



Neutral Citation Number: [2023] EWHC 1298 (Ch)

Case No: PT-2022-BRS-000056

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BRISTOL
PROPERTY TRUSTS AND PROBATE LIST (ChD)

Bristol Civil Justice Centre
2 Redcliff Street, Bristol, BS1 6GR

Date: 31 May 2023

Before :

HHJ PAUL MATTHEWS
(sitting as a Judge of the High Court)

Between :

(1) SUSAN MARY HARVEY **Claimants**
(2) DAMON MAXWELL HARVEY
- and -
PAMELA VAN HOORN **Defendant**

Alex Troup and Oliver Wooding (instructed by **GA Solicitors**) for the **Claimants**
Michael Clarke (instructed by **GA Solicitors**) for the **Defendant**

Hearing date: 15 December 2022

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.

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This judgment will be handed down by the Judge remotely by circulation to the parties or representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 am on 31 May 2023

HHJ Paul Matthews :

Introduction

1. On 15 December 2022 I heard this CPR Part 8 Claim for (i) an order under the Variation of Trusts Act 1958, or alternatively (ii) a direction that the trustees of a settlement be at liberty to implement an arrangement involving the release and reimposition of certain powers, as discussed by Warren J in *A v B* [2016] EWHC 340 (Ch). The order under the 1958 Act would be to approve an arrangement on behalf of minors and unborns as being for their benefit. But there was a threshold question as to whether the court had jurisdiction, in the circumstances of this case, to do so. At the end of the hearing I announced that I was satisfied, first, that the court had such jurisdiction, and second, that the arrangement was for the benefit of the minors and unborns in question. In the exercise of my discretion I therefore approved the arrangement and made the order under the 1958 Act. I therefore did not need to decide the alternative question. But I said that I would give short reasons in writing for my decision on the jurisdiction point. These are those reasons. I am sorry for the delay in completing them, but I have had other lengthy judgments to prepare first.

The settlement

2. The settlement was made in 1989. The settlor and the trustees were then non-UK resident. Subject to an overriding power of appointment in clause 5 (to which I shall return), by clause 6 it provided for the income to be paid to the settlor during his life, with a power for the trustees to advance capital to him during his life, subject thereto upon trust to pay the income to his widow for her life, subject thereto to hold the capital and income on trust for such of the settlor's children as attain the age of 21, and if more than one in equal shares. Subject to that, clause 7 contains a gift over to charity. The settlor died in 2001.
3. The first claimant is his widow, and the second claimant is his only child, now aged 52. He is unmarried and has no children. Since a deed of retirement and appointment of new trustees made in 2003, the claimants have been the only trustees, and are UK resident. The claimants are concerned about the capital gains tax consequences of the second claimant becoming absolutely entitled to the capital of the trust fund upon the death of his mother, the first claimant. Accordingly they have promoted a scheme of arrangement to prevent the second claimant becoming so absolutely entitled. The proposed arrangement would convert the second claimant's interest in remainder to a life interest with remainders over, and also extend the perpetuity period to 125 years.
4. The problem is the overriding power of appointment. This provides as follows:

“5(a) THE Trustees shall hold the Trust Fund and the income thereof upon such trusts in favour or for the benefit of all or such one or more of the Appointed Class exclusive of the other or others of them and with and subject to such powers and provisions for their respective maintenance education or other benefit or for the accumulation of income (including if thought fit administrative powers and provisions) and including also

discretionary trusts and powers to be executed or exercised by any persons or person whether or not being or including the Trustees or any of them and so that the exercise of this power of appointment may be delegated to any extent and if more than one in such shares or proportions and in such manner generally as the Trustees (subject to the application (if any) of the rule against perpetuities) by any deed or deeds revocable not later than the Perpetuity Date or irrevocable and executed not later than the Perpetuity Date shall with the written consent of the Settlor during the Settlor's lifetime but otherwise in their absolute discretion appoint PROVIDED ALWAYS that no exercise of the foregoing power shall invalidate any prior payment or application of the Trust Fund all the income thereof or any part or parts thereof made under any other power or powers conferred by this Settlement or by law".

