Neutral Citation Number: [2020] EWHC 1226 (Ch)

Case No: PT-2020-000016
& PT-2020-000017

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

The Rolls Building
7 Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 15 May 2020

Before :

MASTER TEVERSON

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Between :

(1)WILLIAM LAWRENCE GREENWELL SWAN **(2) THE HON ELIZABETH GILMOUR** **(3) JAMES MICHAEL BEALE CAYZER-COLVIN**	**Claimants (in both claims)**
- and –	
Defendants in PT-2020-000016	
(1)DOMINIC VAUGHAN GIBBS **(2) ESTHER ANNE MARY CAYZER-COLVIN** **(3) MOLLIE ISABELLA ELIZABETH CAYZER-COLVIN** **(4) LILY GEORGIA DAPHNE CAYZER-COLVIN** **(5) NICHOLAS JAMES GAGGERO** **(6) ALEXANDER CHARLES GAGGERO** **(7) GEORGE EDWARD MICHAEL PONSONBY**	
-and-	
Defendants in PT-2020-000017	
(1) DOMINIC VAUGHAN GIBBS **(2) MOLLIE ISABELLA ELIZABETH CAYZER-COLVIN** **(3) LILY GEORGIA DAPHNE CAYZER-COLVIN**	

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John Child (instructed by **Currey & Co LLP Solicitors**) for the **Claimants (in both claims)**

Judith Bryant (instructed by **Currey & Co LLP Solicitors**) for the **First Defendant (in both claims)**

Hearing date: 23 April 2020

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Approved Judgment

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.

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MASTER TEVERSON

MASTER TEVERSON:

1. I have before me two applications under the Variation of Trusts Act 1958 ("the 1958 Act") relating to the same family. The first application [PT-2020-000016] concerns the trusts of the will of Sir August Cayzer ("the Baronetcy Trust") under which property is held in two funds known as "James's Fund" and "James's Children's Fund". The second application [PT-2020-000017] concerns "the Molly & Lily Shares", which forms part of the property subject to the trusts of the will of The Right Honourable Elizabeth Catherine Baroness Cayzer ("the Lady Cayzer Will Trust").

2. The applications were heard before me by remote hearing on 23 April 2020. At the conclusion of the hearing I asked to be provided with the principal trust documents currently having effect and for counsel to address the question whether the removal from the current trusts of a contingent future absolute interest, and its replacement with a life interest instead (as is proposed in both PT-2020-000016 & PT-2020-000017) could properly be regarded as giving effect solely to a variation of trusts within the jurisdiction conferred by the 1958 Act and not a resettlement for trust or tax purposes. I received this additional material from Mr John Child, counsel for the Claimants, on 27 April 2020. I am grateful to counsel for their prompt assistance.

3. There are currently three trustees of the Baronetcy Trust, who are the First and Second Claimants and the First Defendant in the first application. There are four trustees of the Lady Cayzer Will Trust. They are the three current trustees of the Baronetcy Trust together with the Third Claimant, James Cayzer-Colvin ("James").

4. James was born on 1 April 1965 and is now aged 55. He is the great grandson of Sir August Cayzer who died on 28 February 1943. He is the grandson of Lady Cayzer who died on 12 October 1995. Lady Cayzer was married to William, Baron Cayzer, the elder son of Sir August Cayzer. William, Baron Cayzer and Lady Cayzer had two daughters. James is the son of the late Honourable Mrs Nichola Colvin. He is married to Esther Anne Mary Cayzer-Colvin ("Esther). James and Esther have two daughters, Molly Isabella Elizabeth ("Mollie") born on 30 September 1995 and Lily Georgia Daphne ("Lily) born on 8 April 1999. Mollie is aged 24 and Lily is now 21.

5. The primary beneficiaries of the relevant trusts the subject of these applications are James and his two daughters, Mollie and Lily. Mollie and Lily are Defendants in both sets of proceedings. James's wife, Esther, and his three nephews, all of whom are adult, are Defendants in the Baronetcy Trust proceedings.

6. As there are no existing minor beneficiaries of the trusts to be varied, the First Defendant, Mr Dominic Gibbs, has taken on the role of considering the proposed variations from the point of view of unborn and unascertained beneficiaries of the trusts. He has done so with the assistance of Miss Judith Bryant of Counsel whose Opinion is exhibited setting out why the arrangements are considered to be for the benefit of the unborn and unascertained beneficiaries.

