future generations can be met via the adaptation of that trust to meet their needs (for example trusts can be adapted to suit non-traditional families where desired).

We feel that this is the perfect balancing act between the past and the future, providing wealth protection structures that can be both enduring and adaptable.

For further information or advice on perpetuity periods in Bermuda, please contact your usual Conyers lawyer, or one of the contacts listed below.

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