Neutral Citation Number: [2015] EWHC 1717 (Ch)

Claim No: HC-2015-000270

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Rolls Building, Fetter Lane,
LONDON EC4A 1NL
Date: Tuesday 23rd June 2015

Before:

MR JEREMY COUSINS QC, SITTING AS A DEPUTY JUDGE OF THE CHANCERY DIVISION

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Between:

MARTHA VIRGINIA ALLFREY

Claimant

- and -

(1) **JACK MERLIN SAMUEL ALLFREY (a child by his litigation friend Alexander Peter Allfrey)**

(2) **WILLIAM JUDE ALLFREY (a child by his litigation friend Alexander Peter Allfrey)**

(3) **STANLEY ADRIAN ALLFREY (a child by his litigation friend Alexander Peter Allfrey)**

(4) **FRANK PETER ALLFREY (a child by his litigation friend Alexander Peter Allfrey)**

(5) **ROSE SUSANNA ALLFREY (a child by her litigation friend Alexander Peter Allfrey)**

(6) **MERLIN BINGHAM SWIRE**

(7) **ANNA CARLIN SWIRE (a child by her litigation friend Alexander Peter Allfrey)**

(8) **SAMUEL COMPTON SWIRE**

(9) **SIR ADRIAN CHRISTOPHER SWIRE**

(10) **LADY JUDITH SWIRE**

Defendants

APPROVED JUDGMENT

Mr Francis Barlow QC (instructed by **Messrs Lester Aldridge LLP**, of 70, Chancery Lane, LONDON WC2A 1AF) for the Claimant

Mr William Massey QC (instructed by **Messrs Lester Aldridge LLP**, of 70, Chancery Lane, LONDON WC2A 1AF) for the First, Second, Third, Fourth, Fifth and Seventh Defendants

Mr James Rivett (instructed by **Messrs Lester Aldridge LLP**, of 70, Chancery Lane, LONDON WC2A 1AF) for the Sixth and Eighth Defendants

Miss Georgia Bedworth (instructed by **Messrs Lester Aldridge LLP**, of 70, Chancery Lane, LONDON WC2A 1AF) for the Ninth and Tenth Defendants

Hearing dates: 9th March 2015

MR JEREMY COUSINS QC:

1. On 9th March 2015, I made an order pursuant to the provisions of s1 of the Variation of Trusts Act 1958 ("the 1958 Act") whereby the court approved an arrangement for

the variation of the trusts of a settlement known as "Sir Adrian Swire's Grandchildren's Trust" ("the Settlement") which was created by a deed dated 24th July 1986. The principal changes effected by the arrangement were to incorporate a power to accumulate income to meet future periodic inheritance tax changes, and to extend the trust period. The sixth and eighth defendants ("Merlin" and "Samuel"), by their counsel, Mr James Rivett, assented to the arrangement. Having considered the evidence before me, and after hearing counsel's submissions, I was satisfied that the arrangement was for the benefit of the first to fifth and seventh defendants ("the Minor Defendants") and of all unborn persons who might become interested under the trusts affecting the trust fund subject to the Settlement. It is not necessary for me in this judgment to say anything further in that regard. However, at the invitation of all counsel, I agreed that I would, at a later date, briefly state my reasons as to why I was also satisfied that the arrangement does not give rise to a resettlement of the fund or any part or share thereof. This judgment is concerned with that issue.

The family

2. Sir Adrian and his wife, the tenth defendant ("Lady Judith"), have three children; the claimant ("Martha"), Merlin and Samuel, born respectively on 12th May 1972, 4th December 1973, and 12th March 1980. Martha and her husband, Mr Alexander Peter Allfrey ("Mr Allfrey"), have five children, and they are the first to fifth defendants, Mr Allfrey being their litigation friend. They are aged fifteen, thirteen, ten, seven, and one respectively. Merlin's wife is Laura Caroline Swire, and they have a baby girl, the eighth defendant, Anna, who was born on 21st December 2014. Samuel is unmarried and has no children.

