COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2020/CLE/gen/00652

IN THE MATTER of the trusts of the Deed of Settlement establishing the A Settlement

IN THE MATTER of Section 4 of the Rule Against Perpetuities (Abolition) Act, 2011

IN THE MATTER of an application by the Co-Trustees of the A Settlement made pursuant to Section 4 of the Rule Against Perpetuities (Abolition) Act, 2011

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. N. Leroy Smith and Mr. Jonathan Deal of Higgs & Johnson for the Petitioners

Hearing Date: 18 March 2021

Rule Against Perpetuities (Abolition) Act, 2011 – Service and notification of Petition — Principles to be applied in exercising discretion under Section 4 – Confidentiality

The "A Settlement" is an irrevocable discretionary trust which was established in 2009 for the benefit of certain named persons, their children and remoter issue and such charities as might be added to the beneficial class. At its inception, the Settlement was governed by the laws of the principality of Liechtenstein, however, in 2018, the governing law and the forum for the administration of the A Settlement were changed to Bahamian law and the courts of The Bahamas respectively.

Under the terms of the A Settlement, the "*Duration of this Settlement*" was defined as meaning "60 years from the 5th March 1966 or the day on which shall expire the period of twenty one years after the death of the last survivor of the individuals referred to in the second Schedule of [the instrument establishing an earlier trust, the "B Settlement"] as were living and ascertained as of 5th March 1966 (whichever shall occur first)". The end of this period was defined as the "Final Day", upon which the Trustees were obliged to distribute the trust fund of the A Settlement and were no longer able to exercise any overriding powers.

The Petitioners who are the Co-Trustees of the A Settlement, commenced these proceedings by way of a Petition filed on 22 July 2020, seeking orders pursuant to section

4 of the Rule Against Perpetuities (Abolition) Act, 2011 (the "RAPAA 2011") including a declaration that the RAPAA 2011 shall apply to the trusts of the A Settlement and every disposition of assets thereto.

Whilst these proceedings were brought on an *ex parte* basis, the Petitioners did so on notice to the individual identified as the Primary Beneficiary in the Deed of Settlement establishing the A Settlement, each of the charities added to the class of beneficiaries and the trust Protector. Each of the notice recipients confirmed their support for the application.

The Petitioners, in compliance with their duty to the Court, raised with the Court the fact that, by reason of an ambiguous provision within the trust instrument, the possibility existed that the children and remoter issue of certain individuals removed from the class of beneficiaries in *circa* 2015 may have still fallen within the class of beneficiaries.

HELD: This is an appropriate case to proceed without directing further notification or service of the Petition. The relief sought under section 4 of the RAPAA 2011 is granted. The court file is ordered to be sealed and the Ruling anonymized to protect the confidentiality of the affairs of the trust.

1. By virtue of the RAPAA 2011, the rule against perpetuities is, without more, abolished under the laws of The Bahamas in respect of trusts established after 30 December 2011.

2. Insofar as it concerns trusts established before 30 December 2011, the rule against perpetuities will still apply unless and until an application is made to the Court pursuant to section 4 of the RAPAA 2011 for an order expressly disapplying the rule against perpetuities in respect of that trust.

3. Where an application is brought pursuant to section 4 of the RAPAA 2011, section 4(3) confers a discretion upon the Court to determine upon whom the petition should be served or to whom notice of the petition should be given. The words "if any" used in section 4(3) indicate that, in an appropriate case, an application under section 4 may be made completely ex parte. **Re C Trust 19** ITELR 814 referred to.

4. The Court had regard to the fact that (i) notice had already been given to the Principal Beneficiary and other 'key' beneficiaries of the trust, (b) those persons had confirmed their support for the application and (c) there appeared to be no relevant prejudice that would accrue to the other beneficiaries in the event that the Court should ultimately determine to accede to the Petitioners' application. Based upon these considerations, the Court is satisfied that this is an appropriate case in which to proceed without directing further notification or service of the Petition.

5. Section 4(1) of the RAPAA 2011 does not prescribe any threshold test or criteria to be satisfied before the Court may make an order under Section 4(1). It follows

that Parliament has invested the Court with a *prima facie* unfettered discretion to make an order where it thinks it fit to do so.

6. The Court had regard to Bermudian jurisprudence concerning section 4 of the Bermuda's Perpetuities and Accumulations Act, 2009 and endorsed the following principles emanating from that jurisprudence:

   (i) The Court should not act as rubber stamp. The Court must exercise its discretion judicially and not capriciously or whimsically, upon a consideration of all of the facts.

   (ii) The Court should have regard to the best interests of all interested parties, broadly defined and looked at as a whole. Where abolishing the rule against perpetuities would be in the interests of the beneficiaries as a whole, this would justify the Court making an order.

   (iii) Having regard to the Court's unfettered discretion, it is not a necessary requirement in every instance that abolishing the rule against perpetuities be in the interests of each and every beneficiary; and

   (iv) The fact that extending the duration of a trust will dilute the economic interests of existing beneficiaries will ordinarily be an irrelevant consideration: **Re C Trust** 19 ITELR 814 and **Re G Trusts** 21 ITELR 46 considered.

