



Neutral Citation Number: [2016] EWHC 340 (Ch)

Case No: HC 2015 -004220

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 25/02/2016

Before :

MR JUSTICE WARREN

Between :

A and others

Claimants

- and -

B and others

Defendants

Susannah Meadway (instructed by **Hunters incorporating May, May & Merrimans**) for the
Claimants

Francis Barlow QC (instructed by **Hunters incorporating May, May & Merrimans**) for the
8th to 11th defendants

Robert Arnfield (instructed by **Hunters incorporating May, May & Merrimans**) for the 12th
and 13th Defendants

Hearing dates: 16 February 2016

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this
Judgment and that copies of this version as handed down may be treated as authentic.

A handwritten signature in black ink, appearing to read 'W Warren', written over a horizontal dotted line.

MR JUSTICE WARREN

Mr Justice Warren :

Introduction

1. I had before me on 16 February 2016, an application under the Variation of Trusts Act 1958 (“**the VTA**”) to vary the trusts of the will of a testator (“**the Will**” and “**T**”) and also of a settlement (“**the Settlement**”) made by reference to the Will by T’s brother (“**H**”), approval being sought of an arrangement propounded on behalf of C1 and C2 (“**the Arrangement**”). T died many years ago; H died more recently in the 1980s. The first Claimant (“**C1**”) and the second Claimant (“**C2**”), who are beneficiaries under the Will and the Settlement, are respectively the eldest surviving son and the eldest grandson of H. C1’s elder brother died without issue in the 1990s. The first to eleventh Defendants, who are also beneficiaries under the Will and the Settlement, are all descendants of H or their respective wives or husbands. The fourth Defendant is C1’s wife. The sixth Defendant (“**D6**”) is the younger brother of C1; the seventh Defendant is his wife and the eighth to eleventh Defendants are their children. The twelfth and thirteenth Defendants are, together with C1, the trustees of the Will and the Settlement (the three of them together “**the Trustees**”). Ms Susannah Meadway appears for C1 and C2, Mr Francis Barlow QC appears for the minor Defendants (namely the eighth to eleventh Defendants) and Mr Robert Arnfield appears for the twelfth and thirteenth Defendants as Trustees. He has a particular role to advise whether or not the Arrangement is for the benefit of a particular class of unborn and unascertained persons, namely the descendants of C1 or of D6 and the wives, husbands widows or widowers of C1, D6 or their respective descendants (not being persons who are parties to these proceedings) (“**the specified class**”).
2. At the hearing on 16 February 2016, I approved the Arrangement. The application does not, with the exception of one point, raise any matter which would warrant a written judgment rather than a brief oral statement of my reasons for approving the Arrangement. When I approved the Arrangement I did not give even that brief oral statement. Instead, I indicated that I would write a judgment, that is to say this judgment, dealing with the point just mentioned and would give a brief oral statement of my reasons for approving the Arrangement on the hand-down of the judgment.

The relevant trusts

3. To identify the point with which this judgment is concerned, it is necessary to say something about the trusts of the Will and the Settlement as they now stand following a succession of appointments made pursuant to powers contained in them but prior to the Arrangement which I have already approved. It is not necessary, however, to go into a great deal of detail. The description contained in the following paragraphs 4 to 16 of this section of my judgment is sufficient.
4. The trust funds of each of the Will and the Settlement are divided into a number of sub-funds. There are three relevant sub-funds under the Will: the 1983 Fund (so called because it derives from an appointment made in 1983), the Grandchildren’s Fund (reference here being to the children of C1 and of D6) and the Appointed Fund. Under the Settlement, there are two relevant sub-funds which are held on materially the same terms as the Grandchildren’s Fund and the Appointed Fund and each is administered as one with those Funds respectively.

