CICA No. 20 of 2005

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

BETWEEN:

COUTTS (CAYMAN) LIMITED, COUTTS (JERSEY) LIMITED, SEATON TRUSTEES INC., and PARTHENON TRUSTEES INC.

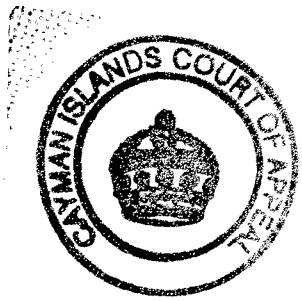
APPELLANTS (Defendants)

AND:

PANDELIS CHRISTOS LEMOS, MARIKA CHRISTOS LEMOS, PANDELIS GEORGIOS LEMOS, ASPASIA GEORGIOS LEMOS, and AIKATERINI GEORGIOS LEMOS

RESPONDENTS (Plaintiffs)

Before: The Right Hon. E. Zacca, President
The Hon. M.R. Taylor, Justice of Appeal
The Hon. E.D. Mottley, Justice of Appeal



Michael Briggs, Q.C., and David Blayley, for the Appellant
Alan Steinfeld, Q.C., and John Stephens, for the Respondents

Heard: April 24, 25 & 26, 2006 Judgment Released:

REASONS FOR JUDGMENT

TAYLOR, J.A.

The defendants in this breach of trust action appeal the decision of a Grand Court judge granting the plaintiffs leave to amend their statement of claim so as to make various allegations of intentional or wilful breach of duty.

The position of the defendant trustees is that the proposed amendments raise a new cause of action by pleading a mental element not involved in the cause of action originally pleaded, and that the new cause of action is time-barred as against the first two plaintiffs, the others being infants or having recently come of age.

The defendant trustees contend that if the plaintiffs wish to make these further allegations they ought to be required to do so in a new action which could then be consolidated with the present action for trial, so that limitation issues would be resolved at trial. The consequence of inclusion of the new claims in the present action by amendment is that they are then deemed to have been brought at the date of the original writ, thereby preventing the raising of any limitation defence that might be available if they were brought later in a separate action.

The purposes of the trust in question and the history of this protracted litigation need not be gone into for the present purpose; they are described in the decision appealed from and earlier decisions of the Grand Court and this court, as reported, for instance, in *Lemos et al. v. Coutts et al.* [2003] CILR 381.

(a) The Background

The Grand Court judge found that the new claims of intentional or wilful breach of trust arise out of the same or substantially the same facts as those originally pleaded, for

the purposes of the Grand Court Rules, Order 20 rule 5(5); it is not clear that the judge was of the view that they raise a new cause of action; if any new cause pleaded must be one arising out of the same or similar facts, it would be unnecessary to resolve the difficult question whether a separate cause of action is raised.

The judge below also held that if the facts are new, the running of time would be postponed by s. 37(1) and (2) of the *Limitation Law* until the plaintiffs discovered them, or could reasonably have discovered them. Counsel for the respondent plaintiffs no longer seeks to support this second ground, conceding that the evidence below was insufficient to establish when they could reasonably have been discovered.

The Grand Court judge did not resolve the further fundamental issue whether any limitation could apply to these plaintiffs as persons who, until the trust is wound up, can benefit only in the discretion of the trustees.

That issue involves interpretation of s. 27(3) of the *Limitation Law*, which imposes a six-year limitation but delays the running of time in certain cases until the plaintiff acquires an "interest in possession". The judge noted a disagreement between English and New Zealand decisions dealing with essentially similar provisions, and found this disagreement to raise an arguable point of law. By respondents' notice the plaintiffs reassert their argument on the point as an alternative ground on which leave to amend should be upheld. If the plaintiffs are right on this point, there could be no limitation

defence open to the trustees, and thus no basis would exist for allowing the appeal against the granting of leave to amend.