7. In the present case, the Petitioners supported the abolition of the rule against perpetuities as it applied to the A Settlement on the basis that it would avoid any need for a forced restructuring or disposition of the assets of the A Settlement, it would enhance the flexibility of the A Settlement and it would enable the Trustees to continue to benefit the beneficiaries (several of which are foreign charities/non-profit organisations). These reasons were collectively sufficiently compelling to satisfy the Court that it is appropriate to make an order under section 4(1).

8. Finally, whilst the Court must always be mindful of the principle of open justice, the Court will be prepared to make such orders as are necessary to preserve the confidentiality of private trusts governed by Bahamian law in appropriate cases. In this case, the Court made an anonymization and sealing order as the application before it was of a narrow compass and was exclusively concerned with the internal administration of a private Bahamian trust. **Re G Trusts** 21 ITELR 46 followed.

RULING

Charles J:

Introduction

[1] By a Petition filed on 22 July 2020, the Petitioners in their respective capacities as Trustees of a Bahamas law governed trust which shall, for present purposes, be called the "A Settlement", applied for the following substantive relief:

> "(1) A Declaration pursuant to section 4 of the Perpetuities Abolition Act that:
>
> (a) The Perpetuities Abolition Act shall apply to the trusts of the [A Settlement], the Trust Fund and every disposition of assets thereto; and
>
> (b) The [A Settlement] and the Trust Fund shall no longer be subject to any rule against perpetuities as that term is defined in the Perpetuities Abolition Act.
>
> (2) An Order that sub-Clause 1(4) of the Deed of Settlement be varied so as to read:
>
> 'Duration of this Settlement (4) the period between the date hereof and such date after the date hereof as the Trustees may declare by instrument in writing.'
>
> (3) An Order that the Current Trustees' Costs of this application shall be borne by the trust fund of the Trust.
>
> (4) Such other relief as this Honourable Court shall deem just."

[2] The Petitioners relied upon two Affidavits in support of their Petition which variously exhibited the Deed of Settlement, ancillary trust documents and correspondence including the consents by several beneficiaries. The Petitioners also adduced correspondence at the hearing which was later formally placed in an Affidavit.

[3] The Petitioners also lodged written submissions and a Bundle of Authorities containing (a) the salient legislation (including the Rule Against Perpetuities Abolition Act, 2011 (the "RAPAA 2011") and the Rule Against Perpetuities

(Abolition) (Amendment) Act, 2020 (No. 38 of 2020) (the "RAPAAA 2020")) and (b) relevant case law.

[4] After hearing both Counsel for the Petitioners on 18 March 2021, I made an Order in the following terms:

> **1. The Perpetuities Abolition Act shall apply to the trusts of the [A Settlement] and every disposition of assets thereto.**
>
> **2. The [A Settlement] shall no longer be subject to any rule against perpetuities as that term is defined in the Perpetuities Abolition Act.**
>
> **3. The Deed of Settlement is hereby amended by the deletion of Clause 1(4) and the insertion of the following text in substitution therefor:**
>
> | | |
> |---|---|
> | **'Duration of this Settlement (4)** | **the period between the date hereof and such date after the date hereof as the Trustees may declare by instrument in writing.'** |
>
> **4. The Court File shall be and is hereby sealed and shall be kept in such a secure manner so as to ensure the confidentiality of these proceedings.**
>
> **5. Any written reasons or Judgment(s) produced herein shall be anonymized prior to publication.**
>
> **6. The Petitioners' Costs of this application shall be borne by the trust fund of the [A Settlement]."**

[5] I now give my reasons for the decision to make the above Order.

Background

[6] The A Settlement is an irrevocable discretionary trust which was established pursuant to a Deed of Settlement made in 2009 (the "Deed of Settlement"). At its inception, the Settlement was governed by the laws of the Principality of Lichtenstein. However, in 2018, the governing law and the forum for the administration of the A Settlement were subsequently changed to Bahamian law and the courts of The Bahamas, respectively.

[7] The A Settlement was (i) established by the trustees of another trust, namely, an irrevocable discretionary trust established under the laws of The Bahamas in 1966 which shall, for present purposes, be anonymized and be called the "B Settlement" and (ii) funded by assets deriving from the B Settlement and settled upon the trusts of the A Settlement.

[8] The trust fund of the A Settlement comprised cash and securities valued at in excess of CHF 10,000,000 and the shares of an underlying company.

[9] The Petitioners are the current Co-Trustees of the A Settlement.

[10] Pursuant to Clause 1(4) of the Deed of Settlement, the term "*Duration of this Settlement*", was defined as meaning:

> *"***60 years from … March, 1966 or the day on which shall expire the period of Twenty one years after the death of the last survivor of the individuals referred to in the second Schedule of [the instrument establishing the B Settlement] as were living and ascertained as of 5th March 1966 (whichever shall occur first).**

[11] The Petitioners had operated on the basis that the trust period of the A Settlement would expire in March 2026. The end of the "*Duration of this Settlement*" is defined under Clause 1(5) of the Deed of Settlement as the "*Final Day*".