5. This is followed by trusts in default of appointment in clause 6, which I have already summarised. The existence of these trusts in default of appointment makes clear that the power of appointment in clause 5 is a *mere* power rather than a *trust* power (or discretionary trust): *Re Mills* [1930] 1 Ch 654, CA. At the same time, I point out that the power, being conferred on trustees as such, is clearly a *fiduciary* rather than *personal* power. Accordingly, in this judgment, I am not dealing with the position of the object of a purely personal power.

6. By clause 1(b),

“ ‘the perpetuity date’ shall mean the earlier of

(i) the last day of the period of 80 years from the date of this Settlement which period of 80 years (instead of any other) shall be the perpetuity period applicable hereto

(ii) such date as the Trustees shall by deed specify (not being a date earlier than the date of execution of such deed)".

7. By clause 1(c),

“ ‘the Appointed Class’ shall mean the following objects and persons (whether now living or born hereafter but before the Perpetuity Date)

(i) the children and remote issue of the Settlor's parents (including the Settlor)

(ii) the spouses widows and widowers (whether or not such widows or widowers shall have remarried) of the persons in subclause above

(iii) such other objects or persons as are added in pursuance of the power to that effect conferred by clause 3".

The reference to “the power ... conferred by clause 3” is one to a power contained in that clause of the settlement to add or remove persons from the Appointed Class. I was told that this power has not been exercised.

The objects of the power

8. The Settlor's parents had five children, including the Settlor. All five had at least one child and, with the exception of the second claimant, all the Settlor's parents' grandchildren have also had children. What this means is that there are a considerable number of objects of the power of appointment in clause 5 who are in existence, some of whom are adult and some of whom are minors. There is also the possibility of further members of the class coming into existence before the Perpetuity Date, which under the existing settlement would fall in 2069. The claimant obtained the written consent of the adult members of the class to the proposed arrangement, but needed the court to give its consent on behalf of the minor and unborn objects. HM Revenue and Customs was notified of the claim, but did not respond to it.
9. Before me Mr Troup represented the claimants generally. But Mr Wooding was instructed (by the claimants) to advise them on the position of unborn persons who might benefit under the settlement. He wrote an opinion which I have had the advantage of reading. And Mr Clarke was instructed by the defendant, who is the litigation friend for the minors who might benefit under the settlement.
10. There is no problem about the jurisdiction of the court to approve the arrangement on behalf of *unborn* objects of a power. Section 1(1)(c) of the 1958 Act provides that the court may approve the arrangement on behalf of "any person unborn". Instead, the problem lies with the *minor* objects of the power. Section 1(1)(a) of the 1958 Act provides that the court may approve the arrangement on behalf of

"any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting".

The question which arises in this case is whether the minor objects of the (mere, though fiduciary) power of appointment contained in clause 5 fall within the scope of section 1(1)(a). In particular, the question is whether such an object has an "interest ... under the trusts".

Construction and context

11. As is well known, in construing a statute, context is all important: see *eg Argentum Exploration Ltd v The Silver* [2023] 2 WLR 209, [92], per Popplewell LJ. In the context of trust and property concepts, in *Melville v IRC* [2000] STC 628, Lightman J decided that a general power of appointment retained by the settlor of a settlement over the assets of the settlement was "property" within section 272 of the Inheritance Tax Act 1984. That section provided that "except where the context otherwise requires ... 'property' includes rights and interests of any description". In the course of his judgment, he referred (at [11]-[12]) to a number of earlier decided cases which either held or at least admitted the possibility that (in particular taxation contexts) the object of a discretionary trust had an "interest" for the purposes of the statutory context in question. The Court of Appeal affirmed his decision on the

construction of section 272 and therefore on the status of the general power: see [2002] 1 WLR 407. So, whether the object of a fiduciary power such as we have here has an “interest” depends on the statutory context, that is, the Variation of Trusts Act 1958. That is not a taxing statute, but one dealing with trust law itself. So I begin by looking at trust law.

