

Alert

Long Live Bermuda Trusts – Dis-applying the Rule Against Perpetuities

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Bermuda’s Chief Justice (Kawaley CJ) has provided additional guidance under the Bermuda Perpetuities and Accumulations Amendment Act, 2015 (the “2015 Act”) which amended the Bermuda Perpetuities and Accumulations Act, 2009 (the “2009 Act”) to empower the Court to dis-apply the rule against perpetuities (the “Rule”) for Bermuda law trusts established before 1 August 2009.

The 2009 Act had dis-applied the Rule for all trusts established after 1 August 2009, except trusts owning real property in Bermuda. The 2015 Act amended the 2009 Act to grant the Court power to amend or extend trust periods or dis-apply the Rule to trusts established before 1 August 2009.

In a recent case, *In the Matter Of The G Trusts* [2017] SC (Bda) 98 Civ (15 November 2017) (“G Trusts”) Kawaley CJ for the Supreme Court of Bermuda notably interpreted Section 4 of the 2009 Act (as amended under the 2015 Act) as empowering the Court “to declare that the rule against perpetuities shall not apply, most broadly, in relation to: instruments taking effect before August 1, 2009 which are governed by Bermuda law; and instruments taking effect under a foreign governing law either before or after the commencement of the 2009 Act . . .” Kawaley CJ also highlighted that “a generous ambit of discretion is granted to [the] Court” in these provisions.

In *G Trusts*, Kawaley CJ re-affirmed the following three guiding principles previously set out *In The Matter Of The C Trust* [2016] SC (Bda) 53 Civ (16 May 2016) (in which Ben Adamson of Conyers appeared for the Applicant):

- “(1) the Court should not act as a ‘rubber stamp’;
- (2) the Court should have regard to the best interests of all interested parties, broadly defined and looked at as a whole; and
- (3) the fact that extending the duration of a trust will dilute the economic interests of existing beneficiaries will ordinarily be an irrelevant consideration.”

Of note, Counsel for the Applicant in *G Trusts* submitted that the first of these principles, in the context of an application to dis-apply the Rule, really meant that “the Court should exercise its discretion in a principled way, upon consideration of all the facts.” Counsel also submitted that, if an extension of the perpetuity period would “be in the interests of ‘the beneficiaries as a whole’, that would undoubtedly justify the Court granting the order”, but this requirement would not be necessary in every instance. The Court in *G Trusts* also confirmed its unfettered discretion is “crucial to the maintenance of the flexibility which the statutory power was intended to provide. There may for example, be a case where a beneficiary or group of beneficiaries might be prejudiced by the making of an order. In such a case the detriment might be minimal or very remote (and therefore of little relevance) or counterbalanced by other, substantial, benefits”. With regard to the third principle set out above, it must be the case as there will always be a dilution of existing interests whenever the period of a trust is extended. Any other treatment of such circumstances would deprive the 2015 Act of all effect.

Finally, as grounds for exercising the Court’s discretion in *G Trusts*, Kawaley CJ accepted a number of “important arguments” to dis-apply the Rule including the:

- preservation of existing and future tax benefits;

- attainment of the family’s objective and view of its wealth as dynastic in nature;
- family’s concern “to avoid what, under the Trusts, will be an enormous distribution being made to the generation which happens to be in existence at the end of the present perpetuity period” and the alternative to that being a “restructuring of the Trusts, potentially in circumstances which could be detrimental in other respects, most likely taxation”;
- fact that a distribution would, “by definition, be to the detriment of any subsequent generations”; and
- charitable “foundations will benefit from the disapplication of the perpetuities rule in the same way as the individual beneficiaries: the longer the assets remain within the Trusts, the greater the potential benefit to the foundations . . .”

Kawaley CJ in *G Trusts* accepted and quoted in the Ruling the above principles and submissions, among others, as being the “*correct approach*” in the context of a 2009 Act Section 4 application and exercised the Court’s statutory discretionary power favourably to dis-apply the Rule to the relevant trusts.

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