[12] Clause 2 of the Deed of Settlement (The Overriding Power) invests the Trustees with a power of appointment exercisable over the trust fund and income exercisable in such manner as the Trustees shall by written instrument revocable or irrevocable appoint.

[13] Clause 4 of the Deed of Settlement (Limitations on Exercise of the Overriding Power) provides that no appointment under the Overriding Power shall take effect or be revoked later than the Final Day.

[14] Clause 5 of the Deed of Settlement (Destination of the Income of the Trust Fund) invests the Trustees with power over income accruing in any calendar year to distribute the same to for the benefit of any Beneficiary and (if more than one) in

such shares as the Trustees shall think fit and states that any income not so distributed should be accumulated as an accretion to the capital of the trust fund.

[15] Clause 6 of the Deed of Settlement provides:

> "**6. Destination of the Capital and Income of the Trust Fund on the Final Day**
>
> **Subject to any exercise of the Overriding Power, the Trustees shall stand possessed of the Trust Fund and its income (whether received or accruing) on the Final Day upon trust for the Beneficiaries in such shares as the Trustees shall on or before the Final Day appoint and in default of any such appointment for all the Members in equal shares.**"

[16] The scheme deployed by the trust for identifying beneficiaries is essentially as follows:

(i) The term "*Members*" is defined as meaning the members of the "*Specified Class*" from time to time.

(ii) The term *"Specified Class*" is defined as meaning the persons whose names appear in the First Schedule of the Deed of Settlement, subject to any exercise by the Trustees of their power under Clause 8 of the Deed of Settlement to remove Beneficiaries.

(iii) The term "*Beneficiaries*" is defined as meaning a Member and any spouse, widow or widower of any Member.

(iv) Part I of the First Schedule to the Deed of Settlement sets out a list of individuals under the rubric "The Specified Class":

1. Three named individuals who for the purposes of this Judgment shall be called individuals "A", "B" and "C".

2. The children and remoter issue of any of the persons mentioned in 1. above.

3. Such charity or charitable objects as the Trustees may in writing appoint to be included in the Specified Class.

(v) In Part II of the First Schedule, individual A is described as the Principal Beneficiary.

[17] In the events that have happened:

(i) the Trustees in *circa* 2015 executed certain Instruments of Exclusion whereby individuals B and C were removed from the Specified Class; and

(ii) the Trustees in *circa* 2012 and 2018 executed certain deeds of addition whereby three foreign charitable/non-profit Organizations (who for these purposes shall be called "X", "Y" and "Z") were added to the Specified Class.

The application

[18] By this application, the Petitioners assert that it would be beneficial and/or desirable for the perpetuities period applicable to the A Settlement to be abolished in order to enable it to (in keeping with among other things the wishes and approval of the Principal Beneficiary) continue to support charitable organisations beyond the perpetuity (and trust) period.

[19] Within the application papers, the beneficiaries of the trust were identified as being A, X, Y and Z. However, when this application came on for hearing, learned Counsel Mr. Deal who appeared for the Petitioners raised with the Court, at an early stage, the fact that:

(i) It had only just recently come to be learned by Counsel that (i) B and C each had two adult children and (ii) having regard to the manner in which the First Schedule of the Deed of Settlement was drafted, a real question arose as to whether the removal of B and C from the Specified Class automatically caused the removal of their children and remoter issue from the Specified Class as well.

(ii) If it had not, then the four children of B and C (the "Adult Children") would have also fallen within the Specified Class. However, for reasons which shall become evident, it was not ultimately necessary for the Court to consider and determine this issue of construction.

(iii) The Petitioners had given each of A, X, Y and Z and the Protector notice of the Petition. Each of those notice parties had confirmed (by way of correspondence exhibited with the Petitioners' evidence) that they had read and understood the Petitioners' application papers and had no objection to and indeed supported the Petitioners' application.

(iv) Tthe Petitioners had taken no steps to notify the Adult Children of the application.

Service and notification of the Petition

[20] Because the Petitioners had possibly not notified or served each of the *sui juris* beneficiaries, the first question that the Court had to decide was whether the hearing ought to be used to deal with the substantive merits of the Petitioners' application or whether, instead, the hearing ought to be used for procedural directions.

[21] Mr. Deal submitted that section 4(3) of the RAPAA 2011 permits the Court to proceed with an application made under Section 4 of the said Act on an ex parte basis in appropriate cases:

> **"(3) An application under subsection (1) shall be made by petition which shall be served upon or notice thereof given to, *and* the hearing may be attended by, such persons, if any, (including a settlor) within or outside the jurisdiction of the court, as the court may direct."**

[22] Counsel next submitted that the use of the words "if any" appearing in section 4(3) demonstrates that the Court is empowered to hear a petition brought under section 4 without the applicant (invariably, the trustee) giving notice to any other person.

