Neutral Citation Number: [2019] EWHC 1643 (Ch)

Case No: BL-2018-002366

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST

Rolls Building, Fetter Lane,
London EC4A 1NL

Date: 04/07/2019

Before:

CHIEF MASTER MARSH

- -

Between:

(1) PQ and another	**Claimants**
- and -	
(1) RS and others	**Defendants**

- -
- -

Richard Dew (instructed by **Wedlake Bell LLP**) for the **Claimants**
Francis Barlow QC (instructed by **Wedlake Bell LLP**) for the **3rd Defendant**
Susannah Meadway (instructed by Boodle Hatfield LLP) for the 4th and 5th Defendants

Hearing dates: 6 March 2019

- -

Approved Judgment
(with additional corrections)

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.

.....

CHIEF MASTER MARSH

Chief Master Marsh:

1. According to the common law rules of construction, a child is legitimate only if the child is born or conceived in wedlock. Section 15(1)(a) of the Family Law Reform Act 1969 came into force on 1 January 1970 and changed the law so far as it relates to dispositions made after that date, but otherwise left the law unchanged. Despite the passage of nearly 50 years since section 15(1)(a) of 1969 Act came into force, the fact that the third defendant, who is aged 9, was born shortly before her parents married has necessitated the issue of this claim.

2. The claimants are trustees of a discretionary settlement executed by the Settlor made on 11 March 1968. The Settlement was made for the benefit of the Settlor's children and remoter issue and their respective spouses, widows and widowers. The assets of the settlement are substantial and have a current value in excess of £80 million. The claimants ask the court to provide assistance under the first and second categories of jurisdiction described in *Public Trustee v Cooper* [2001] WTLR 901 at 922H. The trustees ask the court (a) to confirm that they have power to take the step they propose to take and (b) they seek the court's blessing on their proposed course of action.

3. In accordance with an order made at the hearing, the parties have been anonymised. I will explain the basis upon which the order was made later in this judgment.

The Settlement

4. Under clause 7(a) of the Settlement the trustees were given a power:

> *"… to pay or apply all or any part of the capital of the Trust Fund to or for the benefit of all or any one or more exclusively of the others or other of the Beneficiaries in such manner and to such extent and in such shares and proportions and upon such terms and conditions … and generally in such manner in respects as the Trustees may in their absolute discretion think fit …"*.

5. The trustees were given a further power at clause 7(b):

> *"… to vary all or any of the trusts powers and provisions hereby declared or to substitute therefor any other trusts powers or provisions … but so that no person or persons shall take or be capable of taking under any such varied or substituted trusts powers and provisions any interest or benefit … except the Beneficiaries or some of them …"*.

6. The term "the Beneficiaries" was defined in clause 1(iii) of the Settlement as including the following:

> *"(a) The child or children and remoter issue of the Settlor and their respective wives husbands widows or widowers now born or who shall be born during the trust period as hereinafter defined (including in [sic] expression child or children and remoter issue all adopted persons, whensoever adopted and whether adopted under the law of England or any foreign country having jurisdiction as if such persons were the children of the person or persons by whom they are adopted)"*.

7. On 29 March 1979 the trustees exercised their powers under clause 7(b) of the Settlement to appoint that the Trust Fund was held under certain trusts. By that date the Settlor had one child who was aged 22. She was not then married and had no children. The Settlor's daughter was the principal object of the exercise of the trustees' powers, subject to a power under clause 9 exercisable during the lifetime of the Settlor's daughter to:

> *"appoint that the whole or any part of the Trust Fund and the income thereof shall thenceforth be held … Upon Trust for such one or more exclusively of the other of the children or remoter issue of [the Settlor's daughter] born before the expiration of the Trust Period at such age or time and if more than one in such shares and with and subject to such trusts powers and provisions and generally in such manner for their or any of their benefit as they shall in their discretion think fit".*

8. The current governing deed is the Appointment made on 1 October 1987. It created trusts under which the trust fund is held to pay the income for life to the Settlor's grandchildren, RS and TU, who are the first and second defendants, and subject thereto under clause 6(2) on trust:

> *"for such one or more of the children of the Grandchild as shall attain the age of 18 before the Perpetuity Date or shall be living and under that age on the Perpetuity Date and if more than one in equal shares".*