7. The purpose of the proposed arrangement is summarised by Miss Bryant in paragraph 7 of her skeleton argument as being in each case to:

   (a) extend the applicable perpetuity period to 125 years from the date of the Order approving the variation;

(b) enable powers of revocation, appointment and application in relation to the trust property to be exercised throughout the new 125 year period;

(c) replace existing absolute trusts for the benefit of the current principal beneficiaries – if they are living at the end of the current perpetuity periods or, in the case of the Molly & Lily Shares, on their earlier attainment of the age of 50 years- with continuing life interests for those principal beneficiaries and continuing powers of application for their benefit;

(d) allow the extended powers of revocation, appointment and application to be exercised so as to make provision (if the trustees think it appropriate) for the accumulation of income of the trust property throughout the new period of 125 years;

(e) widen the administrative powers available to the trustees on the lines of the standard form of administrative powers used in relation to new trusts.

8. The trusts currently affecting each applicable Cayzer Family Trust are fully summarised in the First Claimant's witness statement in support of each application. Counsel were agreed this summary is accurate. It is nevertheless important for the principal trust documents to be before the court. They should be included within the electronic bundle. I have found it particularly helpful to read them in full in the context of the question whether the arrangements are or are not a resettlement for trust or tax purposes. In summarising the current trusts, I have followed for the most part the summary contained in Miss Bryant's skeleton argument.

9. As regards the application in PT-2020-000016, a Deed dated 5 March 1999 ("the Baronetcy Trust Deed") contains the principal trusts now affecting both James's Fund and James's Children's Fund. It introduced a royal lives clause into the Baronetcy Trust. "The Perpetuity Date" is defined to mean the date on which will expire the period of 21 years from the date of the last to die of the issue of His late Majesty King George V living on 28 February 1943 (the date of death of Sir August Cayzer). The Perpetuity Date is thought likely to occur in around 2050. At that date James will be 85.

10. The Baronetcy Trust Deed established James's Fund and James's Children's Fund. They derive from a Fund called "the Remaindermen's Fund" that was created by a prior 1958 Act arrangement in 1963. James has an interest in possession in James's Fund. The Trustees have power at any time before the Perpetuity Date to pay or apply capital to James or for his benefit. If James is living on the Perpetuity Date, he will be entitled to James's Fund absolutely.

11. If James dies before the Perpetuity Date leaving a widow, then she will be entitled to the income of James's Fund during her lifetime and the Trustees will have power to pay or apply the capital of James's Fund to or for her benefit before the Perpetuity Date (although that life interest is revocable by James).

12. Subject to those interests, James has a wide power of appointment over James's Fund in favour of his wife or widow, and his children and remoter issue, and the spouses, widows and widowers of such children and remoter issue, with the Trustees having a similar power of appointment, subject to James's power of appointment. If all of the foregoing trusts fail, then James's Fund will accrue to James's Children's Fund.

13. A future wife of James therefore has a contingent reversionary income interest in James's Fund, and future children and remoter issue of James and their spouses, and future spouses of Mollie and Lily, are objects of powers of appointment exercisable over James's Fund subject to the prior interests of James and any widow of his.

14. As part of the proposed arrangement, it is intended to remove James's contingent absolute interest in James's Fund leaving the other fixed interests in place.

15. In relation to James's Children's Fund, the Trustees have an overriding power of appointment (exercisable only with James's consent if he is living) in favour of James's wife or widow, and his children and remoter issue, and the spouses, widows and widowers of such children and remoter issue subject to accumulation and maintenance trust restrictions that are now obsolete. Subject to any exercise of that power, each of Mollie and Lily and any future child of James born before the first child of James to reach 25 (Mollie will attain 25 on 30 September 2020) - "a future child of James"- is entitled to an equal share of James's Children's Fund contingent on them attaining 25 before "the Closing Date" (defined as being 4 March 2024 – the expiry of 25 years from the date of the Baronetcy Trust Deed) or being alive and under that age on that date.

16. If Mollie or Lily or a future child of James fulfils that contingency, their share of James's Children's Fund ("the Share") will not vest in them absolutely but will be held on interest in possession trusts for their primary benefit in each case. The Trustees have power while Mollie or Lily or a future child of James is under 25 and before the Perpetuity Date to pay or apply capital of their respective Shares to or for their respective benefits.

17. If Mollie or Lily or a future child of James is living on the Perpetuity Date (when Mollie and Lily will be in their 50's) they will be entitled to the capital of the Share absolutely. A future child of James therefore has a defeasible contingent absolute interest in James's Children's Fund.