[23] Separately, Mr. Deal adduced correspondence in which one of the Petitioners confirmed the following points: (1) Despite being named as the "Primary Beneficiary", distributions have not been made to A given that, among other things, any such distributions would attract substantial tax charges under the laws of her place of residence; (2) for that reason X, Y and Z had been the principal recipients of distributions from the trust; (3) A had a philanthropic disposition (and herself worked for a charity) and so supported the charities being benefitted; (4) the Adult Children also reside in the same jurisdiction as A and they are unaware of the existence of the trust; (5) giving them notice of the proceedings or the A Settlement is likely to produce family discord/disharmony and is not in the best interests of the A Settlement; and (6) in any case, their branches of the family were independently wealthy.

[24] On this basis, Mr. Deal further submitted that the Court ought to proceed to hear the merits of the Petitioners' application without requiring that the Petitioners give notice of the Petition to the Adult Children because:

(i) A, the individual named as the Principal Beneficiary, and those being benefitted under the A Settlement, X, Y and Z, confirmed their support for the application;

(ii) the Petitioners were against providing notice to the Adult Children due to an apprehended risk that giving them notice of the proceedings or the A Settlement would be likely to produce family discord/disharmony and would not be in the best interests of the administration of the A Settlement;

(iii) the Adult Children were discretionary objects. (The legal significance attaching to this point was understood to be that by virtue of section 83 of the Trustee Act 1998 discretionary beneficiaries do not have a right to be notified of the existence of the trust if at least one beneficiary has been provided with the requisite information concerning the existence of the trust in question and the nature of his rights thereunder);

(iv) the Petitioners' application was not prejudicial to the Adult Children since the Petitioners did not intend to benefit them in the foreseeable future but they might receive benefit if the lifetime of the A Settlement were extended.

[25] Mr. Deal also drew my attention to the fact that in **Re C Trust** 19 ITELR 814, a decision of the Supreme Court of Bermuda in respect of an ex parte application brought under section 4 of the Bermudian Perpetuities and Accumulations Act 2009 ("BPPA"), Kawaley CJ granted the relief sought by the trustee.

[26] In my judgment, section 4(3) of the RAPAA 2011 confers a discretion upon the Court to determine upon whom the Petition should be served or to whom notice of the Petition should be given in each particular case. The words "if any" used in section 4(3) indicate that, in an appropriate case, an application under section 4 may be heard ex parte. However, the Court will always be astute to ensure that the beneficiaries' interests are adequately safeguarded.

[27] In the result, I was also satisfied that this was an appropriate case to proceed without directing further notification or service of the Petition. The Protector and the persons that appeared on the Petitioners' evidence to currently be the main beneficiaries under the A Settlement had communicated their support for the application and it did not appear to me to be either necessary or desirable that the Adult Children be given notice of the Petition.

The RAPAA 2011

[28] The RAPAA 2011, as amended by the RAPAAA 2020, provides, in material parts, the following:

"2. Interpretation.

(1) In this Act –

"the rule against perpetuities" includes the rule of law prohibiting trusts of excessive duration and any rule of law restricting the period during which income may be accumulated;

3. Abolition of rule against perpetuities in certain cases.

Notwithstanding the Perpetuities Act Ch.114, the rule against perpetuities is abolished, and the Perpetuities Act (Ch. 114) shall not apply, in respect of –

(a) every disposition of an interest in property in trust made on or after the commencement of this Act; and

(b) every disposition of an interest in property in trust made before the commencement of this Act in respect of which the Court makes an order under section 4.

4. Power of court to apply Act to pre-Act dispositions.

(1) In relation to any disposition of an interest in property in trust made before the commencement of this Act, the Court may, on an application made by the trustee of the trust, make an order, on such terms as it thinks fit, declaring that the Act shall apply to the disposition.

(2) The terms upon which an order under subsection (1) may be made include terms –

(a) providing that anything done by any person before the order is made on the basis that the disposition was void by virtue of the application of the rule against perpetuities shall have effect as if the order had not been made;

(b) protecting or preserving the interest of any person in the property the subject of the disposition which interest will or may be defeated or its vesting in possession deferred by virtue or in consequence of the application of the Act to the disposition or of the terms of any order made under this section;

(c) varying or deleting any provision of the trust which in any way restricts (to or by reference to the perpetuity period applicable to the trust) the exercise of any power arising under or in consequence of the disposition;

(d) providing that this Act shall be deemed always to have applied to the disposition.

(3) An application under subsection (1) shall be made by petition which shall be served upon or notice thereof given to, and the hearing may be attended by, such persons, if any, (including a settlor) within or outside the jurisdiction of the court, as the court may direct.

(4) In subsection 2(b), "interest" includes an interest arising by virtue or in consequence of the disposition being void as a result of the application of the rule against perpetuities to that disposition.