5. The Will contains a definition of “the specified period” being a period of lives in being plus 20 years from the date of T’s death. It is likely to expire sometime in the 2040s or 2050s.
6. The Will contains a set of trusts for the benefit of T’s descendants. The Trustees and the holder of a particular position from time to time are given a wide power of appointment, wholly or partially to revoke those trusts. It is exercisable by deed or deeds revocable or irrevocable. Although no class of objects of the power is specified, T expressed non-binding wishes about how it was to be exercised, the detail of which is not relevant for present purposes.
7. The Settlement was created by C1’s father out of property which had previously been appointed to him from the Will. The terms of the Settlement were similar to those of the Will and made the same administrative provisions.

The 1983 Fund

8. The trusts of this fund are currently contained in an appointment made in 2015. The trusts are fully discretionary during the specified period in favour of “the New Discretionary Class”, namely C1 and his descendants, D6 and his descendants, and the wives, husbands, widows and widowers of any of them. The trusts are revocable, although they may only be revoked so as to make a new and exhaustive appointment under the power of appointment described in paragraph 6 above. The power of revocation is, however, itself subject to a power of release.

The Grandchildren’s Funds

9. The trusts of the Grandchildren’s Funds are contained principally in a deed referred to as the Principal Grandchildren’s Appointment made in December 1978 and successive supplemental deeds of revocation, appointment and release.
10. Under the Principal Grandchildren’s Appointment the Trustees had a wider power of appointment exercisable in favour of all or any one or more of the specified class as defined in that Appointment (namely descendants of T’s father and their husbands, wives, widows and widowers).
11. In 2015, the Trustees (as they were empowered to do) released that power of appointment in relation to the Grandchildren’s Funds to the extent that the same might be or become exercisable in favour of any member of the specified class who was not also a member of the “new specified class” (that is to say C1 and his descendants, D6 and his descendants, and the wives, husbands, widows and widowers of any of them).
12. In the deed effecting that release, the Trustees retained the power to revoke that release in relation to the whole or any part of the Grandchildren’s Funds. And by a proviso to that power, the Trustees also had power wholly or partially to release or restrict this power of revocation.
13. The result is that the Grandchildren’s Funds are now held on trust for C2 for his life, with power for the Trustees before the end of the specified period (here called “the perpetuity date”) to pay or apply capital to him or for his benefit. Subject to that, the Grandchildren’s Funds are held for C2’s children who attain 21 or are living under

that age on the perpetuity date, provided that if on the perpetuity date C2 does not have any children, the Grandchildren's Funds will then vest in C2 absolutely. If C2 should die before the perpetuity date without leaving children, the Grandchildren's Funds would be held on similar trusts for his younger brother D3, and if he should die before the perpetuity date without leaving children, they would be held on similar trusts for D6's son, D8. On his death before the perpetuity date without leaving children, they would be held in equal shares for the children of C1 and D6 on similar trusts, and in the extremely remote event of these trusts failing, they would be held for C2 (or rather his estate) absolutely.

14. These trusts are, however, subject to the powers of revocation, release and appointment which I have already mentioned. The Trustees could, by exercising these various powers, extend the class of beneficiaries beyond the new specified class so as to include other descendants of T's father and their wives, husbands, widows and widowers.

The Appointed Funds

15. The subsisting trusts of the Appointed Funds are contained principally in two Deeds of Revocation and New Appointment made in March 1979 and successive supplemental deeds of revocation, appointment and release in one of which a "new perpetuity date" of 13th September 2029 was introduced and in another of which yet another "new perpetuity date" which could be 1st January 2052 was introduced.
16. The Appointed Funds are currently held upon trust:
- i) For C1 for his life, with power for the Trustees (before the perpetuity date in the case of some of the property, the new perpetuity date of 13 September 2029 in the case of other property, and the alternative new perpetuity date, possibly 1 January 2052, in the case of the rest) to pay or apply capital to him or for his benefit.
 - ii) Subject to that, and provided C1 dies before the relevant perpetuity date, part of the Appointed Funds is held for D4 for her life, with power for the Trustees (before the relevant perpetuity date) to pay or apply capital to her or for her benefit.
 - iii) Subject thereto, the Appointed Funds are held for C2 for his life, with power for the Trustees before the relevant perpetuity date to pay or apply capital to him or for his benefit.
 - iv) Subject to that, the Appointed Funds are held for C2's children who attain 21 or are living under that age on the relevant perpetuity date, provided that if on the relevant perpetuity date C2 does not have any children, the Appointed Funds will then vest in C2 absolutely.
 - v) If C2 should die before the perpetuity date without leaving children, the Appointed Funds would be held on similar trusts for his younger brother D3, and if he should die before the perpetuity date without leaving children, (and C1 has no further male issue), they would be held on similar trusts for D6 and his male issue, and if those trusts failed, for C2 (or rather his estate) absolutely.

