



*This bulletin provides an overview of the financial services industry and recent developments in the Cayman Islands, including legal and regulatory amendments, important judgments and significant transactions.*

## **Conyers Launches Private Client Practice in Cayman**

In September 2009, Conyers launched a Private Client practice in Cayman, headed by high profile lawyer Sara Collins. Conyers now provides private client advice on all aspects of Cayman trust law to Cayman licensed trustees and clients, including high net worth individuals worldwide. Following increased client demand, the practice expanded in March 2010 with the hire of well respected trusts lawyer David Pytches.

The launch of Conyers' Private Client practice in Cayman marks a significant step in the firm's growing presence in the jurisdiction. The Private Client group augments the well established Litigation and Restructuring group, headed by Nigel Meeson, QC and the Corporate/Funds group, headed by Richard Finlay.

Conyers has grown into a full service law firm with 18 lawyers and 60 staff in its Cayman Islands office since establishing there seven years ago, and has a total of 35 lawyers practicing Cayman Islands law across its global network of offices in Hong Kong, London, Dubai, Moscow, São Paulo and Singapore.

## **Canada Signs TIEA with Cayman**

On June 24, 2010, Canada signed a tax information exchange agreement ("TIEA") with the Cayman Islands.

The Canada-Cayman TIEA will provide a more tax effective platform for Canadian-owned groups with foreign operations, and exempt certain dividends payable to foreign affiliates resident in Cayman and distributed to their Canadian parent companies from relevant Canadian taxation.

The agreement will make it easier for Canadian firms to form new Cayman companies and to potentially move business to Cayman from other double-tax treaty jurisdictions.

We expect Cayman to play a significantly greater role in international structuring by Canadian companies as a result of this new TIEA. The Cayman Islands has now signed 19 TIEAs with other countries and is currently negotiating 11 others.

## Conyers Advises Second Ever Cayman Company to List on Toronto Stock Exchange

Conyers advised ISE Limited on its C\$20,700,000 listing on the Toronto Stock Exchange (“TSX”) on February 23, 2010. The listing was done by way of a reverse triangular merger which saw Conyers form ISE Limited, a Cayman company, which subsequently formed ISE Acquisition Corp., a California company. ISE Acquisition Corp merged with ISE Corporation, another California company, with the surviving company being named ISE Corporation, being a wholly owned subsidiary of ISE Limited. Immediately after the merger, ISE Limited listed on the TSX. The subsidiary is the operating ISE company. The shareholders of ISE Corporation became shareholders of ISE Limited, thus the “triangular” aspect of the merger, followed immediately by the IPO on the TSX.

## CIMA Releases New Investment Fund Statistics

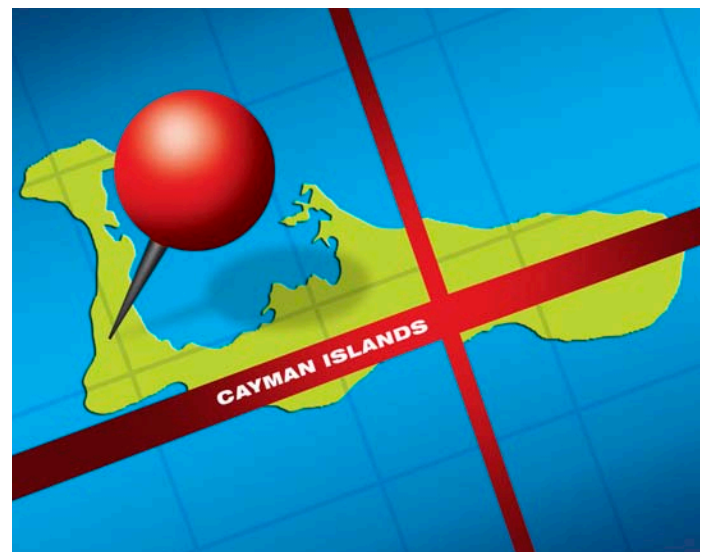
The Cayman Islands Monetary Authority (“CIMA”) has just released their latest publication, the *Investments Statistical Digest 2008* (the “Digest”). In 2007 the Cayman Islands’ Mutual Funds Law was amended to require each hedge fund registered with CIMA to submit an annual return which captures certain key data on the fund via an E-Reporting system. CIMA now uses the information gathered from the annual returns to generate the Digest.

The Digest provides an important snapshot of statistical data relevant to the investment funds industry not only in the Cayman Islands, but worldwide. It includes aggregate statistics for over 7,000 regulated funds for 2008 regarding their structure, investment strategies, financial position, fund administration, investment management, subscriptions, redemptions and suspensions. CIMA’s publication of the Digest over the coming years will provide regulators and industry participants with a greater understanding of the Cayman Islands’ and the global funds’ industry, contributing to a more transparent industry overall.