(5) For the avoidance of doubt, where an order has been or is made since the coming into force of the Act under subsection (1) in relation to a disposition of an interest in property in trust, neither the order nor the consequent abolition of the rule against perpetuities in relation to the disposition shall constitute –

(a) a disposition or resettlement of an interest in the property in trust;

(b) the settlement of an interest in the property in trust upon new trusts; or

(c) a distribution of an interest in the property in trust to a beneficiary."

Discussion

[29] The RAPAA 2011 abolished the rule against perpetuities in The Bahamas for trusts created on or after 30 December 2011. As a result, such trusts established after that date are not subject to the rule against perpetuities (which the RAPAA 2011 defines as including "*the rule of law prohibiting trusts of excessive duration and any rule of law restricting the period during which income may be accumulated*").

[30] However, for trusts established before 30 December 2011, Mr. Deal posited, correctly, in my view, that the RAPAA 2011 does not have the effect of automatically disapplying the rule against perpetuities (as per section 3(b) of the RAPAA 2011, as amended). Instead, where it is desired to have the rule against perpetuities abolished in respect of the trust, the trustee may apply to the Court for an order under section 4 of deeming the RAPAA 2011 to apply.

[31] In the present case, because the A Settlement was established before 30 December 2011, the Petitioners have properly applied pursuant to section 4 of the RAPAA 2011 insofar as they wished for that Act to apply to the A Settlement.

[32] Section 4(1) of the RAPAA 2011 simply states "the Court *may*, on an application made by the trustee of the trust, make an order, on such terms as it thinks fit, declaring that the Act shall apply to the disposition". However, the subsection is silent on any express threshold that must be met or any criterion against which an application must be assessed before the Court may make an order under the subsection. The Court therefore enjoys a *prima facie* unfettered discretion to make an order where it thinks it fit to do so.

[33] Mr. Deal relied on three cases of the Supreme Court of Bermuda, namely, **Re C Trust** 19 ITELR 814; **Re G Trusts** 21 ITELR 46; and **In the matter of the GA, GB and GC Settlements** [2019] SC 38 Civ, each concerning the interpretation and application of section 4 of the Bermudian Perpetuities and Accumulations Act, 2009 ("the BPAA").

[34] Section 4 of the BPPA provides:

> *"***4. Court order declaring that rule against perpetuities does not apply to certain instruments.**
>
> **(1) This section applies in relation to an instrument which takes effect—**
>
> **(a) before the commencement day; or**
>
> **(b) on or after the commencement day but to which section 3 does not apply to limit the application of the rule against perpetuities.**
>
> **(2) Subject to subsection (3), the Supreme Court may, on an application made by the trustee or trustees of an instrument to which this section applies, make an order on such terms as it thinks fit declaring that—**
>
> **(a) the rule against perpetuities; or**
>
> **(b) any other similar rule of law that may limit or restrict the time under which property may be held in or subject to any trust,**
>
> **shall not apply to such instrument and the property held thereunder.**
>
> **(3) An order under subsection (2) may not be made to the extent that it would affect the residual application of the rule against perpetuities as provided by section 3 if the instrument had been one to which**

section 3 applies (so that the rule against perpetuities will continue to apply to all instruments to the extent that the property is land in Bermuda as provided by section 3).

(4) The terms upon which an order under subsection (2) may be made include (but are not limited to), terms—

(a) extending the duration of a trust*;*

(b) extending the time within which an interest in property must vest or take effect;

(c) extending the time within which certain powers are exercisable;

(d) providing that anything done by any person before the order is made on the basis that the instrument was void by virtue of the application of the rule against perpetuities or other similar rule of law shall have effect as if the order had not been made;

(e) protecting or preserving the interest of any person in trust property where such interest will or may be defeated or its vesting in possession deferred by virtue or in consequence of the terms of any order made under this section

(f) *varying or deleting any provision of the trust which restricts (to or by reference to the perpetuity period or limitation on duration applicable to the trust) the exercise of any power arising under or in consequence of the instrument*;

(g) providing that the order shall be deemed always to have applied to the instrument."

[35] In **Re C Trust** 19 ITELR 814, the trustee of a trust with assets valued at approximately US$2 billion made an ex parte application to the Supreme Court of Bermuda for an order under section 4 of the BPAA dis-applying the rule against perpetuities because the settlor wished for the trust to be dynastic in duration and to ensure that succeeding generations of beneficiaries would never be spoiled by suddenly coming into great personal wealth.

[36] After determining that the matter was an appropriate one in which to proceed in an ex parte manner, Kawaley CJ proceeded to consider the merits of the application under section 4 of the BPAA. Kawaley CJ stated at [13] – [15]:

"The merits of the application

13. The statutory conditions for granting the relief sought were all met. The Trust qualified for relief under section 4(1)(a), having been created by an instrument before the commencement date of the Act. The Trustee had standing to seek relief under section 4(2). The form of relief sought fell within the non-exhaustive list of examples set out in section 4(4) (sub-paragraphs (a) and (f)). The Court's discretion to grant relief was unfettered.