The judge's decision not to deal with this issue, one raising a pure point of law, was not a decision, made in the exercise of 'trial management' discretion, that it would be better left for resolution at trial. The manner in which the judge disposed of the other issues rendered this issue irrelevant. If there was in law a limitation defence, it was one that could no longer be raised once the judge decided as she did under Order 20, rule 5(5), and granted leave to amend. The position on appeal is that if this court were to find that deliberate or wilful breach of trust is not a different cause of action from 'breach of trust *simpliciter*', that would result in the order being upheld, the amendments allowed and any limitation defence foreclosed. If this court were to find that a new cause of action is pleaded, but disagree with the judge's conclusion that it must arise from the same or substantially similar facts, that would result in the amendments being disallowed, so that the plaintiffs would proceed with a second action but be unable at the consolidated trial to argue either of those two points. The defendants would at the consolidated trial argue that the limitation contained in s. 27(3) of the *Limitation Law* applied, and the plaintiffs would contend that it did not apply, but that if it did apply then under s. 37(1) and (2) of the *Limitation Law* time did not start to run until they had document disclosure and thus discovered the further facts.

The purpose of adding the new allegations is to avoid an exculpatory provision of the trust deed which could in some circumstances be invoked by the trustees. The allegations, while said to arise from recent document disclosure, add no new element to these protracted proceedings, since a similar allegation was made by the plaintiffs in their reply, filed seven years ago. The basis on which amendment is opposed under Order 20 is solely the limitation point. Whether such a defence can be avoided on the ground that the mental element involved raises a new cause of action not based on the same or similar facts for the purposes of Order 20, rule 5(5), is a question that raises the difficult issue of whether the present case is covered by the decision in *Paragon Finance plc v. D.B. Thakerar & Co.*, [1999] 1 All E.R. 400 (C.A.)

It is in these circumstances that the trustees ask that we decide now the issues raised under Order 20 but leave for trial the question whether there could in law be any limitation defence open to the defendants against these plaintiffs.

Since no question can be raised under Order 20, rule 5, unless the plaintiffs in their capacity as what are often, but not always, called "discretionary beneficiaries" are subject to the limitation imposed by s. 27(3) of the *Limitation Law*, we have concluded, notwithstanding the able submissions of counsel for the trustees, that this is the fundamental question that we ought first to address.

(b) Armitage v. Nurse

The issue raised under s. 27(3), and the outcome of this appeal, may well be resolved by the decision in *Armitage v. Nurse* [1998] Ch. 241 (C.A.), the leading English authority under an essentially identical English provision.

That decision on one view establishes that the limitation applies only to actions by plaintiffs entitled as of right to share in the trust estate. The judgment of the Court of Appeal in that case may well lead to the conclusion that the limitation does not apply to persons not entitled to benefit as of right, but entitled only to be considered for such benefits as the trustees may from time to time grant in the exercise of a discretion. While such persons are commonly referred to as discretionary beneficiaries, and will for convenience sometimes be so referred to in these reasons for judgment, they are more correctly described in the law of trusts as "objects of a discretionary trust or power". The trustees accept that such persons have no beneficial present or future interest in the trust property, and this is the position of the respondents.

A question not infrequently requiring resolution in the application of statutory provisions dealing with trusts and trustees is whether in referring to beneficiaries and their interests the legislature intends a provision to extend to persons having such discretionary status, and to what are referred to as their 'expectations'. The plaintiffs have received benefits in the discretion of the trustees and may do so in future, but they

have no entitlement to any benefit, nor right to any part of the trust fund, until the trust is terminated and the residue distributed. This may happen at any time chosen by the trustees, and must happen on or before the "perpetuity date", in 2064.

Section 27(3) provides that a six-year limitation applies to the bringing of action "by a beneficiary . . . in respect of a breach of trust", but that time shall not be taken to have run against "any beneficiary entitled to a future interest in the trust property" until that interest "fell into possession". It reads in full:

> (3) Subject to subsections (1) and (2), an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which another period of limitation is prescribed by any other provision of this Law, shall not be brought after the expiration of six years from the date on which the right of action accrued. For the purposes of this subsection, the right of action shall not be treated as having accrued to any beneficiary entitled to a future interest in the trust property until the interest fell into possession.