Trusts and powers

12. A person who benefits, or may benefit, under a trust may fall into any of a number of categories. Here I mention only a few of them, sufficient for my purpose. First there is the person who has an absolute interest in income and capital, as where for example T holds property on trust for A absolutely. Next there is the case where persons have fixed but different entitlements, as where T holds property on trust to pay the income to B for life, with remainder to C absolutely. Unlike A, neither B nor C *individually* has an absolute interest permitting a *Saunders v Vautier* claim to be made to the capital, though together they may do so. But every trust lawyer would agree that each of the three has an “interest ... under the trusts”.
13. There is then the case of a *trust* power, or power in the nature of a trust. This is also known as a discretionary trust (although sometimes that expression is used to refer simply to a trust with no interest in possession for the time being). An example would be where T holds property on trust to appoint among a class of say D, E and F. T *must* make an appointment, but has discretion as to *which* of the class shall benefit. Next there is the case of a *mere* power (which may be a fiduciary power or a personal power), as where T holds property or its income subject to a power (whether conferred on T or someone else) to appoint among a similar class of say G, H and I, with gifts over in default of appointment. T *may* make an appointment, but has no *duty* to do so. Does any of G, H and I have an “interest ... under the trusts” *before* any appointment is made?
14. In both these cases (trust power and mere power) the objects of the powers only benefit if the power is exercised in their favour by the power-holder. It is true that there is an important distinction. In the former case the power-holder must choose *someone*. In the latter case the power-holder need not do so. But, in *McPhail v Doulton* [1971] AC 424, the House of Lords held that that was not a sufficient reason to apply a different test of certainty of objects of the powers in the two cases. And, in *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709, the Judicial Committee of the Privy Council held that disclosure could be ordered against the trustee in favour of the object, whether it was a trust power or a mere power, in order to protect or vindicate the object’s rights, although the likelihood of actual *benefit* in future was a factor which the court could take into account in deciding whether to order such disclosure.
15. Those cases show that, administratively, at least, objects of the two kinds of powers have some rights in common. Turning to substantive rights, *ie* in relation to beneficial entitlement, there are also important similarities. For example, in *Schmidt v Rosewood Trust Ltd*, Lord Walker, for the Judicial Committee, also stated (at [41]) that

“Either [type of object] has the negative power to block a family arrangement or similar transaction proposed to be effected under the rule in *Sanders v Vautier* (1841) 4 Beav 115 ...”

The impact of the rule in Sanders v Vautier

16. This is very significant. In *Re Nelson* [1928] Ch 920n, a fund was held, in the events that happened, on trust for the benefit of such of (i) the testator’s son and the son’s (ii) wife and (iii) daughter as the trustees should think fit. These three objects assigned all their rights to the fund by way of mortgage. The son later became bankrupt, and the mortgagee sought the payment of the fund to itself in part satisfaction of the mortgage debt. The wife and daughter resisted this. The Court of Appeal held that, since they were the only persons interested in the fund, even though none of them individually had any right to a particular part of it, they had between them effectively disposed of it as if an absolutely entitled beneficiary had done so. So, the *sui iuris* objects of a discretionary trust (trust power) could combine and together take the whole of the trust fund.
17. In *Re Smith* [1928] Ch 915, a one quarter share of a trust fund was held, in the events that happened, on certain trusts for the benefit of a Mrs Aspinall and her three children. These trusts were more complicated than in *Re Nelson*: a combination of trust powers, mere powers and absolute interests in remainder. All three children attained 21 years, although one had since died. Mrs Aspinall was of an age where there would be no further children. Romer J summarised the trusts as follows (at 917-18):