The settlement

3. The settlement was made by the ninth defendant, Sir Adrian Swire. It was an accumulation and maintenance trust for IHT purposes for the benefit of Sir Adrian's children, a class which is now closed. It incorporated an 80 year perpetuity period, and defined the "Vesting Day" as the day upon which that period should expire, although there was a power for the Trustees to accelerate that day. It declared an initial trust for Sir Adrian's children at 25 in equal shares, but included a provision that each child's share should be retained and held on engrafted trusts which have since been superseded. There was a wide power of appointment in favour of the three children, their spouses, and issue, subject to restrictions to preserve the IHT status of the trusts. The Settlement declared an ultimate trust in favour of Sir Adrian's two nephews.

4. It is not necessary for me to refer to the various intermediate deeds which are referred to in the evidence before me; the trust fund is now governed by the trusts appointed by a Deed of Appointment dated 2nd December 2014 ("the December 2014 Deed") whereby the Trustees exercised powers of revocation and re-appointment under one of the intermediate deeds, so that the entire trust fund was resettled on discretionary trusts for the benefit of any existing children and future children of Martha, Merlin and Samuel, with a stirpital default trust in favour of their issue living on the Vesting Day, and an ultimate trust in favour of Martha, Merlin and Samuel, or their respective estates. The December 2014 Deed reserved a power of revocation, subject to a power to release it.

5. The present trustees of the Settlement are Sir Adrian and Lady Judith, Merlin, and Samuel. Martha will become a trustee in the event of any vacancy.

6. The trust fund consists of holdings of ordinary and preference shares in John Swire & Sons Limited, the holding company of Swire Group, which qualify either wholly, or in part, for Business Property Relief ("BPR"). There are also holdings in an open-ended investment company which is effectively a family unit trust, but these do not qualify for BPR at all. The fund has a very substantial value, and commensurate income. There are substantial unrealised gains within the fund.

Background to the application

7. Until 6th April 2008, the trusts of the Settlement qualified as accumulation and maintenance trusts and the trust was therefore exempt from charges to IHT. However, since that time the entire fund has constituted relevant property, and attracts the decennial charge to IHT. Such a charge will arise on 24th July 2016, being the next ten-year anniversary. Whilst, plainly, it would be desirable for there to be a power to accumulate income so as to meet such periodic charges, thereby avoiding the need to sell assets, the Settlement confers no general power to accumulate income. It is to address the absence of such a power that the arrangement was proposed, and since it required an application to the court to give effect thereto, it was considered that this afforded an opportunity to take advantage of the provisions of the perpetuity period as extended by s5(1) of the Perpetuities and Accumulations Act 2009.

8. I was satisfied that I had jurisdiction to extend the trust period, having been referred to *Re Holt's Settlement* [1969] 1 Ch 100, *IRC v Holmden* [1968] AC 685, HL, and *Wyndham v Egremont* [2009] WTLR 1473. An extension of the trust period can be relevant to the issue of whether a proposed arrangement might be regarded as a resettlement; see *per* Blackburne J in *Wyndham v Egremont* at para 21, a point to which I shall return below.

9. With regard to the principal features of the arrangement to which the application relates, save for the extension of the trust period, it was proposed that:

    (1) The trusts appointed by the December 2014 Deed be modified (i) by enlarging the power of appointment conferred by clause 3 so as expressly to authorise the accumulation of income during the extended trust period, and (ii) by adding to the default discretionary income trust, in clause 5, a power to accumulate income during the extended trust period.
    (2) It be ensured that a reserve share of 25 per cent of the trust fund should be held on the varied trusts but for the exclusive benefit of grandchildren and remoter issue of Sir Adrian born during the current 80-year trust period.
    (3) The trustees, as a condition of the arrangement's coming into effect, execute a deed whereby the power of revocation reserved by the December 2014 Deed was released.

The resettlement issue

10. Mr Barlow QC, for Martha, began his submissions on this issue by reminding me that there is no jurisdiction under the 1958 Act to approve an arrangement which effects what is in substance a resettlement of trust property; *Re T's Settlement Trusts* [1964] Ch 158, 162, *Re Ball's Settlement Trusts* [1968] 1 WLR 899, 905, *Wright v Gater* [2012] 1 WLR 802, paras 13 and 16.

11. In *Re T's Settlement Trusts* the arrangement originally proposed by way of a suggested "variation" involved getting in the former trust funds from the former trustees, and holding them upon wholly new trusts such as might be made by an absolute owner of the funds. Wilberforce J, as he then was, held that the court could not approve this. He said that the proposal went much too far "because it was not

confined to dealing in a beneficial way with the special requirements of this infant [beneficiary] but seeks authorisation for a complete resettlement which could only be justified if the court accepted (as, in my view, it should not) that such a resettlement is for her "benefit" within the meaning of the Act".