- vi) The Trustees have, however, two powers of appointment which remain exercisable: first a power exercisable during C1's lifetime (and before the relevant perpetuity date) to re-appoint the trusts in remainder to C1's life interest; and second a power of appointment exercisable in respect of any share of the Appointed Funds in which a male descendant of C1 has an interest in possession. Each of these powers is exercisable in favour of "the narrower class" of C1 and his descendants, D6 and his descendants, and the wives, husbands, widows and widowers of any of them.
- vii) These powers were originally exercisable in favour of a wider class (as defined in the 1979 Deed mentioned above). That class comprises the descendants of C1's father and their wives, husbands, widows and widowers and charity. These powers were however partially released in 2015 to restrict their exercise to the narrower class. Each release was subject to a power of revocation in whole or in part. And, by virtue of a proviso to each power of revocation, the Trustees have power to release or restrict each power of revocation. The Trustees could, by exercising these various powers, extend the class of beneficiaries beyond the narrower class to the wider class comprising the other descendants of C1's father and their wives, husbands, widows and widowers and charity.

The purposes of the variation

- 17. The principal objective of the proposed variation is to extend the perpetuity period applicable to the 1983 Fund, the Grandchildren's Funds and the Appointed Funds (together "**the Arrangement Funds**")
- 18. As matters stood before I approved that Arrangement, the trust period applicable to the majority of the property in the Arrangement Funds would terminate in all likelihood in the 2040s or 2050s. There was, however, a long-stop date of 1 January 2052 in relation to some property, and a much shorter period terminating on 13 September 2029 in relation to other property. The Arrangement extends the trust period for all of the Arrangement Funds so that it will not now terminate until 1 January 2141, taking advantage of a new perpetuity period of 125 years from the date of the Order approving the Arrangement, being the period now prescribed by section 5 of the Perpetuities and Accumulations Act 2009.
- 19. Such a change also enables income to be accumulated at any time during that new period. As part of the Arrangement, the Trustees are given power to accumulate income arising from the 1983 Fund (which is currently held on discretionary trusts), and also given power, when making appointments in respect of the other Arrangement Funds in the future, to make provision for income arising from those Funds to be accumulated.
- 20. Changes of a more administrative nature are also included in the Arrangement:
 - i) The Trustees are authorised in the exercise of their powers of appointment over the Grandchildren's Funds or the Appointed Funds to transfer property to new settlements whose trusts, powers and provisions are authorised by the powers.
 - ii) The Trustees are authorised to take out indemnity insurance.

- iii) The self-dealing provision contained in the Will is clarified to provide expressly that a trustee is entitled to self-deal not only where his other interest is personal, but also where it is as the trustee of some other trust, or as the director or other officer of a company.
- iv) Provisions in certain of the deeds which were inserted to preserve the inheritance tax status of accumulation and maintenance trusts within section 71 of the Inheritance Tax Act 1984, provisions which are now redundant following the amendment of that section with effect from 8 April 2008, are deleted.

