

**INTERNATIONAL TRUSTS AND PRIVATE CLIENT FORUM:
CAYMAN ISLANDS, 24- 25 OCTOBER 2016
CAYMAN COURTS AND RESOLVING INTERNATINLA AND TRUST
DISPUTES**

**PAPER BY HON. ANTHONY SMELLIE,
CHIEF JUSTICE, THE CAYMAN ISLANDS**

**PRESENTED BY HON. INGRID MANGATAL
JUDGE OF THE GRAND COUT, CAYMAN ISLANDS**

SALUTATIONS

The use of the offshore trust for estate preservation and planning as well as corporate commercial purposes must now be acknowledged to be a permanent feature of the financial world.

Even while adhering to the principles of equity from which they are derived, offshore trusts are illustrative of the elasticity and innovativeness of the trust concept. They have over the last three to four decades been applied to a variety of innovative uses in the private and commercial context so that the trust and the manner of its evolution, has become, especially in the offshore world, an emblem of the fluidity of English law.

As I noted some eight and a half years ago in a presentation to a conference¹ in Provence, offshore legislation seeks to keep pace with demand in many of the key jurisdictions by a clear and deliberate policy of adapting the trust structure to fit the need and this has led to a legislative agenda designed to ensure that each jurisdiction offered the most attractive options for meeting those objectives.

In the Cayman Islands, for example, a period of almost constant legislative innovation in the early to mid-1990's saw the introduction of statutory provisions for reserved powers, for presumption of immediate and lifetime effect, for protection of Cayman Trusts from attacks by foreign elements and for statutory validation of non-charitable purpose trusts², among other advances. All of these have since been adopted as common features of the other leading offshore jurisdictions.

As I also remarked to the Provence conference, this facilitative legislative framework presents the offshore judges with a unique challenge - that of having to examine the validity of these new and exciting ways of using trusts, as against the "*irreducible core*"³ of the trust concept. It is a challenge that requires the judges to keep pace with the rapid development of the complicated structures which emerge from the fertile soil of the offshore trust world. An examination of the decided cases was attempted to obtain a view of how the Cayman judges had approached the challenge up until then.

¹ The Trusts and Estates Litigation Forum held at Provence, France, in February 2008: "Form and Substance: The Cayman Islands Perspective in the debate about offshore trusts".

² All now respectively consolidated into Parts 111, VII and IV of the Trusts Law (2011 Revision)

³ The core concept of the "trust" has time and again been reinforced by the local courts, applying the well-known dicta of Millett LJ (as he then was) in *Armitage v Nurse* [1998] CH 241, to the effect that "there is an irreducible core of obligations owed by trustees to the beneficiaries and enforceable by them which is fundamental to the concept of the trust", namely the duty of the trustee to perform the trust honestly and in good faith for the benefit of the beneficiaries.

Now several years later, it seems only fitting that I should in this brief paper, attempt to give an update on the ongoing Cayman judicial response to the challenge and of course, the judges continue to speak through the decided cases.

The cases show, for example, that the judges continue to “*circle the wagons*” for the enforcement of the foreign element protection of Cayman Law in appropriate cases.⁴

Thus, questions concerning the validity of a Cayman Islands Trust or the interpretation or effect of it, continue to be determined according to Cayman Islands law. The cases confirm that foreign law in relation to its validity, will not invalidate a Cayman Islands Trust.⁵

Perhaps nowhere is this more telling than in the context of the examination of so-called “*dynastic trusts*”⁶, when called into question in matrimonial disputes in proceedings before foreign courts. In a case on point, a trustee served with notice of proceedings before the Hong Kong Court in which the validity of the trust was brought into question, was directed by the Cayman Court not to submit to the jurisdiction of that court but to await the outcome as between the husband and wife

⁴ Megerisi v Protec Trust Management 2012 CILR and Schroder Cayman Bank v Schroder Trust AG 2015 (1) CILR 239

⁵ Clear , early examples emerged as long ago as the 1990s: In re Lemos 1992-93 CILR 460 and In re Ojeh 1992-93 CILR 348

⁶ Generally regarded as a trust designed to hold and transfer assets for the benefit of successive generations while minimizing the impact of taxation. Their efficacy has been brought into doubt by the willingness of the courts, first in England and Wales, to regard their assets as being matrimonial property and available for distribution upon divorce on the basis that “ the trustee would be likely to advance capital to the settlor [typically the husband] immediately or in the foreseeable future”. See for instance, Charman v Charman [2005] EWCA Civ. 1606. at paras 12 and 13.

and then seek directions as to the proper response to any order that purported to affect the trust⁷.