### Key statistics:

Aggregate NAV of the funds	US\$1.693 trillion
Regulated funds to file FAR as of 31/12/2008	8,957
Largest concentration of net assets held by investment managers	New York (US\$486 billion, or 29%)
Second largest concentration of net assets	United Kingdom (US \$346 billion or 20%)
Primary location for fund administration	Cayman Islands
Funds requiring a minimum subscription of US\$1 million or more	44%
Most popular investment strategies	Multi-strategy – 39% of funds Long/short equity – 22% of funds
Most popular structure	Master-feeder – 47% of funds
Average return on net assets	-25%
Total subscriptions and redemptions	Subscriptions – US\$1.014 trillion Redemptions – US\$1.110 trillion
Proportion of funds that suspended trading	7%

View the full Digest on the [CIMA website](#).



## Cayman Oppression Remedy Clarified in *Camulos v Kathrein & Co*

The recent Cayman Islands Court of Appeal decision in *Camulos v Kathrein & Co.* helps clarify and narrow the potential scope of the new Cayman Islands' oppression remedy section of the Companies Law (2009 Revision) (the "Companies Law"), section 95(3), which gives the Court jurisdiction to make certain orders in the alternative to a winding up order when a petition is presented by an investor. It also sends a clear message that winding up petitions should not be used to place improper or undue pressure on investment funds to accede to investor demands.

### Summary of the Dispute

On July 31, 2008 Kathrein & Co. (the "Investor") gave notice to redeem all of its shares in Camulos Partners Offshore Limited (the "Fund"), with the applicable redemption date of September 30, 2008. On September 3, 2008 the Fund sent a restructuring proposal to all of its investors. It provided that investors who did not consent to the proposal would receive 85% of their redemption in specie and 15% in cash. The Investor did not accept the proposal.

On November 12, 2008, the Fund suspended redemptions and redemption payments. The Investor brought an action on April 22, 2009, seeking (among other things) a declaration as to the amount it was owed and that payment of 15% of which must be in cash.

The Investor then determined that the Fund proposed to make a cash payment to all other investors in respect of the redemption of their shares which it alleged was unjust and inequitable. As a result, the Investor brought a petition to wind up the Fund on the basis that it would be just and equitable to do so.

### Summary of the Judgment

The Grand Court, at first instance, refused to make an order restraining the Investor from commencing winding up proceedings.

The decision was appealed to the Court of Appeal on the issue of whether the petition should be struck. The Court

of Appeal concluded that it should. The Court held that the Investor's winding up proceedings were unreasonable and an abuse of the Court's process. The key questions in these circumstances are (1) whether there is an alternate remedy available to the petitioner; and (2) whether the petitioner is acting unreasonably in not pursuing that alternative remedy. In this case, the Investor plainly had remedies other than the winding up of the Fund – by bringing ordinary civil proceedings – and the Court found that the Investor was acting unreasonably in not pursuing those.

The Court of Appeal also clarified that section 95(3) of the Companies Law does not provide stand alone, alternative causes of action or remedies. It is likely that an application for relief under section 95(3) must be done by petition to wind up a company, but seeking section 95(3) relief as an alternative. Put another way, winding up must be requested even though it might not be sought. It is equally clear that relief under section 95(3) ought not to be pursued if there is an alternate remedy. It is not an alternative to bringing an action.

Accordingly, the message is clear, that investors must act reasonably and consider carefully any decision to issue winding up proceedings against a fund if, in the alternative, an investor is in a position to bring a more traditional civil action against the fund, since the costs and the consequences of doing so could be particularly harsh.

### AIFM Directive Update

The Alternative Investment Fund Managers ("AIFM") Directive (the "Directive"), proposed by the European Commission to harmonize the EU regulatory and supervisory framework for AIFMs has now entered the "trilogue" process, with the Council of the European Union (the "Council") and the Economic and Monetary Affairs Committee ("ECON Committee") of the European Parliament (the "Parliament") each having agreed on their relative positions with respect to the text of the Directive. The Council and Parliament, along with the European Commission, are now faced with the difficult task of agreeing on a common text. If the Directive obtains

political approval by the end of the second reading, currently set for September 2010, the Commission forecasts that EU member states will have to implement the Directive into national law by 2012.

Critical issues for the hedge fund and private equity industries:

- (a) third country rules – these rules address the steps non-EU funds and fund managers will need to go through to be allowed to offer their funds in the EU – either approach taken by the differing versions of the Directive may prove unworkable and/or impractical, requiring EU equivalence regimes or the need to reach separate agreements with each of the 27 EU member states.
- (b) depositary liability – the adoption of a regime with a high standard of liability is likely to restrict the choice of depositary and increase systemic risk.
- (c) portfolio company disclosure – the requirement to divulge finances, strategy and planning information, particularly during the early stages of business development, may put enterprises at a severe competitive disadvantage.
- (d) remuneration rules – both versions of the Directive are being criticized as inappropriate for investment managers, as they have completely different compensation structures to banks. This issue results from the fact that the Directive copied the relevant wording from the banking directive.
- (e) leverage – both versions of the Directive have suggested the possibility of some type of leverage restriction but have stepped back from earlier, more restrictive, provisions.

