IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN.

CAUSE 208 OF 1990

7-08-90

IN THE MATTER OF A DEED OF SETTLEMENT MADE BY [illegible]
AND IN THE MATTER OF THE TRUSTS LAW (REVISED)

Mr. Angus Foster — for plaintiff and for first, second and third defendants.

Mr. Ramon Alberga Q.C. — for fourth and fifth defendants (the infant beneficiaries).

Mr. Andrew Jones — for the trustees.

JUDGMENT

SCHOFIELD J.

This summons, brought under section 67 of the Trusts Law, seeks an order approving a scheme of arrangement varying the trusts in a deed of settlement made on the 14th December 1982. The settlor died on 13th August, 1984, and his widow, who is the plaintiff in this action, is the principal beneficiary under the settlement. This Court has already approved one arrangement for the variation of the trusts, by order dated the 2nd December, 1987, but that variation has no relevance to the present application. On that occasion the application was made by the trustees and the intention of the variation was to gain taxation advantages for certain of the beneficiaries.

The deed of settlement provides, inter alia, that the plaintiff receives out of the income or capital of the trust fund a sum of Cdn.$180,000 per annum and the trustees have power to pay such sum in excess of that amount as would represent proportionately any substantial increase in the cost of living index consistent with the size of the trust estate and at the same time as would be necessary to enable the plaintiff to maintain her usual standard of living. There is a provision for the trustees to sanction further distributions of income or

capital to the plaintiff if the annual payment from the trust fund is insufficient to meet her requirements by reason of serious illness, provided an Advisory Committee set up by the deed of settlement is satisfied that the payments are justified. A further clause empowers the trustees to pay out of income or capital of the trust fund, at their discretion, all periodic or other sums payable to the plaintiff, during her lifetime, in respect of the rental or purchase of any residence acquired by her 'within or without the borders of any tax haven country'. No payments have been made to the plaintiff for increases in the cost of living, although they have been strongly mooted by the plaintiff and the trustees. No payments have been made to the plaintiff for the cost of medical treatment since the settlor's death. Approximately Cdn.$45,578 has been paid to her in respect of the rental or purchase of residences since the settlor's death. The plaintiff has three such residences.

The settlor left a sister M who has two children, MA who is 43 years old, married but without children, and RB who is 40 years old, married and who has two infant children SJ and MC. The deed of settlement provides for annual payments to be made to M, MA, and RB who are the first three defendants in these proceedings. These annual payments to M, MA and RB will not be affected by the intended variation. There is also a provision for annual payments from the trust fund to an aunt and a foster child and lump sum payments to the settlor's two godchildren. These payments have all been made or continue to be made and no change is proposed in their regard. In the circumstances, and I am satisfied appropriately, the aunt, foster child and godchildren have not been brought into these proceedings. It is as well to note here that the deed provides that in the event that the income and redemption proceeds derived from investments of capital shall at any time be insufficient to satisfy any of the trusts then distributions are to be reduced proportionately with the exception of any distribution to be made to the plaintiff. Another feature of the settlement is that as originally drafted the whole of the income would be distributed. By the variation of the 2nd December, 1987, the way the fund was

held was restructured and distributions are now deemed to be made out of capital. However the effect is the same; the capital of the trust estate does not appreciate.

On the death of the plaintiff, MA and RB are entitled to the capital of and the plaintiff's share of the income from the trust fund, subject to the other distributions, and their children or remoter issue will ultimately be entitled to the capital, should they survive MA and RB.

By Clause 3(3) of the deed of settlement MA and RB, or their issue, may become entitled to such capital and income of the trust fund in a way other than by the death of the plaintiff for it is provided that if the plaintiff remarries or 'otherwise shall contract a common law liaison' the payment of income or capital to her shall be forfeited and MA and RB, or their issue, shall be entitled as they would be on the death of the plaintiff.

The plaintiff seeks the Court's sanction to a variation of the settlement to remove that forfeiture clause. If it was left there then of course the only person who could potentially benefit, at least financially, from the proposed variation would be the plaintiff, so it is proposed that the variation shall include various compensatory provisions, if I may call them that. These are:

1. a reduction of the annual payment to the plaintiff from Cdn.$180,000 to Cdn.$120,000 with the balance of Cdn.$60,000 being paid to a new trust fund to be set up by the plaintiff;

2. the deletion of the power of the trustees to increase the annual payment to the plaintiff in the event of a substantial increase in the cost of living index;

3. the addition of a provision that the aggregate of distributions to the plaintiff in the event of serious illness shall not exceed Cdn.$50,000.