It was recognised that directions could ultimately come to include “*variation*” or “*alteration*” of the trust, such that an order for ancillary relief in the foreign proceedings could be enforced against the trust with the consent of all beneficiaries.⁸

In another case⁹ the question arose, among others, as to whether Cayman or Jersey Law applied to certain dispositions which had been made out from a trust governed by Cayman Law to sub-trusts governed by Jersey Law. While reaffirming the governance of Cayman Law over the Cayman trust, principles of private international law were applied for resolution of the conflict of laws issues arising in respect of the governance of the Jersey sub-trusts. These principles showed that, in any event, Cayman Law was the Law most closely connected with the transactions which effected the dispositions out to the Jersey sub-trusts under challenge, as well as the exercise of the dispositive power of the trustee of the Cayman Trust. The result was that the dispositions out to the Jersey sub-trusts could be and were set aside by the Cayman Court, on the ground that the power had been improperly exercised by the trustee.

The application of Cayman “*firewall*” principles resulted, in the *Megeresi case*¹⁰ - in the confirmation of the re-domiciliation of the trust

⁷ FSD Cause 161 of 2015; HSBC Int’l v Shunyon, Shao Lidan, et al, 10 May 2016. In another case, FSD 17 of 2016, Nazeer Int’l PTC v Jameel et al, preliminary directions were given to enable the trustee to take advice from leading counsel on what position to take in English divorce proceedings, the trustee having already been advised and decided not to submit to the jurisdiction of the English court

⁸ As was directed for instance, by the Jersey Court in Mubarak v Mubarak [2008] JRC 138, in response to an order made in the matrimonial ancillary proceedings by an English court.

⁹ Schroder Cayman Bank v Schroder Trust AG 2015 (1) CILR 239

¹⁰ See above at foot note 4.

from Liechtenstein to the Cayman Islands.¹¹ This then enabled the rectification of the trust documents to reflect the true intentions of the settlor for the settlement of the trust assets and notwithstanding that rectification was sought solely for the purpose of avoiding an incident of tax which would have impacted the trust assets, had they not been deemed to have been properly settled upon the trust.

Despite its highly persuasive curtailment by the Supreme Court in *Pitt v. Holt*¹², the *Hastings-Bass Principle*¹³ remains a part of the Cayman judicial armoury for the remediation of the failings of trustees.

As was held in *Re The Ta-Ming Wang Trust*¹⁴, the principle will guide the court's exercise of its wide statutory powers of remediation under the Trusts Law¹⁵. It allows the court to interfere with a trustee's exercise of discretion if it is clear that the effect of the exercise was different from that intended because of a failure to take into account relevant considerations, or because of a taking into account of irrelevant ones. This basis for interference, while still the subject of searching analysis¹⁶, is recognized to be wider than that afforded by the

¹¹ This was necessary because the laws of Liechtenstein did not avail of the remedy of rectification.

¹² [2013] AC 108, requiring, per Lord Walker, that the rule can only be triggered where it is established that there has been a breach of duty by the trustees or fiduciary - a situation which would seldom arise where competent legal or other expert advice had been taken. The consequence is that a jurisdiction which has come to be regarded in the Cayman Islands (and other "offshore" jurisdictions), as to be conveniently and fairly engaged in appropriate cases to cost-effectively avoid the damaging consequences of defective fiduciary decision making (without the need for hostile litigation) was rendered far less available or useful.