Mechanics of the Arrangement

21. It will be apparent from my description of the trusts under the Will and the Settlement that there are many people who are potential beneficiaries under those trusts other than the parties to the applications. The persons include living individuals, both adult and minor, as well as unborn and unascertained persons and charitable entities or purposes. Because of the nature of the trusts involved (a matter which it is unnecessary and inappropriate to describe in this judgment), it is highly unlikely that any non-party other than members of the specified class will ever benefit under those trusts. The entirety of the Arrangement Funds are in practice intended to be applied for the benefit of the parties and the specified class.
22. Ordinarily, that would not eliminate the need for a variation of the trusts affecting potential beneficiaries to be agreed to by adults and approved by the court on behalf of unborn and unascertained persons. However, in the light of the extremely remote interest which any non-party (other than members of the specified class) has, none of the parties, in particular the Trustees, has considered it sensible or proportionate to involve them in discussions about the future of the trusts let alone to join them as parties to the proceedings if there is some course which can properly be adopted to eliminate the need for such involvement. A method of eliminating the need for such involvement was identified. I was satisfied that the method was technically effective and that it could properly be adopted. It is to explain why I reached that conclusion that this judgment is written.
23. The method operates by precluding any objection or challenge to the Arrangement being made by these potential, but very remote, beneficiaries who are not parties to or represented in these proceedings, in effect, the issue of the T's father, their wives, husbands, widowers and widowers (who are not or do not claim through C1 or D6), and also charities and possibly in relation to the 1983 Fund, everyone else in the world. I say "possibly" because there is an argument identified by Ms Meadway that their consent is not required. It is not necessary to address that argument. These are people who could all become present beneficiaries of the Funds by appropriate exercises of available powers by the Trustees. It is clear from the evidence however, the Trustees would only propose to include them in the event of some family catastrophe.
24. The Arrangement envisages the execution by the Trustees of three deeds, one in relation to each of the Arrangement Funds. Drafts of the deeds are found in three Appendices to the Arrangement; and the Arrangement only takes effect if and when the Trustees execute those deeds. Under those deeds, the Trustees release their powers (the mix of powers of appointment, revocation and release) but only to the

extent that it deprives the members of the wider class who are not members of the narrower class (that is to say, persons who have either consented to the Arrangement or are persons in respect of whom I have approved the Arrangement) of any right which they might otherwise have to challenge the Arrangement.

25. The extent of such a release will be to make the powers to benefit this class of person before the Arrangement coincident with what those powers now are (*ie* after the Arrangement) to the extent that they are adversely affected. It should be noted, however, that the powers are considerably extended in that they become exercisable over a much longer period of time.
26. Ms Meadway suggests that another way of viewing this release is that it removes such persons as potential beneficiaries for the instant before the Arrangement takes effect, (so that they are not potential beneficiaries before the Arrangement takes effect and hence neither their consents to the Arrangement, nor the Court's approval of it on their behalf, are required), but to reinstate them immediately after the Arrangement takes effect according to the terms of the varied trusts. This has its attractions and describes in practical terms the result of the release.
27. A similar procedure was adopted in *Christie Miller's Marriage Settlement Trusts* [1961] 1 All ER 855 (Note). This was a decision of Wilberforce J (later Lord Wilberforce). Counsel before him were Mr Brightman (later Lord Brightman and appearing before he was even a QC), Mr Goulding (later Mr Justice Goulding) and Mr Wolfe (a well-known and established practitioner who did not become a judicial office holder). This array of luminaries of the Chancery world perhaps gives the decision particular authority. The question arose whether certain objects of a relevant power of appointment in a marriage settlement should be parties to the summons as being persons on whose behalf approval of the arrangement was sought. It should be noted that the power was not a fiduciary power but was a special power of appointment exercisable by the husband. It should also be noted that the variation sought related only to the investment provisions: there was no change to the beneficial trusts or the extension of any perpetuity period or the insertion of new powers of accumulation. The Judge was able to approve the arrangement in the light of a release by the husband of his power of appointment which he gave, namely "so far as necessary to make the said arrangement binding on [the relevant class of beneficiaries] who may become interested under any exercise of the said power".
28. The Judge did not discuss how this release operated conceptually. There is no doubt that a power of this nature could be released altogether. If it were released altogether, the persons entitled in default of the exercise of the power would be entitled to vary the trusts or, indeed, to terminate them altogether without the agreement of any object of the power. If the persons entitled in default agree to a variation of the trusts (or, if minors or unborn or unascertained persons are concerned, if the court provides the necessary consent under the VTA), I see no reason why it should be necessary to release the power altogether: it can be released to the extent necessary to allow the variation to take effect. It does not seem to me to matter whether, conceptually, there is a limited release or whether there is a total release but subject to the reinstatement (as part of the variation) of the power of appointment but modified so as to take effect only in accordance with the varied trusts.