18. If any of Molly, Lily or a future child of James dies before the Perpetuity Date, their Share will be held for such of their respective children as attain 25 before or on the Perpetuity Date or are living under that age on the Perpetuity Date and if more than one in equal shares. There is provision for cross-accrual between the Shares, and then for accrual to James's Fund.

19. If the trusts of both James's Fund and James's Children's Fund fail, then those Funds will be held on the trusts that apply to "the Remaindermen's Fund". Under those trusts, James has an entailed interest in the Remaindermen's Fund, with remainder to Mollie and Lily in equal shares.

20. As part of the proposed arrangement, it is proposed to remove the contingent absolute interests of Mollie, Lily and any future child of James in James's Children's Fund, while leaving the other fixed interests in place.

21. The current trusts declared relating to Lady Cayzer's Will Trust are contained in a Deed dated 16 April 2002 ("the 2002 Advancement Deed"). By that Deed, the then trustees exercised a statutory power of advancement (as modified and extended by

clause 6.2 of Lady Cayzer's will) in order to create out of James's Share of her residuary estate two equal sub-shares known as "Molly's Share" and "Lily's Share".

22. Each of Molly/Lily will be entitled to Molly/Lily's Share if she attains the age of 50 or (in the case of Lily who was not born at the date of Lady Cayzer's death) is living on the vesting date, defined to mean the day on which shall expire the period of 21 years less 3 days immediately following the death of the last survivor of the children and remoter issue of Lady Cayzer who were living at her death.

23. Until then, Molly/Lily will be entitled to an interest in possession in Molly/Lily's Share on attaining the age of 25 or on James's death if earlier. If Molly/Lily fails to attain the age of 50 or survive to the vesting date then Molly/Lily's Share will be held on such trusts for the benefit of Molly/Lily's children and remoter issue and surviving spouse as Molly/Lily appoints, and subject to and in default of appointment for such of the children of Molly/Lily as are living on the vesting date or previously attain the age of 25.

24. While Molly/Lily has an interest in possession in Molly's/Lily's Share, the trustees have an overriding power of appointment (exercisable with the consent of Molly/Lily) in favour of the children and remoter issue of James and the spouses, widows and widowers of such children and remoter issue.

25. If the foregoing trusts of Molly/Lily's Share fail, the relevant Share will be held on trust for any future children of James.

26. There is provision for cross-accrual between Molly's Share and Lily's Share.

27. In the remote event of all these trusts failing, then if James is alive when the trusts fail, the income of the Shares will be held for the estates of Mollie and Lily in equal shares and subject to that the Shares will be held for such children of James as attain the age of 21 (and both Mollie and Lily have now attained 21).

28. As part of the proposed arrangement in relation to the Lady Cayzer Will Trust, it is proposed to remove the contingent absolute interests of Mollie and Lily in the capital of the Molly & Lily Shares.

29. The Court may approve a proposed variation if it is satisfied that it would be for the benefit of the persons on whose behalf it is being asked for approval. In exercising its discretion to approve an arrangement the Court is effectively supplying its consent to the arrangement on behalf of beneficiaries who are incapable of consenting: see *Goulding v James* [1997] 2 All ER 237 at 247e-h.

30. As is now common, one of the main purposes of the proposed arrangements is to achieve a lengthy extension of the trusts through the 125 year perpetuity period under the Perpetuities and Accumulations Act 2009 applying to the beneficial interests varied by the arrangements.

31. Another main purpose of the arrangements is to avoid the trusts coming to an end automatically by absolute vesting in favour of the current principal beneficiaries, whether that is due to the expiry of the present perpetuity period or, in the case of the Molly & Lily Shares, due to the attainment of a particular age.

32. The taxation benefits of deferring absolute vesting and extending the existing trust structure are well known and are fully set out in the skeleton arguments of both counsel before me. In the case of each of the three funds, a major part of the trust assets consists of shares in Cayzer Trust Company Limited and Caledonia Investments Plc. These are family controlled companies. A family wide benefit of the proposed arrangements is to make it less likely that it will prove necessary to dispose outside of the family any of those shareholdings.

33. Lewin on Trusts 20th edition (2020) at para. 53-056 states that it will not normally be sufficient to have regard only to those broader factors in considering whether the arrangement is beneficial. The court needs to consider in a practical and business-like manner, whether the arrangement is beneficial to each beneficiary or group of beneficiaries, for whom the court is concerned.