14. The main rationale for extending the duration of the Trust in the present case was the size of the Trust (its assets were said to be worth in the region of $2 billion) together with the desire to have regard to wishes of the Settlor. She wanted the Trust to be dynastic in duration and to ensure that succeeding generations of beneficiaries would never be 'spoiled' by suddenly coming into great personal wealth. This was neither irrational nor in any way objectionable. How should the Court's unfettered discretion be exercised?

15. I accepted Mr Adamson's invitation to adopt the approach endorsed by Mr Gilead Cooper QC and to approach the present application with the following guiding principles in mind:

(1) the Court should not act as 'rubber stamp';

(2) the Court should have regard to the best interests of all interested parties, broadly defined and looked at as a whole;

(3) the fact that extending the duration of a trust will dilute the economic interests of existing beneficiaries will ordinarily be an irrelevant consideration."

[37] In **Re G Trusts** 21 ITELR 46, a group of trusts had been settled under Cayman Islands law in the 1980's primarily for the benefit of the settlors' grandchildren, but the settlor had wished to create a dynastic trust of unlimited duration. The trustees wished to change the governing law of the trusts to Bermuda law to take advantage of the BPAA. An application was made under section 4(2) together with an application for a declaration that Bermuda's Children Act 1998 would not apply retrospectively to the trusts.

[38] Kawaley CJ (at [31]) accepted the submissions of Mr. David Brownbill QC for the plaintiffs (i) as to the correct approach to the exercise of the discretion to dis-apply

the perpetuity period under section 4 of the BPAA and (ii) as regards the merits of the application. With respect to the former, Kawaley CJ reproduced those submissions at [27] and [28]:

> ***"The plaintiffs' submissions***
>
> **[27] Mr Brownbill QC, after noting the breadth of the discretion conferred on the court by s 4 of the 2009 Act to dis-apply the rule against perpetuities (or any similar rule) reminded the court that the statutory discretion nevertheless had to be exercised judicially. Of the various authorities he cited by way of illustration of what exercising a discretion judicially means, I found the following statement to be most helpful. In *Breadner v Granville-Grossman* [2000] All ER (D) 996, Park J held:**
>
> > **'Under that provision I need first to decide who the unsuccessful party before me was. I need secondly to decide whether I wish to make an order which differs from an order that the unsuccessful party should pay the costs of the successful party. It is at that second stage that an element of discretion comes in. *I accept that it is a discretion which must be exercised judicially. I cannot range at large, and I must have regard to principle and authority.*' (Emphasis added.)**
>
> **[28] As to the principles which governed the exercise of the specific discretion engaged by the present application, the plaintiffs' counsel submitted as follows:**
>
> > **'32. There is only one reported case in which section 4 of the 2009 Act has been considered: *Re The C Trust* [2016] SC (Bda) 53 Civ…In this case (at para 7) the Court considered the legislative history of the section, noting the remarks made by Minister for Economic Development, Dr. Grant Gibbons, during the second reading of the Bill which resulted in the present version of section 4 of the Act being enacted into law:**
> >
> > **"Mr Speaker, for these reasons a more streamlined and cost-effective approach should be adopted … in addition to providing a clear process to modify the use of the [perpetuity] rule this amendment is intended to:**
> >
> > **1. lower costs to applicants;**
> >
> > **2. allow the courts to exercise their discretion to act in the best interest of any applicant and any other interested party;**
> >
> > **3. establish additional legal flexibility for trusts being governed under Bermuda law and**

4. enhance Bermuda's competitiveness and reputation as a quality jurisdiction for international trust business."

33. The Court concluded that it should exercise its discretion with these guiding principles in mind:

> **(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;**
>
> **(3) the fact that extending the duration of a trust will dilute the economic interests of existing beneficiaries will ordinarily be an irrelevant consideration.**

34. The first of these echoes Sir Andrew Morritt in *Tamlin v Edgar* [2011] EWHC 3949 … in which he stated that, where trustees seek the court's blessing of a decision, under the well-known "momentous decision" category in *Public Trustee v Cooper* [2001] WTLR 901 … the court should not act simply as a rubber stamp. In an application under section 4 of the 2009 Act this may not be wholly apt as there is, of course, no decision of the trustees which the Court could "rubber stamp". The true concern here would appear to be that indicated earlier, that the Court should exercise its discretion in a principled way, upon a consideration of all of the facts.

35. The second principle reflects the remarks of the Minister for Economic Development, noted above. It also reflects the approach of the Court in the exercise of its discretion under section 47 Trustee Act 1975 to authorise transactions relating to trust property which are, in the opinion of the Court, "expedient". In *Re GH and IJ v KL and others* [2010] Bda L.R. 86 (at para 8) … the Court accepted the view (expressed in *Re Craven's Estate* [1937] 1 Ch 431 at 436 …) that "expedient" in section 47 meant "expedient for the trust as a whole", as distinct from the situation where a transaction might be expedient for one beneficiary but inexpedient for other beneficiaries. The Court went on to say that this at least contemplates the possibility that a transaction may be sanctioned where it is expedient for one beneficiary and neutral for the others.