While there is little doubt that a common text of the Directive will eventually be approved, the current proposals are vastly disparate, particularly regarding the critical third country rules. It is therefore still too early to make any reliable predictions as to the ultimate outcome, although it is hoped common sense will ultimately prevail. Nevertheless, amid concerns that the Directive will reduce investment opportunities and risk diversification and lead to higher costs and lower returns in the investment funds

industry, there is confidence that the Cayman Islands will remain a leader in the hedge fund and private equity industry and adapt where necessary to continue to provide a robust framework in which business will thrive.

An advisory will be circulated once the Directive is finalized to address specific provisions, implications and appropriate responses.

## **Cayman Remains Dominant in International Trusts Sphere**

*Cayman remains a major player amongst international private client forums, thanks to its promotion to the OECD White List and a number of important recent developments.*

### **New Financial Services Division**

The new Financial Services Division of the Grand Court (“FSD”) came into being on November 1 last year to deal with the increasing volume of financial services cases in Cayman. It is anticipated that the majority of proceedings relating to investment funds, corporate reorganisations, trusts and insurance will now be handled in the FSD.

The emphasis in the FSD is on providing more flexible and efficient case-management. A one-off fee of CI\$5,000 is payable on filing of the originating summons or writ and, thereafter, there are no further filing fees. All parties attend a case-management conference with the judge to set out a time-table for the case and that same judge will see the case through from start to finish.

The FSD’s case load has an intake of about 200 per year, with an average disposal rate of within twelve months. The standard period of resolution for the substantive issues of these cases is expected to be about 6 months. Three new specialist judges have been appointed to the bench of the FSD.

### **Recent Trusts Cases**

*MEP and Anor v Rothschild Trust Cayman Limited and ors.*

This case concerned an application to vary the terms of a trust under Section 63 of the Trusts Law (as revised), the section which gives the Court power to authorise dealings

with trust property where there is no power for that purpose vested in the trustees by the trust instrument.

The case is significant as it is among the first of its kind in Cayman and demonstrates a willingness on the part of the Court to allow for greater flexibility in the management of administration of trusts where it is expedient to do so.

The trustees of a family trust applied for an order empowering them to partition the trust fund into three equal shares and to appropriate one such share to each of three sub-funds nominated in the names of the daughters of the primary beneficiary. Each share would continue to be held on the original trusts set out in the trust instrument but, from an administrative viewpoint, the existence of separate funds would allow the trustees to address the different tax circumstances, investment goals and practical needs of the various branches of the family. There was no power in the trust instrument which would allow the trustee to partition the trust fund in this way.

Smellie C.J. analysed the limits of the Court's jurisdiction to modify beneficial entitlements under a trust whilst conferring powers on trustees. He looked at the Court's inherent jurisdiction to supervise trusts and its jurisdiction under Section 72 of the Trusts Law – the latter being a power for the Court to approve variations on behalf of certain categories of beneficiary. He concluded that neither could be invoked in this case. However, on the basis that the predominant purpose for partition was to facilitate the more efficacious management of the trust with the further potential benefit of maintaining family harmony, and that it was not intended that there would be any alterations of the respective beneficial entitlements as a result of the partition, he accepted that the Court had jurisdiction under Section 63 and granted the necessary power to the trustee.

*TMSF v Merrill Lynch Bank and Trust Company (Cayman) Limited and ors.*

This case involved a Defendant, a Turkish citizen, who had settled two revocable Cayman trusts in 1999; the Appellant, TMSF, was a Turkish government entity responsible for pursuing fraudulent financial operators. In proceedings in Turkey, the court had awarded TMSF judgment against the

Defendant in the sum of US\$30 million, this amount reflecting the value of the assets in the Cayman trusts plus interest and costs. The Defendant was subsequently made bankrupt in Turkey.

TMSF issued proceedings in Cayman seeking to have receivers appointed over the Defendant's powers of revocation so that they could have the trusts wound up in order to satisfy their judgment debt. At first instance, the Chief Justice agreed to appoint receivers over any future distributions made to the Defendant under the trusts and, further, were he ever to exercise his power to revoke the trusts, the assets would pass immediately to the receivers. However, he refused to appoint receivers over the power of revocation on the basis that, being a power, it did not constitute "property" over which a receiver could be appointed.

On appeal, the Court of Appeal ("CA") upheld the Chief Justice's decision. On the question of the Court's jurisdiction, the CA chose to concentrate on policy issues, rather than examine whether a power of revocation could be regarded as property. Drawing an analogy to the law of bankruptcy, where legislation had been required in order to make a general power of appointment available to a trustee in bankruptcy, the CA concluded that legislation would also be required to allow equitable execution over a power of revocation and that it would not be open to the court to take such an advanced step.

Significantly, both the Chief Justice and the CA found that the two trusts were valid and duly constituted, notwithstanding the existence of the powers reserved by the settlor.

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