9. In other words, on the deaths of RS and TU their shares will vest absolutely in their children if and when they attain the age of 18. By clause 8 of the 1987 Appointment, the trustees are given further overriding powers including at 8(2)(i):

> *"The Trustees may revoke the trusts of the Share (wholly or in part) for the purpose only of appointing (and so that the Trustees do by the same deed appoint) such new trusts for the benefit of all or such one or more of the Beneficiaries exclusive of the other or others of them in such shares and with and subject to such trusts powers provisions and generally in such manner for their or any of their benefit as the Trustees shall without infringing the rule against perpetuities think fit"*

10. The terms "Grandchildren" and "Beneficiaries" are defined in clauses 1(b) and (c):

> *"(b) 'The Grandchildren' means* [RS, TU] *and all other children of* [the Settlor's daughter] *who shall be born en ventre sa mere before the Perpetuity Date and before the first of the Grandchildren shall have reached the Relevant Age.*
>
> *(c) 'The Beneficiaries' means all the children of* [the settlor's daughter] *who shall be born en ventre sa mere before the Perpetuity Date and before the first of the Grandchildren shall have reached the Relevant Age"*

11. The 1987 Appointment does not define "children of the Grandchild" or contain any provisions concerning illegitimate or adopted children.

12. RS was born on 28 July 1980 and is aged 39. He married on 23 October 2009. He and his wife have three children V, W and X who are the third, fourth and fifth defendants

respectively. V was born on 20 September 2009, about a month before her parents married. W was born on 21 November 2012 and X on 25 July 2014. V is represented by her litigation friend Jennifer Anne Cutts who is partner in Wedlake Bell LLP. W and X are represented by their litigation friend, Mark Lindley, who is a partner in Boodle Hatfield LLP.

13. TU was born on 5 June 1982. He is unmarried and has no children.

14. There is an issue about whether V is a beneficiary under the current trusts. It turns on whether she falls within the definition of "children of the Grandchildren" because her date of her birth pre-dates her parents' marriage. Put another way, is she regarded in law as illegitimate? If the court accepts that her status is uncertain, the court is invited, rather than determining the issue, to approve an appointment by the trustees that will put the position beyond doubt.

15. Mr Barlow QC was instructed by V's litigation friend to consider the issue concerning V and he provided an opinion dated 24 July 2018 which has been placed in evidence. He expressed the view that based on the uncertain state of the authorities, although it is arguable that powers under the Settlement could be used to benefit V on the basis that she is a beneficiary, it is by no means certain that this is permitted.

16. The law was amended by Part II of the Family Law Reform Act 1969 but only prospectively. The provisions of Part II of the 1969 Act were replaced by the provisions in sections 1 and 19 of the Family Law Reform Act 1987, but again only with prospective effect. Similarly, the provisions of section 5 of the Legitimacy Act 1976 apply only with prospective effect.

17. The 1979 and 1987 Appointments could, at least in theory, amount to the exercise of a power to create on each occasion a new settlement and such a settlement would be a "disposition" for the purposes of the 1969 and 1976 Acts. If that were the case, the statutory rules of construction would apply. However, the creation of a new settlement is not a necessary consequence of exercising such a power: see *Swires v Renton* [1991] STC 490. It seems unlikely that this was the intention of the trustees in this case when the powers were exercised.

18. It follows that although the 1979 and 1987 Appointments were made after the Legitimacy Act 1976 came into force, they are not "dispositions" within the meaning of the Act: see *Re Hoff* [1942] Ch 298 and *Re Brinkley's Will Trusts* [1968] Ch 407. The relevant disposition was the 1968 settlement.

19. It would have been possible for the 1979 and 1986 appointments to have incorporated illegitimate issue either expressly or by incorporating the then current rules of statutory rules of construction. However, there is no indication that this was intended on either occasion. Mr Barlow expresses the view in his opinion that it would be natural for references to issue in a settled advance to bear the same construction as in the head settlement. Although he is unable to cite authority to support that proposition, I agree it is natural to assume, without an indication to the contrary, that common language in connected documents was intended be given the same meaning.