4. that the clause which provides that in the event of the income and redemption proceeds being insufficient to satisfy the trusts that the distributions be reduced proportionately with the exception of payments to the plaintiff be varied to provide that payments to the new trust fund be also excepted in the event of a proportionate reduction;

5. a deletion of the power give to the trustees to make payment to the plaintiff in respect

of rental or purchase of any residence;

6. a variation of the provision for distribution of surplus income among the beneficiaries in the fiscal year following the redemption proceeds received on a pro rata basis according to the distributions, by inverting the ratio of distribution as between the plaintiff and the new trust fund from $120,000 and $60,000 to $60,000 and $120,000, thus giving the higher ratio to the new trust fund.

The relevant portion of the provision under which this application is made, section 67 (1) of the Truste Law (which is in similar terms to the section 1(1) of the English Variation of Trusts Act, 1958,) reads:-

"67. (1) Where property, whether real or personal, is held on trusts arising whether before or after the passing of this Law, under any will, settlement or other disposition, the Court may if it thinks fit by order approve on behalf of -

(a) 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; or

(b) (does not apply);

(c) any unborn person; or

(d) (does not apply),

any arrangement (by whomsoever proposed, and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts:

Provided that except by virtue of paragraph (d) the court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person."

My concern is not therefore for the adult beneficiaries, those of whom are to be affected by the proposed variation have already given their consent to it. My concern is for the infant children and the unborn children; my duty is to consider whether I should give the approval which they are incapable of giving for themselves and, according to section 67, I must not approve an arrangement unless the carrying out thereof would be for their benefit.

The plaintiff argues that the infants SJ and MC and any unborn children will benefit by the variation in two ways.

First, that the compensatory provisions which I have set out above have the effect or potential effect of increasing the available capital which will eventually pass on to them under this trust fund and they may also benefit from the creation of the new trust fund. Secondly, that the potential for family discord which is created by the forfeiture clause will be removed.

At the commencement of the hearing there were on file two affidavits of Mr. Peter Oreck the Canadian solicitor acting for the plaintiff and for MA and RB. The first of these affidavits, filed with the originating summons, set out the background of and the reasons for the application. Paragraph 13 of that affidavit reads:

> "13. I am informed by (the plaintiff) (MA) and (RB) and verily believe that the Settlor was and (the plaintiff) is very close to (MA) and (RB) and in many respects have treated them as their own children. (MA) and (RB) are likewise most concerned for the welfare and well-being of (the plaintiff). In the circumstances (the plaintiff), (MA) and (RB) are all concerned about the effect of the forfeiture condition relating to remarriage or contracting a common law liaison attached to the provisions in favour of (the plaintiff). Although I am advised by (the plaintiff) and verily believe that she has no present intention of remarrying or contracting a common law liaison (whatever that may mean) she, (RB) and (MA) are all concerned at the inhibiting effect which the condition may have upon (the plaintiff) and her future life. I am informed by them and verily believe that they feel strongly that (the plaintiff's) future life-style, whatever it may be, should not be dictated by any fear that she may forfeit the substantial payments out of the Trust Fund upon which she is obviously largely dependent to maintain her usual standard of living. I am further informed by them and verily believe that they are also concerned that the condition concerned could be a source of family friction in the future particularly in view of the imprecise nature of the condition relating to contracting a common law liaison and they are anxious to avoid such a possibility."

The second of Mr. Oreck's affidavits depones to the tax advantages to be gained by MA and RB, which could in consequence be of benefit to the infants and unborn beneficiaries, by the creation of the proposed new trust fund. A further affidavit was sworn by Mr. Angus Foster who acts for the plaintiff to the

effect that he is also instructed by M, MA and KB, and they have no objection to the proposed variations. There was also an affidavit from the paternal grandfather of BJ and MC who, as their guardian ad litem, indicates that he, too, has no objection to the proposed variations.