¹³ *Re Hastings Bass (Deceased)* [1975] Ch 25

¹⁴ 2010 (1) CILR 541, applying *A v Rothschild Trust Cayman Ltd*, 2004-05 CILR 485.

¹⁵ Specifically under section 48 of the 2009 Revision

¹⁶ See for instance : " In the post-Pitt world..." by Michael Furness QC and Tiffany Scott , *Trusts and Trustees*, Vol. 20 No 9, November 2014 pp871-881, also published through their chambers web-site at www.wilberforce.co.uk. A very comprehensive treatment is given by Michael Ashdown of Merton College , Oxford, *The Rule in Re Hastings Bass*: ora.ox.ac.uk. The author observes accurately that *Hastings – Bass*, a case which dealt primarily with severance of void interests from valid ones, is now regarded by the successive cases both in England and in the "offshore" jurisdictions, as the foundation of a rule that bears little resemblance to the circumstances of *Hastings-Bass* itself.

doctrine of mistake, even as the doctrine has been restated in *Pitt v Holt*¹⁷.

Continued recognition of the Hastings-Bass Principle in the wake of *Pitt v Holt* is not unique to the Cayman Islands. We see the principle now incorporated into domestic legislation in Jersey and Bermuda¹⁸ and reaffirmed by strong judicial dicta in other offshore jurisdictions, perhaps most recently in the comprehensive judgment of Deemster Doyle of the Manx Court, given in *AB v CD, cause CHP16/0007*, delivered on 30 June 2016¹⁹.

The different philosophical and policy outlook of the offshore jurisdictions is now clearly demarcated: the remedial jurisdiction of their courts for the setting aside of a fiduciary's actions carrying detrimental unintended consequences for beneficiaries, should not be confined only to circumstances of a clear breach of duty. The courts should be able to provide a remedy where it may do so without unjust consequences and this is not to be seen merely as a “*get out of jail free card*”²⁰ for trustees but in reality, as a means of avoiding unintended and unjust consequences for the beneficiaries.

¹⁷“ The true requirement for rescission on the ground of mistake is simply for there to be a causative mistake of sufficient gravity. The test will normally be satisfied only where there is a mistake either as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction ...A mistake must be distinguished from mere ignorance, inadvertence and misprediction... Forgetfulness, inadvertence or ignorance is not, as such, a mistake, but can lead to a false belief or assumption which the law will recognize as a mistake. Mere ignorance, even if causative, is insufficient.” Per Lord Walker, at paras 122, 132, 104, 105 and 108, respectively. This dictum has already been applied in the Cayman Islands: *Schroder Bank* (above) at 255-257 and in *Re the Y Trust No.1* (unreported) below.

¹⁸. Respectively by The Trusts(Amendment No.6) (Jersey) Law 2013 and the Trustee Amendment Act 2004 introducing section 47A of the Bermuda Trustee Act 1975.

¹⁹ In which among others, the Cayman Islands cases were discussed and applied. The judgment provides reasons for his order setting aside certain call options granted by trustees and declaring them void ab initio such that they were deemed never to have taken effect and to be treated by all the parties as never having been granted.

²⁰ Who may otherwise be prone to suit for breach of duty- see for instance: “The latest in *Re Hastings-Bass*: *Get out of jail free card removed*”; www.pannone.com/articels.

The case of *Re The Y Trust No. 1*²¹ illustrates the kind of pragmatic approach the Cayman Court will take for the resolution of complex issues of construction; in that case requiring the identification of the true trust protector and which would otherwise have left in place a defective chain of trustee decisions dating back some three decades, with severely detrimental impact upon the interests of the beneficiaries.

While refusing the primary relief sought which was by way of rectification, the Grand Court considered and granted different forms of declaratory relief.

As noted by legal commentators on the case²² : *“It is clear that in the right circumstances, the Cayman Islands Court will be prepared to consider all options available to it in attempting to reach a viable solution to an otherwise seemingly intractable problem.”*

The subject of trust confidentiality remains a vexed one, whether seen from the point of view of the OECD Tax Agencies or from that of beneficiaries demanding access to trust information.