20. This leads to the recent decision in *Re Hand's Will Trust* [2017] Ch 449. It concerned a will made in 1946. The testator died in 1947 and was survived by two sons and a

daughter. By his will the testator settled an equal share of his residuary estate on each of his children for life with the remainder on trust for such of his or her "child or children who should attain the age of 21 years". His younger son died in 2008 leaving two adopted children. The will did not modify the common law rule of construction concerning references to children and issue. The question for the court was whether the adopted children were children for the purposes of the will.

21. The relevant provisions of the Adoption Act 1976 were identical to the provisions of the Legitimacy Act 1976. Put shortly, they did not assist because they do not apply to an "instrument" made before 1 January 1976. Rose J (as she then was) accepted that on the basis of English domestic law the adopted children's claim would fail. However, she allowed their claim because:

    (1) The restrictions on the rights of adopted children to inherit contained in the Adoption Act 1976 constituted an infringement of the adopted children's rights under Article 8 of the European Convention on Human Rights taken in conjunction with Article 14.

    (2) Under sections 2 and 3 of the Human Rights Act 1998 it was possible to read down paragraph 6(1) of Schedule 2 of the 1976 Act so as to make it compliant with the adopted children's Convention rights.

    (3) This would not be giving retrospective effect to the 1998 Act since the question whether the testator's younger son had any "children" only fell to be determined on his death which was after the 1998 Act came into effect.

    (4) Although the daughter's children (the other son had died and his share had passed to the two surviving children) had vested interests in the testator's estate in the sense that term is used in the law on inheritance, it was not unfair to apply the 1998 Act in a way that reduced the rights of the sister's legitimate children.

22. The decision is a controversial one. The 1969 Act and both 1976 Acts restricted the operation of the new rules of construction to instruments executed after a specified date. The effect of the decision in *Re Hand* is to impute to Parliament an intention by the 1998 Act to contradict the policy of the earlier legislation.

23. If *Re Hand* is decided correctly, then V is arguably entitled to benefit from a future exercise of powers under the Settlement. However, Mr Dew has advised the trustees that the position is not free from doubt and it would be unwise to rely on *Re Hand* as a basis for the propose of making an appointment in favour of V. The trustees have an alternative approach, which is the course of action they invite the court to approve.

24. I express no view about whether *Re Hand* was correctly decided. However, in light of the analysis provided by Mr Barlow, which I have summarised, there must be doubt about whether it will be followed. I am therefore content to proceed on the basis that there is appreciable uncertainty about whether the decision in *Re Hand* will be followed in other cases and will be approved in due course by the Court of Appeal.

The proposed appointment

25. The Trustees are proposing to execute a Deed of Appointment exercising the power in clause 8(2)(i) of the 1987 Appointment for the benefit of RS and TU by revoking the trusts in clauses 6(2) and 6(3) of the 1987 Appointment, other than the entitlement of RS and TU to receive the income of their share of the fund. They will be replaced with new trusts for a class of beneficiaries described as the "Discretionary Beneficiaries" and defined as meaning:

> "…the children and remoter issue (whether legitimate, illegitimate, legitimated or adopted) of [RS and TU]".

26. The effect of the proposed appointment is twofold. First, it will remove any doubt about whether V is a beneficiary. Secondly, it will remove the concern that the assets will vest upon RS' children at the age of 18 in the event of his death. The inheritance of substantial sums at such a young age would impose a very significant burden and responsibility.

27. The course of action that is proposed, particularly as it affects V, is strongly supported by RS and TU. Although the Settlor died in 2018, there is cogent evidence to the effect that he also wished V to benefit from the trusts. This can be discerned from a letter of wishes dated December 2016 and a letter written by him on 28 February 2018, shortly before he died. His letter of wishes describes the possibility that V might not benefit as a result of her being born out of wedlock as being "abhorrent" to him. His later letter, which was written at a time when this claim was in contemplation, expresses his support for the proposed application and says that it was always his intention that all his great-grandchildren would benefit from the Settlement.

Is there power to make the appointment?

28. Mr Dew who appeared for the Trustees and Mr Barlow both submitted that the Trustees have the necessary power. Ms Meadway, who appeared for W and X (V's sisters), did not oppose the Trustees' application. However, she was allocated the task of providing the court with such arguments as there may be against the Trustees having power to make the proposed appointment.