34. With one exception, Miss Bryant's task is a relatively straightforward one. As well as the wider fiscal benefits of the arrangements for the family as a whole, she is able to point to the potential individual benefit to the unborn and unascertained beneficiaries of the contingent absolute trusts in favour of the current principal beneficiaries being removed. She referred to this as accelerating their interests. I think enhancing their interests is the better description.

35. As Miss Bryant identified, the position of a future child of James, however remote the chances are of a future child being born before the first of his children to attain 25, given that Mollie will be 25 on 30 September 2020, requires separate consideration. If such a child were born before the class closing date, such child would, like Mollie and Lily under the present trusts of James's Children's Fund have a contingent absolute interest in a share of James's Children's Fund (although that interest is defeasible by the exercise of the trustees' overriding power of appointment over James's Children's Fund). Miss Bryant submits that the benefit of the proposed variations for a future child of James must be considered in the round. She submits that (i) the removal of the contingent absolute interests of James in James's Fund (which is of greater value than James's Children's Fund) – having at the time of establishment in 1999 by the Baronetcy Trust Deed represented an 87.5% undivided share of the Remaindermen's Fund) and (ii) of Mollie and Lily in the Molly & Lily Shares when combined with the flexibility and other advantages afforded by the extension of the perpetuity periods in relation to each of the three funds, outweighs any disadvantage to a future child of James of the removal of a contingent absolute interest in a share of James's Fund.

36. The interest of a future child of James is not being eliminated altogether but is being varied in the same manner as the interests of Mollie and Lily. In assessing the interest of such a future child, the Court must assume that such a child is born before the class closes, however unlikely that may be, but take into account the likely surrounding circumstances in the event such a child is born. The likely surrounding circumstances are that such a child will be treated by the trustees and their father in the same way as Mollie and Lily who as young adults likely to be alive at the existing Perpetuity Date have consented to the arrangements. Looking at the matter overall, it would contradict the whole philosophy and approach underpinning the proposed arrangements were the Court to decline to approve them on the basis that one beneficiary was to have removed an absolute contingent interest in circumstances in which the current principal beneficiaries were consenting to and actively seeking the removal in each of

their cases of such an interest. For those reasons as well as the ones advanced by Miss Bryant, I am satisfied benefit, looked at in a practical and business-like way, is shown.

37. The Court has power to approve a variation varying or revoking any of the trusts but not to approve a complete resettlement. In *Re T's Settlement Trusts* [1964] Ch 158, the Court (Wilberforce J.) declined to approve an arrangement transferring the share of an infant about to attain her majority to new trustees on protective trusts for life with remainder to her issue. The Judge said, though presented as "a variation", it was in truth a complete new settlement. He did however approve an alternative arrangement to the effect that the share of the infant should not vest absolutely at 21 or marriage but be retained by the trustees upon protective trusts for her until she attained a specified age. That case is about the only reported case in which an arrangement has been rejected as giving rise to a new settlement.

38. An arrangement does not amount to a resettlement merely because a new perpetuity period is adopted. The adoption of a new perpetuity period is consistent with the framework of the existing trusts being preserved and extended.

39. The deletion of a contingent capital trust in remainder will of itself not give rise to a resettlement. In *Wyndham v Baroness Egremont & Others* [2009] EWHC 2076 (Ch) the existing trusts were summarised by Blackburne J. at paragraph 5 as follows:-

(i)the Fund was held in trust for George during his lifetime;

(ii) if George should be living on the Vesting Date, the Fund would thereupon vest in him absolutely;

(iii) the Trustees had power at any time or times before the Vesting Date to transfer the Fund to George absolutely or to apply the same for his benefit in such manner as they with his consent should think fit.

40. At paragraph 8, the Judge said that given the ages of the remaining Royal Lives in being under the definition of "the Vesting Day" in the relevant Deed, the present trusts would inevitably come to an end in the not too distant future, and since George was only 26, in all likelihood, in George's lifetime. The Judge at paragraph 10 set out the modifications made by the arrangement to the pre-arrangement trusts. These included the redefinition of "the Vesting Day" and "the deletion of the contingent capital trust in favour of George (being the trust summarised at (ii) of paragraph 5 above)". The Judge after reviewing the "useful guidance" provided by *Roome v Edwards* [1982] AC 279 which concerned a claim for capital gains tax, concluded at paragraph 24 that he was in no doubt that the alterations to the pre-arrangement trusts contained in the arrangement before him, constituted a variation of those trusts and not a resettlement. He said:-

"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 remainder, although the ultimate trusts in favour of George and his personal representatives remain the same, and (2) the introduction of the new and extended perpetuity period."