This sub-section is not concerned with when action *can* first be brought, but with whether and when time runs within which action *must* be brought.

That the object of a discretionary power or trust may for the purposes of a statute be considered a beneficiary having an interest in the trust property has been established by a series of English decisions, including: *Attorney-General v. Heywood* (1887) 19 QBD 326; *Attorney-General v. Farrell* [1931] 1 KB 81; *Gartside v. Inland Revenue Commissioners* [1968] AC 553; and *Leedale (Inspector of Taxes) v. Lewis* [1982] 1 WLR

1319 (H of L). In *Gartside* it was held, in the context of the taxing statute there considered, that objects of a discretionary power had no interest in the trust fund, but Lord Reid observes (at p. 612) that in *Attorney-General v. Heywood* it was rightly held to the contrary under an earlier taxing statute that the granting by a settlor of a discretion to a trustee to apply income for the benefit of the settlor or members of the settlor's family amounted to reservation by the settlor of an interest in settled property. In this connection Lord Reid makes the observation (at p. 612):

> It is always proper to construe an ambiguous word or phrase in light of the mischief which the provision is obviously designed to prevent, and in light of the reasonableness of the consequences which follow from giving it a particular construction.

Lord Reid goes on to say that where such a word as 'interest' is used in two statutes, each dealing with a different problem, there is only "a slender presumption" that it has the same meaning in both. The other cases mentioned demonstrate that point.

In *Leedale v. Lewis*, objects of a discretionary power were held to be "persons having interests in the settled property" for the purposes of a capital gains tax, Lord Fraser of Tullybelton, Lord Wilberforce and Lord Scarman all referring to the *Heywood*, *Farrell* and *Gartside* cases in reaching this conclusion.

In *Armitage v. Nurse*, Lord Justice Millett, giving judgment for the Court of Appeal with respect to s. 21 of the *Limitation Act 1980* – essentially the same as s. 27(3)

of the *Limitation Law* – considers the position of a plaintiff who had the possibility of receiving income in the discretion of the trustees until age 25 at which point she became entitled to income as of right. Lord Justice Millett says (at p. 621):

> The second question is whether Paula had a present interest while she was under the age of 25 or whether she had only a future interest which fell into possession when she attained that age. The judge held that she had merely a future interest. In my judgment, he was right. Until Paula attained 25 the trustees held the trust fund upon trust to accumulate the income with power instead to pay it to Paula or to apply it for her benefit. She had no present right to capital or income but only the right to require the trustees to consider from time to time whether to accumulate the income or to exercise their power to pay or apply it for her benefit. That, in my judgment, is not an interest in possession. Paula was, of course, a beneficiary and as such was entitled to see the trust documents. The respondents submit that this was sufficient to give her an interest in possession within the meaning of the section, and cite *Leedale v. Lewis* [1982] 1 W.L.R. 1319 in support. In my judgment, that case does not assist the respondents. As Lord Wilberforce pointed out, at p. 1329: "The word 'interest' is one of uncertain meaning and it remains to be decided on the terms of the applicable statute which, or possibly what other, meaning the word may bear."
>
> The statutory language and context in that case compelled the conclusion that an object of a discretionary trust of capital and income had an interest in settled property. *Attorney-General v. Heywood* (1887) 19 Q.B.D. 326 was to similar effect. That decision was approved in *Gartside v. Inland Revenue Commissioners* [1968] A.C. 553, where, however, a different conclusion was reached because of the different context in which the word "interest" was used.
>
> The meaning of the word must, therefore, be ascertained from the context in which it appears. As the tax cases show, the evident policy of a taxing act may sometimes make it necessary that an object of a discretionary trust or