29. Clause 8(2)(i) of the 1987 Appointment is set out in paragraph 7 above. The power is expressed to be solely for the purpose of "appointing" new trusts for the benefit of RS and TU. Ms Meadway categorises the power as a power of appointment and described it as a power that is limited to selecting amongst particular beneficiaries. She submitted that powers of appointment and powers to apply capital are fundamentally different. She relies on Lord Romer's description of a power of appointment in *Muir v Muir* [1943] AC 468 at 483:

> "If, for example, property be settled on trust for A for life and after his death on trust for such of A's children or remoter issue in such proportions as B shall by deed appoint, B has no interest in the property whatsoever. He has merely been given the power of saying on behalf of the settlor which of the issue of A shall

> take the property under the settlement and in what proportions. It is as though the settlor had left a blank in the settlement which B fills up for him if and when the power of appointment is exercised. The appointee's interests come to them under the settlement alone and by virtue of that document. These remarks apply equally well to the case were the donee of the power of appointment has, not only the power of saying which of the class shall take under the trust, but also the power of saying what interests they shall take."

30. Ms Meadway submitted that a power to apply capital is rather more than a power to fill a blank in a settlement. It is a power "… given as an aid to enable the trust property to be used for the fullest benefit of the beneficiary": per Fox LJ in Inglewood v IRC [1983] 1 WLR 366 at 373.

31. However, some caution is needed when having regard to Lord Romer's description of a power of appointment because the power under consideration was entirely different to the power in this case. Lord Thankerton described the power at p. 476 as being a limited power of appointment and went to say:

> "It confers power on the donee to do three things – to select the beneficiaries among a specified class, to apportion the fund among the person so selected and to qualify, by restriction or limitation, the nature of the interest to be taken by these persons. These three powers are exercised by the donee as the delegate of the testator."

32. A power to appoint, paraphrasing the terms of the Settlement, such new trusts as the Trustees think fit is a radically different proposition.

33. In addition, Ms Meadway submits that a further consequence of the difference between powers of appointment and powers to apply capital is the principle that the donee of a discretion may not delegate the exercise of the discretion. She points to the declaration of discretionary trusts in the proposed appointment under which the Trustees delegate the discretion given to them by the power they exercise. *In Re Hay's Settlement Trusts* [1982] 1 WLR 202 is an example of impermissable delegation but, again, the circumstances were very different to this case. Sir Robert Megarry V.-C. described the power of appointment created by the settlement as an intermediate power. The power permitted the trustees to hold the trust fund "for such persons or purposes … as the trustees shall by any deed … executed within 21 years from the date hereof appoint…". The deed of appointment they executed stated they were to hold the trust fund "to or for the benefit of any person or persons whatsoever or to any charity…". Sir Robert Megarry V.-C held that the deed of appointment had not designated the person to whom the appointment was made but merely created the mechanism whereby a person or persons might be ascertained from time to time. *In Re Hay's Settlement* the mechanism in the settlement for ascertaining who would benefit was not being used. Instead, the power was used to create a new mechanism.

34. In this case, the power given to the trustees in the Settlement is a very wide one and they are expressly permitted to exercise it by creating new trusts. They are not, by doing so, delegating the power given to them but using it for the very purpose for which it was granted. Mr Dew points out that the power is very similar to the one in *Swire v Renton* [1991] STC 490 where it was held to be wide enough to create new trusts within the existing settlement.

35. The point taken against the Trustees having the power to make the appointment is, however, not dependant on authority but rather on the proper construction of clause 8(2)(i). Hence, I do not find *Re Morris's Settlement Trusts* [1951] 2 All ER 528 or *Re Hunter's Will Trusts* [1963] Ch 372 (which was decided without reference to the House of Lords judgment in *Re Pilkington* [1964] AC 612 delivered just a month earlier), where different words fell to be construed in different contexts, are useful guides. The use of the verb 'appoint' is not an uncommon one and it is used in different contexts to mean different things. It could, taken in isolation, be a pointer to the clause being only a power to fill gaps but when looked at in its context it is obviously used in a much wider sense. It seems to me that an appropriate synonym for "appointing" in the context of this settlement is "creating". The language is much wider than merely a power that permits only a limited and closely constrained exercise. Indeed, it is difficult to see how the power could have been drafted more widely. The language used allows the Trustees to revoke the existing trusts and create new ones. Providing that this is for the benefit of RS and TU, it is permitted under the power.