41. Mr Child, supported by Miss Bryant, submitted that that case, where the arrangement was approved even although it removed a contingent absolute interest, therefore dealt with the identical point that arises in the two applications before the court, and resolved it in favour of the applications.

42. In my judgment, the court has in each case to look at the arrangement before it in the context of the existing trust structure. There is no doubt that the court has taken a wide or benign view of where the line is to be drawn: see *Re Ball's Settlement Trusts* [1968] 1 W.L.R. 899. As counsel pointed out, in that case, a variation was approved which involved the substitution of a contingent absolute interest for a life interest. Mr Child submitted that the arrangement in that case went very much further in altering the previous trusts than what is being sought in the applications before me.

43. A related question is whether a new settlement will be created for tax purposes. Mr Child referred me to a Statement of Practice SP7/84 issued by HMRC on 11 October 1984 following the decision in *Bond v Pickford* [1983] STC 517. It confirmed that in the case of the exercise of a power of appointment or advancement, the Revenue would not normally regard the exercise as creating a new settlement for tax purposes, either-

(i)Where the power being exercised was not wide enough to authorise the creation of a new settlement; or

(ii) Even where the power being exercised was wide enough to create a new settlement, nevertheless if the effect of the exercise was not to prevent the original trusts from possibly having effect at some future date; or, in any event, if duties in respect of the affected property still fall to trustees of the original settlement in their capacity as trustees of that settlement.

As to the first situation, Mr Child submitted an analogy could be drawn between the case where the power being exercised was not wide enough to authorise a new settlement, and the restriction in the 1958 Act to a variation and not a resettlement.

44. Mr Child referred me further to paragraph 23 of the judgment of Mr Jeremy Cousins QC in *Allfrey v Allfrey & Others* [2015] EWHC 1717 in which the Deputy Judge recorded:-

"Helpfully…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. I consider that HMRC was correct to reach that conclusion."

45. For my part, I consider that this analogy is rather self-serving. I agree with Blackburne J. that the most useful guidance is to be found from the leading case of *Roome v Edwards* [1982] A.C. 279 and the passage from the speech of Lord Wilberforce at 292-293.

46. In the case of the applications before me, I consider that the additional administrative powers that are sought to be granted and which are expressed by the arrangements to

be vested in the existing trustees acting in that capacity, is a factor which is either neutral or which supports Mr Child's submission that there is no resettlement.

47. In the case of the Baronetcy Trust, looking at the arrangement as a whole, I think that it takes effect as a variation and not a resettlement. The existing trust structure is kept in place.

48. In the case of Lady Cayzer's Will Trust, I found the issue less clear cut. On trying to determine why I found the issue more difficult than in the case of the Baronetcy Trust, I realised it was because I was in substance asking myself the prior question whether the 2002 Advancement Deed gave rise to a new settlement for trust or tax purposes. This depends on the manner in which the power of advancement was exercised: see Lewin at paragraph 3-063.

49. I have concluded that I should proceed on the basis that the 2002 Advancement Deed did not create a new settlement for capital gains tax or for trust administration purposes. There is no evidence before me that it has been held to have had that effect. Clause 9 of the 2002 Advancement Deed contained a declaration by the trustees for the avoidance of doubt that:-

(1) "subject to and so far as consistent with the beneficial trusts and powers declared by this deed the administrative powers and provisions of the will shall continue to apply; and

(2) the present trustees do not intend by this deed to create a new settlement"

50. On that footing, I have concluded that the proposed arrangement in the second application before me takes effect as a variation and not a re-settlement. It leaves in place the structure of the trusts created by the 2002 Advancement Deed. I have separately considered whether there is an argument that the proposed arrangement when combined with the 2002 Advancement Deed, in some way tips the whole edifice over the edge, but I do not think that it does. Either the 2002 Advancement Deed amounted to a resettlement or it did not. If it did not, the proposed arrangement is a variation of those trusts and not a resettlement.

51. In those circumstances, I will approve the proposed arrangements with one amendment. In line with my decision in *Duke of Somerset v Fitzgerald* [2019] EWHC 726(Ch) in which I gave reasons for distinguishing *Re Portman Estate* [2015] EWHC 536 (where a power for trustees to add administrative powers was refused at [34] to [36]), I will direct that the power for trustees to add administrative powers (which is one of the additional administrative provisions sought to be included in the arrangements) be made subject to a provision that before exercising any added administrative power the trustees should first satisfy themselves with the benefit of appropriate professional advice that the proposed exercise of the power is expedient for the trust as a whole.