“the whole of this share is now held by the trustees upon trusts under which they are bound to apply the whole income and eventually pay over or apply the whole capital to Mrs. Aspinall and the three children or some or one of them. So far as the income is concerned they are obliged to pay it or apply it for her benefit or to pay it or apply it for the benefit of the children. So far as regards the capital they have a discretion to pay it and to apply it for her benefit and, subject to that, they must hold it upon trust for the children. Mrs. Aspinall, the two surviving children and the representatives of the deceased child are between them entitled to the whole fund.”
18. So during her lifetime Mrs Aspinall and her children were the objects of a *trust* power of appointment of the income, but Mrs Aspinall was an object of a *mere* power of appointment of the capital. After her death, the children were entitled to income and remaining capital in equal shares absolutely. Mrs Aspinall, her two surviving children and the personal representatives of the deceased child all joined in an assignment by way of mortgage of all their rights to the fund to support a loan. During the lifetime of Mrs Aspinall, the mortgagee directed the trustee to pay the income of the fund to itself. The trustee sought the directions of the court as to whether it retained any discretion in relation to the application of income *or capital*, or instead had to comply. Romer J held that the mortgagee was entitled to the whole income of the fund.

19. The judge referred to *Re Nelson*, and said (at 919):

“It has been laid down by the Court of Appeal in the case to which I have referred that, in such a case as that you treat all the people put together just as though they formed one person, for whose benefit the trustees were directed to apply the whole of a particular fund.”

Accordingly (at 920), he made

“a declaration that, in the events which have happened, the plaintiff is bound to pay the whole of the income of the one-fourth to the defendant society during the lifetime of Mrs. Aspinall, or until the mortgage is discharged.”

20. So, the entire income interest in the fund had been effectively assigned to the mortgagee by way of mortgage, by all those who were interested in it. That included Mrs Aspinall and her children as objects of a trust power over the income, and also Mrs Aspinall as an object of a mere power over capital. Had Mrs Aspinall not assigned her rights as the object of a mere power over capital, the trustee would have been free to appoint the whole of the capital to her, and thus render the mortgage valueless. No doubt that was why the mortgagee insisted on *all* her rights being assigned. And it was to this case that the Privy Council referred with approval in the *Schmidt* case, as justifying the “blocking” right of the object of a mere power that is referred to in the extract set out above.
21. I should add that in *Re Beckett’s Settlement* [1940] Ch 279, Simonds J, referring to *Re Smith*, said (at 285):

“It is quite true that in one sense the objects of a discretionary trust have an interest in the fund which is being administered for their benefit. It is so far true that if the whole of the fund is applicable for their benefit, and they are of full age, they are together entitled to put an end to the discretionary trust ... ”

On the other hand, it is right to say that the judge in that case also considered that such an object did *not* have an interest within section 32, proviso (c), of the Trustee Act 1925, essentially because he did not think a settlor creating a discretionary trust would intend to fetter the statutory power of advancement by requiring the prior consent of all the objects. So, in his view, the consent of such objects was not needed to an advance under that section of the 1925 Act

Other remedies

22. It is clear that objects of a power, whether a trust power or a mere power, have standing to apply to the court to remove a trustee: *Re Manisty’s Settlement* [1974] Ch 17, 25; and see also *Mettoy Pensions Trustees Ltd v Evans* [1990] 1 WLR1587, 1617-18. In addition to that, the object of a trust power certainly has standing to seek proprietary remedies to secure his or her rights: *Joel v Mills* (1857) 4 K & J 458, 473-76. For myself, I see no reason in principle why

the object of a (fiduciary) mere power should not have the same standing. In this regard, I note that in the *Schmidt* case, Lord Walker said;

“51. ... The right to seek the court’s intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a mere power) may also be entitled to protection from a court of equity, although the circumstances in which he may seek protection, and the nature of the protection he may expect to obtain, will depend on the court’s discretion ... ”

23. And, again for myself, I see no reason why the protection that may be sought by the object of a power (trust or mere) should not extend to protection after the event of a breach of trust. Thus, such an object should be able to complain of a breach of trust by the trustee, and to seek and obtain a reconstitution of the trust fund in an appropriate case. But I am fortified in my opinion by the fact that the editors of *Lewin on Trusts* take the same view (20th ed 2020, [42-073]):