12. In *Roome v Edwards* [1982] AC 279, a capital gains tax case, in which it was necessary to decide whether the exercise of a power of appointment contained in a settlement gave rise to a settlement apart from the main settlement. Lord Wilberforce (with whose speech three of their lordships agreed, Lord Roskill delivering a separate speech) said at pages 292-293:

> "There are a number of obvious indicia which may help to show whether a settlement, or a settlement separate from another settlement, exists. One might expect to find separate and defined property; separate trusts; and separate trustees. One might also expect to find a separate disposition bringing the separate settlement into existence. These indicia may be helpful, but they are not decisive. For example, a single disposition, e.g., a will with a single set of trustees, may create what are clearly separate settlements, relating to different properties, in favour of different beneficiaries, and conversely separate trusts may arise in what is clearly a single settlement, e.g. when the settled property is divided into shares. There are so many possible combinations of fact that even where these indicia or some of them are present, the answer may be doubtful, and may depend upon an appreciation of them as a whole.
>
> Since "settlement" and "trusts" are legal terms, which are also used by business men or laymen in a business or practical sense, I think that the question whether a particular set of facts amounts to a settlement should be approached by asking what a person, with knowledge of the legal context of the word under established doctrine and applying this knowledge in a practical and common-sense manner to the facts under examination, would conclude. To take two fairly typical cases. Many settlements contain powers to appoint a part or a proportion of the trust property to beneficiaries: some may also confer power to appoint separate trustees of the property so appointed, or such power may be conferred by law: see Trustee Act 1925, section 37 . It is established doctrine that the trusts declared by a document exercising a special power of appointment are to be read into the original settlement: see *Muir (or Williams) v Muir* [1943] AC 468 . If such a power is exercised, whether or not separate trustees are appointed, I do not think that it would be natural for such a person as I have presupposed to say that a separate settlement had been created: still less so if it were found that provisions of the original settlement continued to apply to the appointed fund, or that the appointed fund were liable, in certain events, to fall back into the rest of the settled property. On the other hand, there may be a power to appoint and appropriate a part or portion of the trust property to beneficiaries and to settle it for their benefit. If such a power is exercised, the natural conclusion might be that a separate settlement was created, all the more so if a complete new set of trusts were declared as to the appropriated property, and if it could be said that the trusts of the original settlement ceased to apply to it. There can be many variations on these cases each of which will have to be judged on its facts."

13. In *Swires v Renton* [1991] STC 490, another capital gains tax case, Hoffmann J, as he then was, having referred to the speech of Lord Wilberforce in *Roome v Edwards* said that the decision in that case showed that "the question must be answered according to the view which would be taken of the transaction by a person with knowledge of trusts who uses language in a practical and commonsense way." At page 500 he continued:

> "The cases show there is no single litmus test for deciding that question. The paradigm case for the creation of a new settlement would involve the segregation of assets, the appointment of new trustees, the creation of fresh trusts which exhaust the beneficial interest in the assets and administrative powers which make further reference to the original settlement redundant ... The absence of one or more of those features is not necessarily inconsistent with a resettlement. It seems to me that the question is one of construction of the settlement using the approach recommended by Lord Wilberforce and looking at the documents in the light of surrounding circumstances. Putting the same thing another way, it is a matter of endeavouring to ascertain the intentions of the parties."

14. Blackburne J put it similarly in *Wyndham v Egremont* at para 22 - there is no "bright-line test" for determining whether a suggested arrangement amounts to a variation or a resettlement. In that case the changes in the trust were to the remainder and to the period of the trust. He cited the following passage from the judgment of Megarry J, as he then was, in *Re Ball's Settlement Trusts* at 905:

> "If an arrangement, while leaving the substratum, effectuates the purpose of the original trusts by other means, it may still be possible to regard that arrangement as merely varying the original trusts, even though the means employed are wholly different and even though the form is completely changed."