I wondered whether any significance could be attached to the absence of any affidavit from the plaintiff herself stating that she has not remarried or entered into a common law liaison and does not immediately intend to do so. Why, I asked, is there, six or so years after the death of the settlor, any need to raise the question of this forfeiture clause if there are no problems existing between the parties and if the plaintiff does not intend to offend the clause? Counsel for the plaintiff would have it that I need not concern myself with that consideration, for the adult beneficiaries, whose interests may thereby be affected but who I am not here to protect, accept the position. He argues that even if the plaintiff does remarry or enter into a common law relationship immediately after the trusts are varied, the interests in the capital which the infants and unborn children will in future take under the trusts will not be affected. My answer to that is threefold. First, as will become apparent later with the deed as presently framed there could arise a situation that if the plaintiff remarries or contracts a common law liaison the infants or unborn children would become "income beneficiaries". Secondly, that whilst section 67 provides that I must consider the benefits attaching to the infants and unborn children before approving this scheme, and I would accept that this is probably my primary consideration, the section also says that I may only make an order if I think fit. In other words I have a discretion to exercise and, following Pennycuick J. in Re Remnant's Settlement Trust [1970] 2 All E R 544, 550 I would only exercise my discretion in favour of the plaintiff if I am satisfied the arrangement is in its nature a fair and proper one. In making such a determination I must be able to satisfy myself, so far as I am able, that all assertions of fact and future intentions are correct. I must be able to test those assertions, determine what the facts are and whether

they are relevant to the exercise of my discretion. It is for the court to decide what it makes of the facts as stated or found. Thirdly, one of the benefits to the infants and unborn children put forward in support of the application is the elimination of potential disharmony within the family. If the plaintiff has convinced the adult beneficiaries, who would gain by her remarriage or entering into a common law liaison, that she does not intend to do so, the potential for family disharmony is enormous if, immediately after the trusts are varied, she remarries or enters into a relationship which would have rendered her liable to forfeit her benefits under the trusts.

Be that as it may counsel has now filed an affidavit of the plaintiff to the effect that she has not and has no intention of offending the present forfeiture clause and I am prepared to take that at face value. Furthermore the situation within the family became clearer during the arguments in the case than is immediately apparent from the face of the affidavits. There have been discussions on the plaintiff's request for consideration of further payments, over and above the annual payment of Cdn.$190,000, to cover increases in the cost of living. So far no grant has been made by the trustees, but if the trusts are not varied by deleting the provision for such future payments the potential for family disharmony will increase. There is possible conflict over whether the plaintiff should receive extra payments and the possibility of the other members of the family being tempted to scrutinise her lifestyle to ensure she is not offending the forfeiture clause is real. The fact that there is not a great deal left over at the end of the year after all the distributions are made enhances the potential for disharmony. On this I am satisfied that the proposed variations will operate to remove potential family discord, and so could be of benefit to the infants or unborn children. The extent of that benefit is impossible to determine but there must be some benefit to an infant in being part of a larger family unit which is in harmony, particularly where the family members draw financially from the same pool.

I am satisfied that the word 'benefit' in section 57 of the Trusts Law is not confined to financial benefit and can include benefit of the kind I refer to, the removal of actual or potential family disharmony. As was said by Pennycuick J in Re Remnant's Settlement Trust (supra) at p. 559 :-

> "I have not found this an easy point, but I think that I am entitled to take a broad view of what is meant by 'benefit', and so taking it, I think that this arrangement can fairly be said to be for their benefit.
> On that last point I was referred to the recent case of Re Weston's Settlements ([1968] 3 All ER 338 at 342, [1969] 1 Ch 223 at 245) where Lord Denning MR said:
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> > 'I think it necessary, however, to add this third proposition: (iii) the court should not consider merely the financial benefit to the infants or unborn children, but also their educational and social benefit.'
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> I do not think that Lord Denning MR intended to use the words 'educational' and 'social' in any restrictive sense. I think that the court is entitled and bound to consider not merely financial benefit but benefit of any other kind."

Of course, as I have said, it is impossible to speculate on the value of the removal of potential family disharmony to the infants and unborn children in this case. The benefit thereof must be a benefit subsidiary to the main benefits put forward, which are financial. Let me briefly deal with each of the compensatory provisions to see how they could benefit those whose interests I have a duty to protect.