“ ... In our view, a discretionary beneficiary, whether as an object of a discretionary trust or of a fiduciary power, can invoke the court’s jurisdiction to seek the proper administration of the trust and the relief claimed can be the reconstitution of the trust ... ”

24. Thus, the object of a mere (fiduciary) power, being someone who may benefit by the exercise of discretion in future, is identified using the same test as the object of a trust power, has the same opportunity to seek disclosure from the trustee, and has a ‘blocking’ right in the same way. These are valuable rights. By way of vindication of those rights, such an object has also the ability to seek remedies to prevent a breach of trust and to seek redress in case such a breach occurs. I conclude that, in pure trust law terms, the object of a mere power has a bundle of rights which may properly be designated an “interest” (as unquantifiable as that of the object of a trust power) in the trust assets, even though (as with the object of the trust power) that interest does not confer the vested right, present or future, to possession or enjoyment of any part of those assets. (I add only that this is not unique by any means. It is trite law that the benefit of a restrictive covenant in relation to land amounts to an – equitable – interest in the land binding on third parties. But that similarly is merely a form of negative control of the land concerned, and confers no present or future right to its possession or enjoyment.)

“Interest” in the 1958 Act

25. Having reached that conclusion, the next question is whether the word “interest” as used in section 1 of the 1958 Act is intended to designate something with characteristics different from those of the “interest” belonging to the object of a mere power. I begin by observing that there have been numerous cases where the court has proceeded on the basis (albeit unchallenged in argument) that the object of a *trust* power *does* have a sufficient interest within section 1 of the 1958 Act. These include *Re Clitheroe’s ST* [1959] 1 WLR 1159, *Re Steed’s WT* [1960] Ch 407, and *Re Bristol’s SE* [1965] 1 WLR 469. In each of these cases experienced chancery

judges appear to have been satisfied with the assumption that they made. Textbooks have taken the same view: see *eg Lewin on Trusts*, 20th ed 2020, [53-012]:

“It is constantly assumed in practice that a minor beneficiary (or adult beneficiary lacking mental capacity) of a discretionary trust ... has a sufficient interest within the section to enable the court to consent on his behalf”.

26. More recently, in *Bernstein v Jacobson* [2008] EWHC 3454 (Ch), Blackburne J said expressly:

“29. ... It is not in dispute that the 1958 Act authorises the court to give its approval on behalf of beneficiaries of a discretionary trust, notwithstanding that they have no fixed proprietary entitlement but only a right to be considered. That section 1(1)(a) extends to such an interest is confirmed by the fact that section 1(1)(d) applies to ‘any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined’. It would be perverse if the Act extended to the beneficiaries of a discretionary trust under protective trusts where the interest to the principal beneficiary had not yet failed or determined, but not to those beneficiaries where the principal beneficiary's interest had failed or determined.”

27. Since, as I have explained above, the object of a mere power also has an unquantifiable interest in the trust assets, albeit not as powerful as that of the object of a trust power, it is hard to see why the 1958 Act should treat such an object differently for its purposes. The (undoubted) differences between them are not legally significant in this context. In my view they should both be “interests” for such purposes. Moreover, it seems that the concept of “interest” goes even further than this. In *Bernstein v Jacobson* [2008] EWHC 3454 (Ch), [29], Blackburne J held that the right to due administration of a deceased's estate, whilst not giving rise to any legal or equitable interest in the assets of the estate, nevertheless could amount to an “interest” for the purposes of the 1958 Act. He said that “interest” for such purposes was *not* confined to cases of legal or equitable interests in assets.

Conclusion

28. It was for the reasons given above that I concluded at the hearing that the object of a mere (though fiduciary) power had an interest within section 1 of the 1958 Act, and that the court accordingly had jurisdiction to give its approval on behalf of such objects who were minors.