> power should be treated as having an interest and sometimes it may show the contrary. The question thus depends upon identifying the legislative purpose which section 21(3) of the Act of 1980 is intended to achieve.
>
> The respondents submit that the policy to which section 21(3) of the Act of 1980 gives effect is that it would be unfair to bar a plaintiff from bringing a claim unless and until he is of full age and entitled to see the trust documents and so has the means of discovering the injury to his beneficial interest. The difficulty with this argument, in my judgment, is that it proves too much. Every beneficiary is entitled to see the trust accounts, whether his interest is in possession or not. The rationale of section 21(3) appears to me to be different. It is not that a beneficiary with a future interest has not the means of discovery, but that he should not be compelled to litigate (at considerable personal expense) in respect of an injury to an interest which he may never live to enjoy. Similar reasoning would apply to exclude a person who is merely the object of a discretionary trust or power which may never be exercised in his favour.

While argument before us was directed particularly to the last two sentences of this passage, it is necessary for the present purpose to consider the whole of the portion of Lord Millett's judgment reproduced above.

In the decision appealed from in *Armitage v. Nurse*, Mr. Justice Jacob had described the issue as: "When did Paula first have an interest in possession?". He concluded that until age 25 she had no present interest, but only a future interest, being her entitlement to income as of right when she attained age 25, which only then "fell into possession". The question was whether while under 25 and an "object of discretion" she

had an "interest in possession". It was accepted that only if she had a *present interest* or *interest in possession* would she be subject to the limitation.

Mr. Justice Jacob described the issue generally (at p. 1) as "whether the limitation defence can be effective". He rejected what he described as an "ingenious argument" for the trustees that the interest of a discretionary beneficiary is for this purpose an "interest in possession". That argument had been based on the grounds: (i) that such a person is entitled to be considered by the trustees and entitled to see the trust accounts, (ii) that the purpose of delaying the operation of the limitation period is that it would be unfair on a plaintiff to be barred unless or until he or she is of full capacity and has the means of knowledge or discovery of the wrong to his interest, and (iii) that a discretionary object of full capacity has such means. The judge said (at p. 5):

> I reject the argument for two reasons. First the language of the proviso itself draws a distinction between a future interest and one which falls into possession. Moreover it is an interest in the trust property which is referred to, not an interest in the management of the trust as such. Second the expressions future interest and an interest in possession are well known terms of art from the law of trusts. I think Parliament was plainly drawing upon that terminology.

The judge did not say that Paula's discretionary status prior to age 25 gave her a future interest that had not fallen into possession, so as to fall within the proviso delaying the running of time. The judge's conclusion was that her discretionary status gave her neither an "interest in possession" nor a "future interest".

It is agreed before us that in the ordinary language of the law of trusts it would not be said that a "discretionary beneficiary" had a future interest in the trust property that had not yet fallen into possession. That is the language in which the judge at first instance in *Armitage v. Nurse* found that Parliament intended the provision to be understood. The only future interest that Paula had was the "fixed" interest represented by her entitlement to income as of right at age 25, an interest that would come into possession when she reached that age. In deciding against the trustees on the question "whether the limitation defence can be effective", Mr. Justice Jacob did not do so for the reason that Paula fell within the proviso delaying running of time in favour of beneficiaries having a future interest. His conclusion that she had no future interest at that time is inconsistent with the possibility that her discretionary status could give her a right under the proviso to delay in the running of time.

The basis on which the matter was decided at first instance in Paula's favour was that her position as "object of a discretionary power or trust" fell outside the scope of the limitation provision itself, this being for the reason that a discretionary beneficiary, having neither present nor future interest in the trust property, is excluded from the class of beneficiaries to which the limitation provision is intended to apply.

On appeal from that decision the intended scope of the sub-section is expressly stated by Lord Justice Millett, as drawn particularly from the rationale of the proviso. Lord Justice Millett says that "similar reasoning" to that disclosed by the proviso with

respect to delay in the running of time would "exclude a person who is merely the object of a discretionary trust or power". This statement must be regarded as concurrence in the assumption on which the case was dealt with – that a person with no beneficial interest in any part of the trust assets is excluded from the class of beneficiaries to whom the limitation provision is intended to apply.

