

Firewalls, Families and Fiduciaries: New Cayman Case Law

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To say the very least, matrimonial disputes can be a trying and traumatic state of affairs for all involved. Discord over custody, property and innumerable other matters can seem to endlessly plague family members, and related litigation often creeps across a variety of jurisdictions. Where a family trust is involved, the more contentious of marital disputes can quickly draw trustees into the ring for a bout over rights to information regarding, or even to assets held in, the trust.

If foreign matrimonial proceedings seek to encroach on the administration of a Cayman Islands (“Cayman”) trust, the trustee of that trust is protected in many respects by what are known as the “firewall provisions” of the *Trusts Law (2011 Revision)* (“Trusts Law”). In a helpful development for the jurisdiction, a judgment delivered by the Grand Court of the Cayman Islands (“Grand Court”) in December 2016 has confirmed the operation of those provisions and reinforced the need for a trustee of a Cayman trust under attack in foreign matrimonial proceedings to ensure its response is at all times in the best interests of the trust.

Re The A Trust

In *In the Matter of the A Trust* (unreported, 1 December 2016), a Cayman STAR Trust (the “Trust”) was the subject of proceedings in the Grand Court commenced by the trustee of the Trust. In establishing the Trust, its settlor had executed various Letters of Wishes, which set out his very detailed views about who should and should not benefit from the Trust and how the assets of the trust should be applied. These Letters of Wishes also made it clear that the settlor wished to ensure that beneficiaries did not live lavish lifestyles funded by the Trust while still ensuring that they received appropriate benefit from the Trust in the future. Consistent with this, the settlor had expressed a desire to see the trust grow from generation to generation and to be a charitable trust providing support for its specified charitable objects.

The settlor and his wife, N, both of whom were excluded from the Trust, subsequently became involved in divorce proceedings before the English High Court (“English Proceedings”). By 2016, the focus of the English Proceedings had turned to the Trust. The main asset of the Trust was shares in a Cayman company, which itself owned shares in other companies holding legal title to very substantial property assets in the UK. In the course of the English proceedings, N was seeking orders to vary the Trust and set aside N’s exclusion as a beneficiary of the Trust so that she might have an interest in it. Flowing from that, requests were made of the trustee, located in Cayman, to release information about the Trust for the purposes of the English Proceedings.

The trustee determined that it was not in the best interests of the beneficiaries of the Trust to submit to the jurisdiction of the English High Court or to disclose confidential information to the parties to the English proceedings. Its concern was that, in doing so, it would confer, on the English High Court, an enforceable power to act to the detriment of the beneficiaries of the

trust and to the benefit, instead, of either the settlor or N. However, recognising that it was an important step for a professional trustee to refuse to submit to the jurisdiction of a foreign court, the trustee applied to the Grand Court for directions pursuant to Section 48 of the Trusts Law.

Application of the Trusts Law

Section 48 enables a trustee of a Cayman trust to apply to the Court at any time for "an opinion, advice or direction on any question respecting the management or administration of the trust money or the assets of any testator or intestate...". Provided that the trustee acts on the opinion, advice or direction given by the Court, he or she will be deemed to have discharged his or her duty as trustee in respect of the subject matter of the application.

In this case, the directions sought were whether the trustee should submit to the jurisdiction of the English Court and participate by disclosing further confidential information to the parties to the English matrimonial proceedings. The former trustee of the Trust had previously provided a "position statement" and copies of the trust deed and related instruments to the parties to the English Proceedings, on the basis of legal advice it had obtained to the effect that providing such documentation would not amount to a submission to the jurisdiction of the English High Court. However, very little information had been provided in relation to the Trust itself. The position of the Trustee was that any variation of the terms of the settlement or any challenge to N's exclusion from the settlement should only be made in accordance with the laws of the Cayman Islands by the Grand Court and as such further disclosure was not necessary.

In considering the matter, the Grand Court confirmed:

- The claims by N, to vary the trust and to set aside her exclusion using provisions in a foreign statute, were, in essence, third party claims, and it was the trustee's duty to protect and preserve the Trust from such claims.
- Pursuant to Cayman's firewall legislation in Sections 90-93 of the Trust Law, which confirms that a trust in Cayman can only be varied in accordance with the law of the Cayman Islands and only by a court of the Cayman Islands, any order made by the English High Court against the trustee would not be enforceable against the trustee, the beneficiaries of the trust or the trust fund.
- N had already been given the trust deed and all supplemental instruments, and full financial information for the underlying companies in the structure. The Court found it was reasonable to conclude that N had sufficient information to understand the terms of the trust and its finances, and that for the trustee to submit to the jurisdiction of the English High Court or to provide further information was not in the best interests of the beneficiaries, in all the circumstances.

The Cayman Islands Approach

The case is a helpful affirmation of the approach previously taken by the Grand Court in *RBS Coutts (Cayman) Ltd -v- W and Others* [2010] 2 CILR 348 (known as "*Re B Trust*"), which confirms that an order of the English High Court is unenforceable in Cayman, whether or not the Trustee submits to the jurisdiction because of the terms of the firewall legislation. In that case, and in a similar factual context, the Grand Court held that a trustee must "jealously guard" its independence and noted that it would be unwise and inappropriate for a trustee to allow itself to be placed in a situation where its trust obligation comes into conflict with an obligation to obey an order of a foreign court.

Divorcing families and related cross-border disputes over asset-protection structures, including Cayman trusts, can place trustees in a challenging, and unenviable, position. However, through its judgments both in *Re B Trust* and now in *In the Matter of the A Trust*, the Grand Court has laid down a clear set of rules as to how trustees should approach a foreign challenge to a trust governed by Cayman Islands law. While these rules may not assist in tempering the trauma of matrimonial proceedings, they will, nonetheless, give the parties clarity to their rights and standing in relation to any such challenge, and be of great support to the trustee in its decision-making processes.

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