



SOME LIKE IT HOT off the press

Recent trust cases round up

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Overview

Variations – a novel possibility

Protectors – a perennial issue still causing problems

Confidentiality in trust applications post-Panama



A new slant on variations

Most jurisdictions have two options:

1. Full-scale variation under the local equivalent of the English Variation of Trusts Act 1958 (section 72 of the Trusts Law (2011 Revision) in Cayman)
2. Changes to management and administration under the local equivalent of section 57 of the English Trustee Act 1925 (section 63 in Cayman)



Requirements for a full variation

Full-scale variation allows changes to *beneficial interests* as well as administrative terms but requires:

- (1) *consent* from all adult beneficiaries and
- (2) *benefit* for unascertained, minor and unborn beneficiaries



Requirements for a s.63 change

No need for consents from adults though requires an appropriate level of support

Test is *expediency* in the interests of the trust as a whole

Any change to beneficial interests must be only *incidental* to the administrative change sought: *Re Z Trust, MEP v Rothschild Trust Cayman Limited* [2009] CILR 593 (Grand Court); *Southgate v Sutton* [2011] W.T.L.R. 1235 (English Court of Appeal)



New(ish) kid on the block: section 47 Trustee Act 1975 of Bermuda

Section 47, substantially similar to section 63 but omits the words *“management and administration”*

Approached by Bermuda Supreme Court as an amalgam of the English section 57 and section 64 of the English Settled Land Act 1925 (*Hambro v Duke of Marlborough* [1994] 3 WLR 341. Possibly modelled on the Northern Irish statute

Now regularly used in Bermuda to vary dispositive as well as administrative powers in increasingly ambitious ways



Bermuda cases

GH and IJ v KL and others [2010] Bda LR 86

Re ABC Trusts [2012] Bda LR 89 per Kawaley C.J.:

“[Section 47] gives the Court very broad jurisdiction indeed to authorise transactions in relation to trust property which have the effect of varying the terms [of] a trust deed. This power is actually broader than that conferred by the provisions of section 48 which explicitly deal with variation alone.”



Why is the Bermuda legislation so useful?

Like section 63 in Cayman:

- (1) no consents required from adults although the trustee will want to be sure that it has their support in proceeding with the application
- (2) The test is *expediency* – no need to provide benefit for unborns etc. though the court likes to hear from someone (representative defendant) on behalf of those classes



Typical local scenario

US-style Cayman trust with no, or limited, overriding powers of appointment or advancement

Accumulated income

Some US beneficiaries, affected by the US throwback tax/accumulation distribution rules risking complete elimination of their interests

US advisers advocate idea of restructuring to improve US beneficiaries' position by severing their interests from non-US beneficiaries and changing the beneficial interests



Position in Cayman and everywhere other than Bermuda

Partition of interests possible even if that causes some incidental change to beneficial interests: *Scotia Bank and Trust (Cayman) Limited v Brossard* (October 2015)

Anything more requires full-scale variation with consents and benefit

US advisers say they do not want their beneficiaries consenting and ideally would like to convert their fixed interests into discretionary interests. If so, no variation possible



Position in Bermuda

Section 47 application possible. Recent examples:

Re Lambda Alpha and Beta Trusts (November 2015): order allowing partition into separate settlements each of which would contain a wide power of advancement allowing individual restructuring

Re L Trusts (January 2016): division into separate settlements, two of which held on the same fixed trusts but the third on discretionary trusts



Considerations for trustees

Changing the proper law to found jurisdiction in Bermuda:
careful consideration required but if the reason for the change is to benefit the beneficiaries that should be a proper fiduciary decision

Are the adult beneficiaries on side? Specially important if they are to become discretionary objects in place of their fixed interests

Are any beneficiaries or classes of beneficiaries prejudiced?

Will you stay or will you go (back)?



Recent trouble with protectors

Re Piedmont & Riviera Trusts; Jasmine Trustees Limited v L
[2015] JRC 196

Jersey Royal Court set aside appointment of new trustees and protectors for irrationality

Power to appoint is fiduciary (*Re Circle Trust* [2006] CILR 323)



Re the K Trust – Guernsey 31/2015

Breakdown of relationship between protector and beneficiaries affected the administration of the trust and the beneficiaries' welfare. Protector removed.



Formal problems over protector appointments

Re The Y Trust No. 1: Smellie CJ, 19th January 2016

Wrong protector named in the original settlement cast doubt on the validity of a subsequent retirement and appointment of trustees (and every other subsequent appointment) done without the consent of the named protector. Put in issue the validity of 31 years of trust administration. Held that the retirement could be achieved without consent and all was well. Phew.