15. As Blackburne J observed, this passage rather begs what is meant by "the substratum" of the trust and "the purpose of the original trust". On these points, Blackburne J also turned to the decision of the House of Lords in *Roome v Edwards* and in particular the passage which I have cited above from the speech of Lord Wilberforce. Taking into account this guidance, Blackburne J said, at para 24, that he had "no doubt" that the alterations proposed to be made in *Wyndham v Egremont* constituted a variation and not a resettlement. He continued:

> "The trustees remain the same, the subsisting trusts remain largely unaltered and the administrative provisions affecting them are wholly unchanged. The only significant changes are (1) to the trusts in the remainder, although the

> ultimate trust in favour of George and his personal representatives remains the same, and (2) the introduction of the new and extended perpetuity period."

16. Against the background of the principles derived from these cases, Mr Barlow submitted that if the proposed variation in the present case were to be permitted, both the trust assets, and the existing trustees, would remain the same and the existing administrative powers would remain in force. Whilst the beneficial class would become potentially capable of enlargement, there would be no actual enlargement for half a century. In short, he argued, the Settlement would remain recognisably the same.

17. Mr Massey QC, for the Minor Defendants, supporting the submissions made by Mr Barlow, referred me to several passages in *IRC v Holmden* in connection with the question of whether an extension of the trust period suggested that the arrangement was a resettlement rather than a variation. In that case, under the terms of the discretionary trusts established in 1927, the trusts were to have effect during the life of Lady Holmden. The variation effected was that they were to have effect during her lifetime, or until 12th January 1981, whichever of those periods should be the longer. Lord Morris of Both-y-Gest said of this provision, at page 704 B-C:

> "The effect of the arrangement was not to get rid of the discretionary trust but to preserve it for a longer period. This circumstance makes it equally difficult to say that the discretionary trust was in some manner (either by surrender, assurance, divesting, forfeiture or in some other manner) "determined." The arrangement of January 12, 1960, did not bring about the ending of the discretionary trust; it brought about its prolongation."

18. Lord Hodson's analysis was similar at page 705C-706A, as was Lord Guest's at 710C-711A, and both Lord Reid and Lord Wilberforce delivered speeches agreeing in the result.

19. Mr Massey also relied upon *Wyndham v Egremont* for the proposition that the extension of the trust period should not be regarded as giving rise to a resettlement.

20. Since the beneficial interests under the original trusts, in the present case, are not exhausted by the arrangement, and in any event the ultimate default trust remains, Mr Massey submitted that the arrangement was not a resettlement.

Discussion

21. Under the terms of the arrangement, from the Operative Date the trustees shall continue to hold the trust fund and the income thereof upon the trusts and with and subject to the powers and provisions applicable thereto under the terms of Settlement, the appointment effected by December 2014 Deed, and the Release effected pursuant to the arrangement. Thus the terms of the Settlement are to remain in force, save that the trust period is extended. The very purpose of the arrangement is predominantly to further the interests of the Settlement by protecting it from the need to realise assets in order to meet the periodic charge. The beneficial interests under the Settlement are not exhausted. The administrative powers originally established are to remain. The same trustees continue.

22. Applying Lord Wilberforce's approach in *Roome v Edwards*, and as later explained by Hoffmann J in *Swires v Renton*, it is easy in this case to ascertain what were the intentions of the parties. The intention was to supplement the provisions of the existing Settlement, thereby enhancing its operation. In my judgment, the arrangement quite clearly is to be described as a variation rather than a resettlement. The parties intended to continue the existing trusts, but with modifications. Although there is no single litmus test (*per* Hoffmann J in *Swires v Renton*), or bright line test (*per* Blackurne J in *Wyndham v Egremont*), the terms of the arrangement fall very clearly on the variation side of the line, and very clearly not on the resettlement side of it.

23. In *Wyndham v Egremont*, Blackburne J explained that his view was that the arrangement did not amount to a resettlement and was not binding upon H M Revenue and Customs ("HMRC"). In that case HMRC declined to be joined as a party to the proceedings concerned, and declined to express any view upon the subject of whether the arrangement might give rise to any adverse tax consequences. In the present case, however, accountants acting on behalf of the trustees sought clearance from HMRC in connection with the proposed arrangement. Helpfully, on 7th October 2014, HMRC responded by letter to the effect that, since the court has no jurisdiction to approve a resettlement under the 1958 Act, HMRC would not seek to argue that there was a resettlement for the purposes of s71 of the Taxation of Chargeable Gains Act 1992 in the event that the court approved the variation under the 1958 Act. In all the circumstances, I consider that HMRC was correct to reach this conclusion.

24. I am grateful to all counsel for their assistance.