The last two sentences of the excerpt from Lord Justice Millett's decision reproduced earlier might on one view seem to mean that the proviso contained in the last sentence of the sub-section delays the running of time not only for those who have a fixed future interest, to which they might or might not live to become entitled, but also for those in whose favour a discretionary power may or may not be exercised. This does not, however, prove on closer consideration to be the true meaning.

What must be the correct meaning is arrived at if the words are taken instead to mean that "discretionary beneficiaries" or "objects of a discretionary trust" do not fall within the class of beneficiaries to which the sub-section applies, so that an action by such a person would not, in the words of the sub-section, be "an action by a beneficiary to recover trust property or in respect of any breach of trust". They are not excluded by the proviso from the running of time but excluded from the class of beneficiaries to which the sub-section applies. Unless caught by another provision of the statute, a person with discretionary status could bring action for breach of trust at any time, the position

prevailing in England with respect to all breach of trust claims prior to 1888, when the first limited statutory limitation was introduced.

Lord Justice Millett says that the right to see trust documents does not create a "present interest" for the purposes of the sub-section, and that a person with discretionary status has no other such right as would constitute a present interest. The right to be considered by the trustees for the exercise of discretion, referred to in argument at first instance and on appeal, did not constitute such an interest. Paula had the right to see trust documents in her capacity as a beneficiary with the fixed future interest derived from her right to receive income at age 25, but this did not give her a "present interest" for the purposes of the sub-section, and nor would her right to see documents in her discretionary capacity create such an interest.

The proposition that a statutory provision dealing with rights of beneficiaries may not necessarily extend to discretionary beneficiaries, or "objects of a discretionary power", is not to be regarded as surprising.

A provision regulating rights of creditors or shareholders, for instance, will not necessarily be intended to extend to preferred creditors or preference shareholders, a provision concerning children may not be intended to apply to step-children, adopted children or children of full age, and while a provision referring to officers may, but will probably not, in a military context extend to non-commissioned officers, in the context of

policing it may extend to everyone on the force. The fact that in law a narrower definition is normally given to a class of persons than in common usage, or that in exceptional circumstances a class may have a broader scope than commonly accepted, are factors to be taken into account, but the outcome depends on the statutory context in which a class is dealt with, or referred to.

Thus the decision in *Armitage v. Nurse* stands for the proposition that discretionary beneficiaries are excluded from the scope of the limitation provision -- that the limitation applies only to beneficiaries who have a proprietary beneficial interest in the trust property, which discretionary beneficiaries are not taken to have.

This point is fundamental to resolution of the apparent conflict between authorities on which the trustees base their argument.

(c) Johns v. Johns

The appellant trustees rely on the different outcome arrived at six years later by the New Zealand Court of Appeal in *Johns v. Johns* [2004] 3 N.Z.L.R. 202, a decision concerned with an essentially identical New Zealand limitation provision.

The New Zealand court refers there (at pp. 213-4) to the above-reproduced portion of Lord Justice Millett's judgment in *Armitage v. Nurse*, and particularly to the two sentences with which the excerpt concludes:

> It is not that a beneficiary with a future interest has not the means of discovery, but that he should not be compelled to litigate (at considerable personal expense) in respect of an injury to an interest which he may never live to enjoy. Similar reasoning would apply to exclude a person who is merely the object of a discretionary trust or power which may never be exercised in his favour.

The court describes the last sentence (at p. 215) as "difficult" and suggests that it conflicts with the sentence that appears before it:

> It draws a contrast with the immediately preceding sentence, seemingly recognising that a person who is merely the object of a discretionary trust is not a beneficiary with a future interest. That is consistent with what he had said earlier. He may have had in mind the situation in the case before him in which the discretionary beneficiary had a further interest in the trust fund capable of falling into possession at a future date. But, standing alone, the sentence suggests that a mere discretionary beneficiary fits the rationale of the proviso. But he or she does not fit the clear requirement of a future interest in the trust property. We are unable to accept that this requirement can be construed as extending to a mere discretionary expectation.