The former is at the center of the controversy engendered by the European Union’s requirement that all correspondent states should implement public registers for trusts, such as to enable the tax administrators to identify trust arrangements that have a link to the EU.

The incidental vulnerability that this would create for trusts in exposing their affairs and those of their settlors and beneficiaries to abuse, has given no pause to this EU regulatory agenda. France, for example, has

²¹ FSD Cause No 49 of 2015 (ASCJ), anonymised judgment published on 19 January 2016.

²² Colin McKie QC and Morven McMillan TEP, in their article “Island Remedy”, published in STEP JOURNAL, August/September 2016 Volume 24/ Issue 7. www.step.org/journal.

introduced a new section to the French General Tax Code²³ mandating the establishment of a public register. While there are limited safeguards against abuse of trust information²⁴ these obviously go nowhere near far enough to prevent detrimental consequences.

It is perhaps not surprising therefore²⁵, that just two and a half weeks after the register went live, France's *conseil d'etat* temporarily suspended the public's right to access, while the court considered a legal challenge from an 89-year-old American woman, resident in France, who organised her succession through various trusts, the details of which had been made available to the public on the register. The court's reason for suspending the register included the woman's age and the risk as she described it, that some of her heirs might pressure her to change the beneficial entitlements.

The court also decided that the *Conseil Constitutionnel* ("CC"), should determine whether or not the public register is an infringement of Article 2 of the French Declaration of Human Rights, including whether it disproportionately infringes the state's obligation to protect the complainant's right to private life.

Commentator's on the case ask the obvious rhetorical question: "*As trusts do not interact with third party members of the public (as, say,*

²³ Under articles 368 to 368C – Decret No 2016-567 du 10 Mai 2016

²⁴ The Register became public on the French Tax Authority's website on 4 July 2016, accessible to any person with a French tax number; non-French residents not being allowed access. The user was not able to access the nature and/or the value of trust assets, and anyone found invading privacy could be held liable for libel in the case of misuse of the information.

²⁵ As reported by Adea Meldani and Agnes De L'estoile-Campi, attorneys at CMS Bureau Francis LeFebvre, in their article "Abuse of Trust?", published in STEP JOURNAL, August/September 2016 Volume 24/Issue 7.
WWW.STEP.ORG/JOURNAL

companies do), why should third parties have access to the private sphere of ordinary citizens and their family arrangements?”²⁶

It is likely that such a question will come to engage the courts of the Cayman Islands in the event of the introduction of a public register²⁷ here. Under the existing regime of our Constitutional Bill of Rights, similar protections of the right to private life are afforded²⁸ and it is just as well that there will also likely be helpful and persuasive judicial dicta to be considered from the French and perhaps other European courts.

In the meantime, the Cayman Courts have continued to be proactive in the framing of orders for the protection of the confidentiality of trusts, in appropriate circumstances. This has happened even while recognising the legitimate public interest in information about court cases and the right of the media to such information as would allow them to fulfill their duty to inform the public about the workings of the administration of justice.

And so, for instance, in *Re The Y Trust*²⁹, the Grand Court made orders for the anonymisation of the proceedings alongside the declarations made in that case and discussed above. The Court accepted the concern that publication of the uncertainties about the former administration of the affairs of the trust would be harmful to the interests of its beneficiaries. So too in another case³⁰ anonymisation

²⁶ Meldani and De L'estoille-Campi, op cit, above.

²⁷ Including -as in the case of France - information about the identification of the settlor, the beneficiaries and the trustee, in the case of individuals by name, date and place of birth and date of death, information which would be kept and made available for ten years following the termination of the trust.

²⁸ Article 9 of the Bill of Rights, Freedoms and Responsibilities, among others.

²⁹ FSD Cause 49 of 2015, above.