36. If an order under section 4(2) would, in this sense, be in the interests of "the beneficiaries as a whole", that would undoubtedly justify the Court granting the order. But, it is submitted, that would not be a necessary requirement in every instance. As indicated above, the Court's discretion under section 4 is unfettered. It does not impose any specific

requirement or standard. The legislature could have imposed such a requirement or standard, whether that of "expedient" contained in section 47, or some other standard. However, it did not do so and, instead, left the discretion completely open. This very point was made, and accepted, in *Re The C Trust* (see paragraph 11 of the judgment).

37. The court's unfettered discretion is, it is submitted, 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. In other cases it may be that any detriment can be addressed by making an order on terms which repairs or compensates for the detriment, albeit in a broad rather than a strict accounting sense. With the discretion being unfettered, the range of possibilities is substantial and offers great scope. For example, an order under section 4 could be made on terms conditional on the exercise of a power of the trustees, including one granted under section 47, an application which could possibly be made in conjunction with an application under section 4.'"

[39] Counsel for the Petitioners properly distilled the following principles from **Re C Trust** and **Re G Trusts:**

"**4.8 … the following substantive principles may be extracted from the Bermudian authorities concerning section 4 of the BPAA;**

(i) The Court has an unfettered discretion whether to make an order and, if so, on what terms: Re C Trust at [13]. The statute does not impose any specific requirement or standard before an order can be made.

(ii) The Court should not act as rubber stamp: Re C Trust at [15]. The Court must exercise its discretion judicially and not capriciously. The Court must act in a principled way upon a consideration of all of the facts: Re G Trusts at [28] and [31].

(iii) The Court should have regard to the best interests of all interested parties, broadly defined and looked at as a whole: Re C Trust at [15]. Where abolishing the rule against perpetuities would be in the interests of the beneficiaries as a whole, this would undoubtedly justify the Court making an order: Re G Trusts at [28] and [31].

(iv) However, having regard to the width of the Court's discretion, it is not a necessary requirement in every instance that

abolishing the rule against perpetuities be in the interests of the beneficiaries as a whole: Re G Trusts at [28] and [31]. The litmus test is simply that the Court must think it fit to make the order.

(v) The fact that extending the duration of a trust will dilute the economic interests of existing beneficiaries will ordinarily be an irrelevant consideration: Re C Trust at [15]."

[40] These principles are equally applicable to the present case.

The merits of the application

[41] I now turn to the merits of the application. In their written submissions, the Petitioners contended that:

> **"4.9 … the instant Application is an appropriate case in which to exercise the court's jurisdiction under Section 4(1) of the Perpetuities Abolition Act. This is so for the following reasons:**
>
> **4.9.1 Abolishing the rule against perpetuities vis-à-vis the A Settlement would prevent the Trust Period from ending in 2026 (at latest) and would avoid the Trustees being forced to restructure the Trust or distribute the Trust Fund at or before such time, which may not be the best means by which the Trust Fund ought to be applied for the benefit of the Beneficiaries.**
>
> **4.9.2 Extending the lifetime of the Trust would permit the Trustees to exercise their wide discretionary powers contained in Clauses 2 (Overriding Power), Clause 5 (Power to Apply Income), Clause 8 (Power to Vary Membership of the Specified Class) over a longer period of time and as circumstances change, rather than being constrained to exercise their powers prior to the expiration of the arbitrary Trust Period; and**
>
> **4.9.3 While the Trust is not a charitable trust per se, at present the main purpose for the trust is to support charitable organizations. Extending the lifetime of the Trust would enable the Trust to continue to advance the interests of the Current Beneficiaries, the majority of whom…are themselves entities which were established for charitable causes/purposes.**
>
> **…in the present case, the dis-application of the rule against perpetuities vis-à-vis the Trust Fund would be "in the best interests of all interested parties, broadly defined and looked at as a whole".**"

[42] Mr. Deal further submitted that (i) as charities are not themselves subject to a rule against perpetuities it would be appropriate for the A Settlement to continue beyond its current perpetuity period and (ii) the extension of the perpetuity period might benefit the Adult Children and such other "children and remoter issue" of B and C as might ever come to be (insofar as they might receive some benefit from the A Settlement in the event that the perpetuity period applicable to the A Settlement were abolished and the A Settlement were to continue beyond March 2026).

[43] I am satisfied that the reasons advanced for abolishing the rule against perpetuities applicable to the A Settlement were collectively sufficiently compelling to make it appropriate to make an order under section 4(1).