The payment of Cdn.$50,000 out of the plaintiffs Cdn.$180,000 income per annum from the trust fund to the new settlement will not in any way alter the distribution of the assets of this trust fund to the detriment of the infants or unborn children. However the new settlement is stated to be for the benefit of MA and RB and on their deaths their respective spouses followed by the infants and any children as yet unborn. In other words there is potential for the infants and unborn children to benefit through the new trust fund and this potential is further protected and enhanced by the protection of the plaintiff's annual payment as against the other distributions being extended to the payment to the new trust fund and the

alteration in the ratio of annual redemption proceeds being varied from $60,000/$120,000 to $120,000/$60,000. Thus the payment into a new trust fund, of the amount by which the plaintiff's income from the trust fund is reduced and the related proposed variations potentially could be of benefit to the infants and unborn children, if the stated intentions of the plaintiff are carried out.

The removal of the power of the trustees to increase payments to the plaintiff in the event of a substantial increase in the cost of living index, the removal of their power to make payments to her in the event of serious illness, except to a maximum of Cdn.$50,000, and the deletion of their power to make payments to her in respect of rental or purchase of any property removes the possibility of serious depletion of the trust capital which capital will ultimately pass to the infants and unborn children.

These financial benefits have been urged by counsel for all the parties, but with different emphases. Counsel for the infant children in being points out that the infants could become 'income beneficiaries' if RB dies before MA and the plaintiff remarries or becomes involved in a common law liaison. He argues that these possibilities are so remote as to be outweighed by the benefits, particularly by the removal of the potential for depletion of the capital which is ultimately intended for the infants and unborn children. Furthermore, he points out that the new trust fund is intended for MA and RB's benefit (and ultimately for their issue) and the intention is to accumulate the income. Furthermore the proceeds will be untaxed. This will result in a very large accumulation of money which could ultimately pass to the infants and unborn children.

The trustees' views are rather more conservative but overall they feel that the proposed variations are capable of conferring financial benefit on the infants and unborn children and they do not harm their positions. The trustees consider it might be a good thing for the infants and unborn children for any

potential family disputes to be removed by these proposed variations.

In this case I am not dealing with existing benefits but with possible or potential benefits which may or may not attach to the infants or unborn children in the future. I do not consider that the word 'benefit' in section 67 should be so restrictively interpreted as to apply only to existing or actual benefit. It must encompass potential benefit. I have to balance in this case the possible advantages which would come their way if the deed of settlement remained unvaried and the plaintiff remarried or contracted a common law liaison against the potential advantages to the infants and unborn children of the creation of the new trust fund and the removal of possible sources of depletion of the trust capital. I must also throw into the balance the possibility of family disharmony and the benefit to them of its removal. As I see it the only possible way in which the infants or unborn children could benefit by the plaintiff offending the forfeiture clause is by a percolation down to them of the increased income which MA and RB would receive in that eventuality or by the loss of income to them in the event that RB predeceaseds MA and his children are still alive, or MA predeceaseds RB and she has produced issue who are still alive. In other words, this court is being asked to take a risk that the compensatory benefits outweigh the possible advantages to be gained by the infants and unborn children by leaving the forfeiture clause in place. I am satisfied that taking such a risk for those who are incapable of taking it for themselves is something which the Court may do (see, for example, Re Holt's Settlement [1968] 1 All ER 470, 490). The adult beneficiaries are prepared to take that risk and I am satisfied that I should take what I regard as a small risk for the infants and unborn children. The possible advantages to be gained by them from these variations far outweigh the possible advantages to be gained by leaving the deed as it stands and I consider that, on balance, the proposed variations are for the benefit of the infants and unborn children.

Are they fair and proper? The only reservation I would have in that regard is that they appear to offend the settlor's intentions. He must be taken to have wanted his widow, the plaintiff, to forfeit her interest under the trust fund if she remarried or contracted a common law liaison. To defeat the settlor's intentions is 'a serious but by no means conclusive consideration' (see Re Remnant's Settlement Trust (supra) p.559). In the circumstances of this case I should take such a serious course and I consider the variations proposed are fair and proper.

I therefore grant the order as prayed in paragraph (1) of the originating summons conditional upon the setting up of the new settlement in terms of the draft submitted to me.

The costs of this application are to be paid out of the trust estate.

Schofield J.

Dated this 7th day of August, 1990