³⁰ *Barclays Private Trust v C, K and the Attorney General* 2014 (1) CILR 144. In this case the principle, among others - that the distributions would be a significant step to discharging the moral obligation of the adult beneficiaries to make charitable donations and so would be a benefit to the beneficiaries - was confirmed, applying the principle from *In Re Clore Settlement* [1966] 1 W.L.R. 955.

orders were made, alongside orders recognising the validity of very large dispositions from the trust fund in the order of \$750 million, in favour of charity. In this case the court accepted as valid the concern, among others, that were the full value of the trust made public, its affairs and those of its settlor's family³¹ would be seriously prejudiced. There was, on the other hand, no obvious overriding interest in that kind of information about the affairs of the trust being exposed to the public domain.

Such orders protective of the confidentiality of trust information, are a longstanding feature of Cayman Islands jurisprudence³² and the existence of the court's overriding discretion to be exercised not just in the interests of the claimant beneficiary but also in the interests of the trust overall, was long expressly recognised in the local case law³³ and later authoritatively confirmed by the Privy Council in *Schmidt v Rosewood*.³⁴

While the cases show that the Cayman Courts will be protective of confidentiality in appropriate circumstances, they also show that disclosure and will be ordered where necessary to prevent abusive or fraudulent practices.

These cases include circumstances where evidence is required for the purposes of criminal proceedings, at home or abroad.

The primary tool available to the Cayman Courts for these purposes was the Confidential Relationships (Preservation) Law³⁵ but the

³¹ Themselves the primary beneficiaries of the trust.

³² Going back at latest to the early 1990s in *Re Ojeh Trust* 1992-93 CILR 348; *In re Hall* 1996 CILR 237, among other cases.

³³ See for instance, *In Re Ojeh Trust* 1992-93 CILR 348.

³⁴ [2003] U.K.P.C. 26.

³⁵ As finally revised in the 1995 Revision before repeal.

justification for disclosure in response to such allegations of misconduct had to be firmly premised. As was stated in *Re Hall* – a Case in which the trustee was under pain of penalty of a U.S. Grand Jury subpoena premised on a presumption that the trust was a sham simply because it was settled offshore³⁶:

“the trustee... owes fiduciary obligations not to divulge trust information except in accordance with Cayman law which governs the trust... if validly constituted, the trust holds property independently of its settlor. that pivotal issue of validity remains to be decide (in this case) ... as a matter of Cayman law, which governs the trust. while that pivotal issue remains to be decided, it would be contrary to public policy and an unwarranted negation of the applicant’s duty of confidentiality owed as trustee, to direct that he should give into evidence confidential information in (foreign) criminal proceedings which, as a matter of Cayman law, may yet come to be regarded as misconceived.”

The CR(P)L has been repealed and replaced by the Confidential Information Disclosure Law 2016. It is clear however, that from Section 4 of the new law, the regime for the giving in evidence of confidential information³⁷ in court proceedings anywhere, will be very similar to that developed under the repealed law and in respect of which a very significant body of jurisprudence had been developed by the judges and will be available for application in the future.³⁸

³⁶ 1996 CILR 237

³⁷ Defined by section 2 as including “ information arising in or brought into the Islands, concerning any property of a principal, to whom a duty of confidence is owed by the recipient of the information” A principal is defined as a person to whom a duty of confidence is owed.

³⁸ Including *In Re Hall* (above); *In re Ansbacher (Cayman) Ltd* 2001 CILR 214; *In Re Polymer Purpose Trust* (unrep) Cause 246 of 2011, 19 July 2011, per Henderson J.

Of course, information-gathering is only the first stage. The next question has naturally been; “*To what extent are the courts prepared to intervene when it is found that the trust assets should be given over to someone else?*” this issue has centered mainly around the power of the court to “*lift the veil*” of the trust, or stated more prosaically - declare it to be a “*sham*”³⁹.

Since the time of the Provence conference, we have seen the robust attitude taken by the Privy Council in *TMSF v Merrill Lynch Bank and Trust and five others*⁴⁰ where the Turkish Government, as judgment creditor, while not challenging the trusts as shams, nonetheless sought the appointment of receivers by way of equitable execution over the judgment debtor’s, Mr Demeril’s, power to revoke two Cayman Trusts which he had settled.