36. I am satisfied that the Trustees have power to make the appointment.

Is the appointment a proper use of the power?

37. All the parties, including Ms Meadway for W and X, contend that the appointment is for the benefit of RS and TU and is a proper use of the power.

38. Mr Dew identifies three aspects of the proposed appointment which may be seen to be a source of difficulties:

    (1) The power which is to be exercised is for the benefit of RS and TU, rather than the great grandchildren of the Settlor.

    (2) It prevents capital vesting upon RS and TU and so arguably is not for their benefit.

    (3) It expressly includes V who may not be a beneficiary.

39. Against these concerns it can fairly be said:

    (1) It is for the objective benefit of V's father, RS, to make provision for all of his children and for TU to make provision for all of his future children, whether or not they are legitimate.

    (2) It is for the objective benefit of both RS and TU to ensure that the wealth which their children may receive is not vested in them absolutely but managed responsibly for their long-term benefit.

    (3) The express inclusion of V is for the benefit of RS and TU because this is what the entire family consider it is right and it is for the benefit of RS because it is for the benefit of V.

    (4) Both RS and TU consider the appointment is for their benefit.

40. Ms Meadway points out that if V was excluded from being or becoming a beneficiary there is another family settlement from which she might be 'compensated' and this would likely be at the expense of her sisters. Furthermore, and I think importantly, V's exclusion could be the source of family dissension which would not be in the interests of her sisters.

Conclusion

41. I am satisfied that the Trustees have the power to execute the proposed appointment and that to do so would be a proper exercise of their power.

Confidentiality

42. On 1 November 2018, before the claim was issued, I made an interim order anonymising the proceedings and restricting access to the court file pending the disposal hearing of the claim. At the hearing on 6 March 2019 a full anonymity order was made in similar terms to the interim order. At that time the decision of the Court of Appeal in *MN v OP*, which had been pending since a hearing on 17 July 2018, was awaited. My decision on the subject of confidentiality was made based on the law as it then stood.

43. In my judgment, the evidence provided by RS in support of the confidentiality order is cogent and at least as strong as that in *V v T and A* [2014] EWHC 3432 (Ch) set out at [23]. In summary, RS expresses concern about:

    (1) V becoming aware of reports of court proceedings that concern her illegitimacy in an uncontextualized fashion and that she has been treated differently to her sisters. He would not want V to feel different to her sisters by reason of her birth status.

    (2) All three children becoming aware of financial details of the Settlement by details of it being placed in the public domain.

44. The family surname is not well known and the children's parents pride themselves on being down to earth. RS works within the family business and his wife runs her own child focussed business. Their underlying wealth is not obvious to outsiders.

45. The children have limited comprehension about the family's position. RS wishes to ensure that they obtain knowledge about is a measured and careful way rather than stumbling across it on the internet or it being discussed by their peers. He is concerned about other people taking advantage of the opportunity to influence young impressionable minds.

46. Any derogation from the principle of open justice must be considered carefully and such derogation should be no wider than is necessary. The court is required to undertake a balancing exercise between the competing rights under articles 8 and 10 of the European Convention of Human Rights. This is not a claim made under the Variation of Trusts Act 1958 and there are no fiscal considerations involved. The claim is made in order to ensure, within the context of the Settlor's family, that V is treated in the same way as her sisters, rather than possibly being prejudiced by a common law rule of construction that does not reflect contemporary thinking of the

majority. The outcome of the claim provides the trustees with guidance about the exercise of their powers and as a consequence they are able to achieve an outcome which accords with their and the family's wishes.

47. It seems to me that the court is entitled to take steps to prevent the risk of a label being applied to V which will differentiate her from her sisters in a way that has no actual importance.

48. The decision of the Court of Appeal in *MN v OP* [2019] EWCA Civ 679 was handed down on 14 April 2019. I do not consider that it been handed down before the hearing in this case on 6 March 2019 it would have compelled me to reach a different conclusion about confidentiality.