In *Armitage v. Nurse* the object of a discretionary power was found at first instance and on appeal not to be subject to the limitaiton. But in *Johns v. Johns* the trial judge is found to have been right in holding that the plaintiff "did not fall within the proviso" while in that position, and that the limitation period therefore ran while his status was only that of

such an object of discretion. The court does not, however, offer any rationale for the proviso that would justify the conclusion that the limitation provision is intended to apply to persons having only discretionary status.

The New Zealand court does not appear to have been addressed to the possibility that the object of a discretionary power, having no present interest in the trust assets, would be excluded not from the running of time under the proviso, but from the class of beneficiary to which the sub-section applies. While not adopting a view of legislative intent different from that taken in *Armitage v. Nurse*, the New Zealand court arrives at a result inconsistent with that intent. The decision in *Johns v. Johns* results in a beneficiary with a fixed future interest facing no limitation period until his or her interest becomes a present interest, while the object of a discretionary power having no legal entitlement to benefit, and who may or may not have benefited or benefit in future, is time-barred should he or she fail to sue within the limitation period.

For other reasons the plaintiff's claim in that case was held not to be *wholly* time-barred, but time-barred only in his discretionary capacity.

(d) The Appellants' Position

Counsel for the trustees does not accept that the rationale of the sub-section is that stated in what counsel describes as an off-the-cuff observation by Lord Justice Millett in

Armitage v. Nurse, but takes the position that the proviso preventing time from running only in the case of a future interest until it is enjoyed by the beneficiary is consistent with an intention that the limitation apply to discretionary beneficiaries as persons who enjoy the right to be considered immediately for the receipt of benefits.

The appellants' position is that provided the plaintiff is of age, and the alleged breach committed, time will run against a person enjoying a present possibility of benefiting from the trust, and not only against one having a present right to share in the trust assets. That reasoning might in the present case seem applicable not only to the entitlement of the plaintiffs to be considered for discretionary payments during the term of the trust but also to their entitlement to share in the terminal distribution, which can be enjoyed by them in the discretion of the trustees at any time up to the terminal date, yet that interest is protected from the running of time by the proviso. The argument for the trustees is that the New Zealand court was right in concluding that the limitation applies to discretionary beneficiaries because this result is supported by a view of the legislative purpose different from that adopted in *Armitage v. Nurse*. The position of the trustees thus stands or falls on their assertion that Lord Justice Millett's statement of legislative intent of the provision is wrong, and that the purpose or intent which they suggest, although not approved or considered in *Johns v. Johns* or any other case to which we are directed, is to be preferred, and is the correct view.

A person who has only the possibility of benefiting if and to the extent that trustees see fit will often be in no position at all to assess the wisdom of bringing an action for breach of trust, and certainly never in the same position as one who has a present right to receive a prescribed share in the assets. The contention, as a general proposition, that immediate right to no more than consideration constitutes a sufficient interest to attract the running of time does not appear to us to have any particular logic as a rationale for the sub-section. This view was advanced in *Armitage v. Nurse*, with respect to the meaning of the proviso, and cannot have been overlooked by the court as an explanation or rationale for the provision as a whole, and we are unable to accept that Lord Justice Millett's final above-quoted sentence should be regarded as an "off-the-cuff" statement. The rationale accepted in *Armitage v. Nurse* has as its logic that no one should be put to the expense of bringing action without a present right to benefit from the trust. The alternative proposed by the trustees expresses a possible meaning for the legislative language that produces the result arrived at in *Johns v. Johns*, but it is not supported by logic or fairness. It is not right in our view, in resolving language of uncertain meaning, to assume that the legislature intended an arbitrary result, or a result that could be considered reasonable only in some cases, if that can be avoided.

The trustees contend that their position finds support in changes that have taken place in the wording of the limitation provision since its introduction more than a century

ago, and which should be taken, counsel says, to demonstrate a legislative intention to bring discretionary beneficiaries within its scope.