[44] Mr. Deal also drew my attention to the fact that, by paragraph (2) of the prayer for relief contained in the Petition, the Petitioners sought consequential relief, namely, an order varying the definition of "*Duration of this Settlement*" which would have the effect of removing the ceiling of the trust period and instead enabling the A Settlement to potentially have perpetual duration, subject only to some exercise by the Trustees of a power to declare the end of the trust period:

> "**(2) An Order that sub-Clause 1(4) of the Deed of Settlement be varied so as to read:**
>
> | | |
> |---|---|
> | **'Duration of this Settlement (4)** | **the period between the date hereof and such date after the date hereof as the Trustees may declare by instrument in writing.'** |
>
> "

[45] As authority for the proposition that the Court was able to grant such consequential relief and apart from citing the provisions of sections 4(1) and 4(2)(c) of the RAPAA 2011, Mr. Deal also relied upon paragraph 4.10 of the Petitioners' written submissions wherein it was stated:

> "**…Similar relief was granted by the Supreme Court of Bermuda in <u>In the matter of the GA, GB and GC Settlements</u>, in which Hargun CJ stated at [13]:**

> **"13. I accept that dis-applying the perpetuities rule to the trusts and making a consequential variation to the definition of the "Trust Period" in the trusts is likely to provide the trusts with the greatest flexibility. It will then be open to the Trustees at any point in the future, if they thought fit, to decide to declare a date upon which the trust period will end but until that time, the trust period will indeed be indefinite. I consider this flexibility to be in the best interests of all interested parties, broadly defined and looked at as a whole."**
>
> **It is respectfully submitted that this element of the relief sought by the Trustees falls within the scope of Section 4(2)(c) of the Perpetuities Abolition Act and, in any event, may be granted as a term of the Order under Section 4(1) given the unfettered jurisdiction of the Court under that provision.**"

[46] I accept that the Court has jurisdiction to vary the definition of "Duration of this Settlement" applicable to the A Settlement under Section 4(2)(c) or, in any event, section 4(1) of the RAPAA 2011, and made the order sought as a consequence of the dis-application of the rule against perpetuities to the A Settlement.

Confidentiality

[47] In the course of the hearing, learned Counsel Mr. Smith who also appeared for the Petitioners addressed the Court on the question of confidentiality attached to these proceedings. The default position is that an application begun by petition will be heard in open court and will not be subject to any confidentiality restrictions. However, I observe, in the headnote at [1] in **Re G Trusts** 21 ITELR 46, Kawaley CJ held that:

> "**(1) The Court's established practice of making confidentiality orders in appropriate cases, which is designed to enable law-abiding citizens peaceably to enjoy their actual and contingent property rights had a venerable legal basis and would continue to be applied in appropriate cases such as the present. The subject-matter of the proceedings would in all other contexts be regarded as confidential, private and subject to legal privilege (see [10], [11]).**"

[48] Paragraph 1 of the headnote is expounded at [10] – [11] of the decision. Kawaley CJ stated:

> "**[10] It is also important to note the generic context in which confidentiality orders are made:**
>
> • **apart from the fact that court approval is required because of the legal mechanics of trust law to rearrange the basis on which the trust assets are administered, the subject-matter of the proceedings would in all other contexts be regarded as confidential, private and/or subject to legal privilege. The ordinary citizen who consults his solicitor about revising his will is not required to disclose the content of his will and his discussions with his solicitor to the general public;**
>
> • **the information sought to be kept confidential has not yet lost its confidentiality because it has, to some extent at least, entered the public domain. This is the sort of sharp tension which exists between privacy and open justice in questions where injunctive relief is sought to restrain the press from publishing private information (see eg *JIH v News Group Newspapers Ltd* [2011] EWCA Civ 42, [2011] 2 All ER 324, [2011] 1 WLR 1645).**
>
> **[11] For the above reasons I had no reticence about tacitly confirming the Confidentiality Order I made at the beginning of the present case when the proceedings reached their conclusion. The present proceedings concern the internal administration of a private trust into which the general public have no right to pry. Persons administering, interested in or settling Bermuda trusts should rest assured that this court's firmly established practice of making confidentiality orders in appropriate cases, which is merely designed to enable law-abiding citizens to peaceably enjoy their actual and contingent property rights, has a venerable legal basis. The existing practice will continue to be applied in appropriate cases such as the present."**

[49] While the Court must always be mindful of the principle of open justice, it is an established practice of this Court, where appropriate, to consider making orders preserving the privacy and confidentiality of private Bahamian trusts in non-contentious, administrative matters. Although there is no automatic right to privacy and confidentiality orders, the Court will be prepared to make such orders as are necessary and proper to preserve the confidentiality of private Bahamian trusts.

[50] In my judgment, this is an appropriate case in which to make an anonymization and sealing order since the application before me is of a narrow compass and the proceedings concerned "*the internal administration of a private trust into which the*

general public have no right to pry" (to adopt the judicious words of Kawaley CJ in **Re G Trusts** 21 ITELR 46).

Costs

[51] In civil matters, costs are discretionary. I am also satisfied that it was appropriate to award the Petitioners their costs out of the trust fund of the A Settlement. The Petitioners had applied to this Court in their fiduciary capacities whilst acting in what they considered to be the best interests of the trust.

Dated the 26th day of March, A.D. 2021

Indra H. Charles
Justice