

**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION**

**CAUSE NO. FSD 119 OF 2020 (IKJ)**

**IN THE MATTER OF A SETTLEMENT KNOWN  
AS THE PARAKEET BAY TRUST dated 14 December 2018 (the "Trust")**

**AND IN THE MATTER OF SECTIONS 48 AND 72 OF THE TRUSTS LAW (2020  
REVISION)  
AND GCR ORDER 85, Rule 2**

**BUTTERFIELD TRUST (CAYMAN) LIMITED**

**Plaintiff**

**-AND-**

- (1) A**
- (2) B**  
**(A minor by her guardian ad litem)**
- (3) C**  
**(A minor by her guardian ad litem)**
- (4) BARBARA O'DONNELL**

**Defendants**

**IN CHAMBERS-ON THE PAPERS**

**(NOT FOR PUBLICATION WITHOUT FURTHER ORDER OF THE COURT)**

**Appearances:**

Mrs Shân Warnock -Smith QC instructed by Maples for the Plaintiff  
(the "Trustee") Butterfield Trust (Cayman) Limited (the "Trustee")

Mr Robert Mack and Ms Sarah Allison of HSM Chambers for the 1<sup>st</sup>  
Defendant

Mr Carlos De Serpa Pimental and Mr Esmond Brown of Appleby for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants acting by their Guardian ad Litem (the “Guardian”)

Mr Benjamin Tonner QC of McGrath Tonner for the 4<sup>th</sup> Defendant

**Before:** The Hon. Justice Kawaley

**Hearing:** On the Papers

**Date of decision:** 23 June 2020

## INDEX

*Trustee application for blessing of momentous decision-distribution of entire trust fund to sole adult beneficiary-variation of trust deed-whether proposed transaction detrimental to the interests of minor and unborn beneficiaries*

## JUDGMENT

### Introductory

1. The present action was commenced by Originating Summons dated June 8, 2020. The relief sought may conveniently be taken from the Trustee’s Skeleton Argument which described it as follows:

*“1. This is an application made by the Plaintiff under the inherent supervisory jurisdiction of the Cayman Islands Court over the administration of trusts and in respect of sections 48 and 72 of the Trusts Law (2020 Revision) and GCR Order 85, rule 2. It is supported by all the parties.*

*2. By its Originating Summons in these proceedings the Plaintiff, in its capacity as trustee of the Parakeet Bay Trust established by declaration of trust dated 14 December 2018 (the "Trust"), seeks the following substantive orders and directions:*

*2.1 Pursuant to s 72 of the Trusts Law (2020 Revision), the Court's approval on behalf of the minor, and unborn Beneficiaries of the Trust of the variation of the terms of the Trust Deed to permit the removal of the words "or indirect" wherever they appear in clause 15 of the Trust Deed, including at clauses 15.1 and 15.2 and removal of the words "and indirectly" at clause 15.3;*

*2.2 Pursuant to s48 of the Trusts Law, the Court's blessing of the Trustee's decision to appoint the entire Trust Fund in the manner described in the First Affidavit of Stuart Bray dated 8 June 2020 in these proceedings."*

2. The decision to appoint the entire Trust Fund to the 1<sup>st</sup> Defendant, the mother of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, is patently a momentous one. The decision is supported by all Defendants but the Court's careful consideration of the application has been required nonetheless.
3. The Trustee has been placed under considerable pressure by the 1st Defendant to make the decision and have it approved so it can be implemented before July 1, 2020, the beginning of Australia's new tax year. The extensive steps the Trustee has taken to obtain legal advice in this jurisdiction and tax advice in Australia, have been entirely reasonable.
4. The 1<sup>st</sup> Defendant's unexpected decision to return with her family to Australia shortly after the Trust was established and the 1<sup>st</sup> Defendant took up residence here created obvious concerns about potential tax exposures which could have consumed a substantial portion of the Trust Fund. Moreover, it was completely at odds with the purpose of the Trust which was to benefit persons not resident in Australia.

### **The Trustee's application**

5. The variation application is of course only necessary if the Court decides to approve the other limb of the application. However, in a practical sense, whether the Trust Deed should be varied to facilitate a distribution of the entire Trust Fund to the sole adult beneficiary is indistinguishable from the question of whether the Trustee's decision to make that distribution should be approved.
6. The substantive concern about the variation application and the transaction it is designed to facilitate is that the proposed distribution will not in any direct sense benefit the minor and unborn beneficiaries. The 1<sup>st</sup> Defendant has indicated that she plans to provide for her children

through her estate. That is an indirect benefit for the minors, at least one of whom is now resident with her father in Australia. The Trust Deed presently prohibits conferring even an indirect benefit on an Australian resident.