Section 8 of the *Trustee Act* 1888, the first English statutory provision imposing a limitation on actions against trustees, contained a general proviso that time "shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession". This wording was remoulded by the *Limitation Acts* 1939 and 1980 into the language found in s. 27(3) of the Cayman *Limitation Law* and the provisions considered in *Armitage v. Nurse* and *Johns v. Johns*. The parties agree that under the 1888 statute the limitation did not apply to discretionary beneficiaries. This could only have been because, not being capable of having any interest in possession, they would not be regarded as beneficiaries within the scope of the provision. The respondent plaintiffs say that the probable purpose of the 1939 changes was simply modernizing and simplifying the language when consolidating previously scattered limitation provisions into a single enactment.

The argument for the trustees is that the change from words imposing delay in the running of time against *any* beneficiary "unless and until the interest of such beneficiary shall be an interest in possession" to words restricting delay in the running of time to "any beneficiary *entitled to a future interest* in the trust property until that interest fell into possession" discloses intention to impose the limitation on discretionary beneficiaries, who have no entitlement to an interest in the trust property. It might be argued, to the

contrary, that the new words emphasize the exclusion of discretionary beneficiaries by making it plain that the interest referred to is not an interest in the administration of the trust, or the right to consideration by the trustees, but a propriety interest in some part of the trust fund or assets. The appellant trustees contend, however, that reference only to beneficiaries having a "future interest", as persons entitled to delay in running of time, demonstrates an intention that the limitation henceforth shall apply, and time run, in the case of those who enjoy a present right to be considered for discretionary benefits, even though they have no interest in the trust property.

We are unable to accept that the legislature could have intended to bring about such a change in the scope of the limitation by such subtle and intricate means, when that could so easily have been done directly.

We are unable also to accept that the interpretation urged on us by the appellants is supportable as a solution to problems which arise in the case of persons having both a fixed-interest and discretionary status under the same settlement. These problems are inherent in the application of the provision to plaintiffs with multiple interests of any sort, and could not be resolved in the present context alone.

(e) Conclusion

It is our view that the decision in *Armitage v. Nurse* cannot have been fully explored in *Johns v. Johns*, a case which in our view casts no doubt on the validity of the reasoning or result in *Armitage v. Nurse*, and that *Armitage v. Nurse* should be regarded as correctly stating the law applicable in this jurisdiction.

Counsel for the trustees described the conflict between these two decisions as one of importance generally to the Commonwealth law of trusts, and urged that we leave its resolution for consideration at trial and, if need be, thereafter by this Court and only then by the Judicial Committee. Counsel cautioned us that if we decide the matter now, a further appeal at this point could result in another delay in the already overdue trial of this action, which is set to start three months hence.

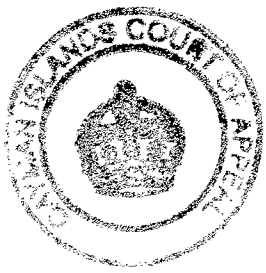
But the issue has now been argued three times at length – before the Grand Court, before three judges of this Court on the application for leave, and on this appeal. To decline to decide it would suggest uncertainty as to its disposition which we do not entertain, or that further argument or enquiry into the facts could cast more light on the matter, which we do not believe to be the case. Should our decision result in an application for leave to appeal, that could lead to a stay of proceedings and trial adjournment only after full consideration of all matters to which counsel has referred, together with other relevant factors. There are, moreover, further interlocutory

proceedings in progress, and more may follow. Any of these could result in loss of the trial date, even if we take the course urged on us. We must be mindful also that the respondents, who are plaintiffs, wish the issue decided now, emphasizing that it was in pre-trial proceedings that decisions were given in *Armitage v. Nurse* and *Johns v. Johns*.

(f) Disposition

We believe this appeal should be disposed of now on the s. 27(3) issue. The appeal will therefore be dismissed, and leave to amend affirmed for the reasons here given. The respondents will have their costs, to be taxed if not agreed.

E. Zacca, P.



M.R. Taylor, J.A.

E.D. Mottley, J.A.

Lemos