In referring the matter back to the Grand Court for execution, the Privy Council declared that the court would recommend appointing receivers over Mr Demeril’s power of revocation, ordering him to assign or delegate it to the receivers. That the Court had the power to appoint a receiver in all cases where it appeared just and convenient to do so⁴¹. The judicial committee also stated that the court’s jurisdiction in this regard could be incrementally developed, although it was not unfettered. The demands of justice were the overriding consideration, and a receiver by way of equitable execution could be appointed over an asset regardless of whether it was presently amenable to execution. It was expressly found that as Mr Demeril had reserved to himself a

³⁹ See for instance, *Rahman v Chase Bank* [1991] JLR 103; *Re Esteem Settlement* [2003] JLR 188

⁴⁰ 2011 (1) CILR 467.

⁴¹ Citing the provisions of section 37(1) of the Senior Courts Act 1981 which had become part of Cayman law, by virtue of the Grand court Law (2008 Revision) Section 11(1) and applying *Masri v Consolidated Contractors* [2008] EWCA Civ 303.

completely general and unfettered power of revocation, the assets of the trust should be regarded by the court as his property and there was no reason why in circumstances of proven fraud⁴² it would not be open to the court to disregard the distinction between a power to affect property and the property itself. Mr Demeril's power of revocation was not fiduciary as he owed no fiduciary duties and his only discretion was whether or not to exercise the power in his own favour.

The case thus serves as a salutary reminder that the abuse of reserved powers will not avail those who seek to misuse Cayman Trusts even where there is no allegation of sham⁴³.

Another controversial aspect of the reserved powers has been their use for the appointment of trust protectors⁴⁴. The increasing use of protectors having extensive control over trustees, acting on behalf of the settlor or in a personal or fiduciary capacity, raises the jurisprudential question of the extent to which such unregulated control can be permitted without offending the irreducible core principles of the trust. In *HSBC Int'l Trustee v Wong Kit et al*⁴⁵ Henderson J. recognised that the legitimate aim of a protector is to provide an additional layer of control over the trust and enhanced security for the beneficiaries. This had become a common feature of Cayman Trusts. He also observed that because of the nature and extent of the powers often conferred upon protectors, the judicial response

⁴² The Turkish judgment was premised on a fraudulent scheme by which Demeril had misappropriated funds of deposits made with his bank which the Turkish Government was obliged by its statutory depositors' protection scheme, to refund.

⁴³ A principle earlier illustrated by *Re AL Sabah* 2004-05 CILR 373, confirmed by the Privy Council, in applying the anti-avoidance provisions of the Bankruptcy Law to set aside the provisions of the trust which had been settled by the bankrupt fraudster.

⁴⁴ Discussed at paras 41-44 of the Provence paper available at: www.caymanjudicial-legal.info/publications/papers.

⁴⁵ Sub nom *In Re Circle Trust* 2006 CILR 323

has been to regard them as fiduciary in nature, absent express provision that they should be exclusively and merely personal in nature.

The cases show that this continues to be the judicial response⁴⁶.

CONCLUSION

This more recent analysis of the cases we trust will reconfirm the judicial approach in the Cayman Islands - one that appreciates the desired flexibility even while respecting the certainty that is required for the protection and preservation of the integrity of the trust concept. As ever, at the heart of the judicial approach, is the notion that the trust, in order to be valid, must be subject to the supervision of the court in the enforcement of the core obligations, requiring that the trust must be performed honestly and in good faith⁴⁷.

Grand Cayman

22nd October 2016.

⁴⁶ The role of the protector has been at least implicitly recognized in subsequent cases; eg: Helmsman Limited v Bank of New York and Trust (Cayman) Limited 2009 CILR 490; ScotiaBank and Trust v Axelrod et al (unrep) FSD 97/13, June 1, 2015 (per Henderson J); Megeresi v Protec Trust (above); In Re Ta Ming Trust (above) and In Re Polymer Purpose Trust (above), Henderson J recognized the fiduciary nature of an appointment as “Enforcer” under the STAR Trust regime, pursuant to section 101 of the Trust law.

⁴⁷ A.N. v Barclays Private Bank and Trust 2006 CILR 367.