29. To illustrate the point by reference to a very simple example where the settled property is held upon trust for A for life with remainder to B absolutely, but where C has a special power of appointment, subject to A's life interest, in favour of A's children and remoter issue. Suppose that A and B wish to vary the trusts so as to provide A's wife with an interest on A's death. C might be willing to allow that to happen. It is, I consider, open to C to release his power of appointment to the extent necessary to allow that variation to take effect. It does not matter whether that is seen as a partial release of an existing power, or whether the power is seen as being wholly released and then reinstated in modified form as part of the variation. I think that this second way of viewing matters is essentially the same as that which Ms Meadway has suggested as mentioned in paragraph 26 above.
30. The position in the present case is different in that the powers concerned are fiduciary powers. The donee of a special power can release or restrict it at will. But in the present case, the Trustees can only exercise their powers of appointment, release and revocation for proper purposes. Why, it might be asked, should the Trustees effectively release or restrict the exercise of their powers to the detriment of the wider class other than members of the narrow class? And why, it can also be asked, would it not be a fraud on the powers for the Trustees to exercise their powers simply with a view to eliminating the need for additional parties to be joined to the application and for need for the court to consent to the Arrangement on behalf of the unborn and unascertained members of the wider class?
31. Ms Meadway submits that such questions do not arise here, or if they do, the answers are that the Trustees are exercising their powers in a perfectly proper manner and there is no fraud on a power. The powers being exercised are powers to restrict the interests of remote beneficiaries. Since such restrictions will necessarily enhance the interests of the core beneficiaries, they may properly be regarded as powers to benefit the core beneficiaries, and since the object of the variation is to benefit the core beneficiaries, it cannot be an objection that these powers are exercised so as to facilitate it. She refers by way of example to *Re Lansdowne's Will Trusts* [1967] Ch 603. In that case, Buckley J at p 608F-609B, 613B-F, 614G, held that the Court could authorise the barring of a minor's entail under the Trustee Act 1925 s. 53 as being for the benefit of the minor, where the barring, by removing a number of remoter interests, would facilitate a variation under the VTA which was for the benefit of that minor. I find that a helpful analogy.
32. I agree with Ms Meadway's submissions. I agree that the Trustees' powers include, or can be regarded as including, power to benefit the core beneficiaries. In the present case, the Trustees clearly consider that the variation is in the interests of the core beneficiaries; they do not wish to cut out the wider class from potential benefit (for instance, in the case of a family catastrophe as previously mentioned). For this reason, they have agreed the Arrangement on terms which preserve their powers subject to the variations for which the Arrangement provides. Whether that is seen as a partial release, or as a total release but subject to reinstatement of modified powers of appointment does not matter. On either view, I consider that, on the facts of the present case, it is perfectly proper for the Trustees to effect the partial releases and that no fraud on a power is involved.
33. That is not a complete answer to the suggestion that the wider class should be represented before me. I have a discretion whether or not to approve an arrangement

under the VTA and could require, as a condition of giving my approval, that representations be made on behalf of the class. I did not consider when approving the Arrangement that I should take that course. I did not consider that there was any sustainable argument that the Trustees were not acting properly in agreeing to the partial release of their powers to enable the Arrangement to take effect. Further, it is strongly arguable that the Arrangement, including the partial releases, is for the benefit of the wider class, preserving as it will the very valuable assets for the future and the value to them in the remote circumstance of their ever benefiting.

34. It is for these reasons that I did not see the method of dispensing with the need for representation of the wider class as other than fully effective, as well as being a sensible and practical approach to the application.