7. The Protector (the 4<sup>th</sup> Defendant) filed an Affidavit supporting the application, in part because concerns about the intangible nature of the protections which would post-distribution be afforded to the minors were counterbalanced by the fact that they would continue to be discretionary beneficiaries of another trust. She is a professional with no evident family connections to the persons interested in the Trust. Her blunt objective assessment was helpful to the Court.
8. The Guardian's evidence was most directly relevant to an assessment of the interests he represented. He is the uncle of the minors and the younger brother of their mother. To my mind he is just as likely to be concerned about the welfare of his nieces as he is to support his older sister. The combination of his evidence and that of the 1<sup>st</sup> Defendant poignantly made out a strong case that in general wellbeing terms, the minors' best interests lay in being reunited as a family in the land of their birth. It made any suggestion that the 1<sup>st</sup> Defendant would deliberately renege on her promise to financially provide for her children in due course seem fanciful.
9. The Trustee's counsel in its Skeleton Argument submitted:

*“35. A variation to modify the wording of the Overriding Restriction in the manner proposed by the Trustee would not make B a beneficiary of the Trust (or C if she is an Excluded Person) but would pave the way to an effective exercise of the Trustee's powers to make a distribution to Mrs A in the manner proposed. It is plain that such a variation would not operate to the detriment of the minor and unborn beneficiaries and thus satisfies the requirements of s72 of the Trusts Law.*

*36. Since the amendment to s72 which was made in 2019 it is no longer necessary for the Court to be satisfied that a variation is for the 'benefit' of the relevant minor or unborn beneficiaries. The statutory requirement now operative is that the proposed variation does not operate to the 'detriment' of the relevant class. Self-evidently, this proposed amendment does not do so.”*

10. Assuming the substantive transaction is approved, I find no impediments for not approving the variation limb of the application.

11. The Guardian's counsel in his Skeleton Argument concluded:

*“10. The Guardian therefore confirms his consent and approval, on behalf of B and C to the Trustee's application in respect of both limbs of its application and the Court making the draft agreed Order so as to bless the Trustee's decision, if it is minded to do so.”*

12. As far as the legal test for approving the appointment decision, the Trustee submitted in its Skeleton Argument:

*“21. Distribution of all of the Trust Funds to one beneficiary would in any circumstances be a 'momentous decision' for the Trustee to make in the management and administration of the Trust. As such, it falls within category two in the categories of decision set out by Hart J in The Public Trustee v Paul Cooper & ors [2001] WTLR 901, in respect of which a Trustee can seek direction from the Court but without surrendering its discretion to the Court.*

*22. Quoting Robert Walker J from an unreported case, Hart J described it thus:*

*‘The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers.’*

*23. The principles in Public Trustee v Cooper have most recently been applied in the Cayman Islands by the Chief Justice in AA v BB & Colin Shaw (amicus curiae) (unreported) 14 February 2020.*

*24. In that case, the questions to be asked in a 'category two' application were summarised as follows:*

*a. Does the trustee have the necessary power to enter into the proposed transaction?*

*b. Is the Court satisfied that the trustee has genuinely formed the view that the proposed transactions are in the interests of the trust and its beneficiaries?*

*c. Is the Court satisfied that this is a view that a reasonable trustee (having undertaken the same enquiries and faced with the same circumstances), could properly have arrived at?*

*d. Is the trustee operating under any conflict of interest, which would prevent the Court from approving the trustee's decision?*

*25. In this case:*

*a. The Trustee has the necessary power to make the distribution to Mrs A, see paragraph 26 below. Mrs A is a beneficiary of the Trust and an object of the power in question, see paragraph 11 of SB1, at Tab 2, Core Bundle. The Protector has confirmed that she will consent to the distribution.*

*b. B and C will benefit, albeit indirectly, in the distribution to Mrs A and their guardian ad litem agrees to the distribution on that basis. That indirect benefit is, however, the reason why the parties invite the Court to approve a limited variation to the Trust to ensure that the trustee does not infringe the prohibition in the Trust on a distribution which has that effect.*

*c. The Trustee has made genuine and thorough enquiries into the possible implications of the exercise of the power and the tax risks attaching to the exercise of the power to Mrs A and her family. The Trustee has kept the other parties informed throughout, see paragraphs 24 to 73 of SB1, at Tab 2, Core Bundle. Mrs A and those advising her, have carefully analysed the advice given to the Trustee at every stage.*

*d. The Trustee has no conflict of interest which would prevent the Court from approving the Trustee's decision."*

13. I accept those submissions. The Trustee's evidence combined with the evidence of the supporting parties satisfied me that the requirements for approving the proposed exercise of discretion in strikingly unusual circumstances were met. The Trustee's diligence in analysing so quickly such complex and significant considerations is to be commended. Best efforts have been made to formulate a response to the sole adult beneficiary's wishes which maximises the value to her of the proposed distribution. To act precipitously and liquidate the trust assets before the Trustee had developed a coherent plan of action, as the 1<sup>st</sup> Defendant initially wanted, would have been foolhardy and unprofessional conduct on the Trustee's part.

14. Superficially viewed, there could also be grounds for anxiety about the *bona fides* of the circumstances in which the Trust was created and then, in effect, precipitously abandoned. In my judgment the evidence collated for the purposes of the present application leaves little to no room for doubt that the 1<sup>st</sup> Defendant's change of plans in relation to her family residential were attributable to genuine family welfare concerns exacerbated in March of this year by the Covid-19 pandemic.

**Conclusion**

15. For the above reasons, I grant the relief sought in terms of the draft Order.



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THE HONOURABLE MR JUSTICE IAN RC KAWALEY  
JUDGE OF THE GRAND COURT