

**INTERNATIONAL WEALTH STRUCTURING FORUM  
CAYMAN ISLANDS, 28-30 JANUARY 2018**

**INTERNATIONAL TRUSTS AND TRUST LITIGATION UPDATE**

**Keynote Address by Honourable Anthony Smellie, QC,  
Chief Justice of The Cayman Islands**

I would like to welcome everyone here to this important conference and to thank the organisers for the opportunity to address you today. It has been at least four years since I last had the pleasure of speaking to such a distinguished gathering of local and overseas trust practitioners, although I am pleased to note that Justice Mangatal was present in 2016 at a similar conference to fly our judicial flag<sup>1</sup>. Well, I am here again today to do just that, to share with you the perspective from the Cayman bench on developments in the trust field, especially as they may be gleaned from a look at some recent cases.

To begin, I think it is always useful to reflect, however briefly, on why it is that we are all so supportive of the the trust concept, even while it continues to sustain attacks, especially from onshore regulators aimed at

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<sup>1</sup> Presenting a paper to The International Trust and Private Client Forum, Cayman Islands, 24-25 October 2016, on our behalf entitled "Cayman

undermining its credibility. The use of the offshore trust for wealth preservation, estate planning and for charitable as well as commercial purposes, is long established. The central tenet of an ordinary private trust has remained unchanged over the centuries, since the emergence of the trust concept. It is that a trustee is obliged to administer, honestly and in good faith, certain property held by him or under his control for the benefit or advantage of beneficiaries, who are entitled to enforce that obligation in the courts of equity<sup>2</sup>.

Its venerability notwithstanding, over the last forty years or so, we have seen a remarkable level of innovation and change in the field of private and commercial trusts, and in the succession context. As families have become more prosperous and individuals increasingly internationally mobile, their wealth structuring and estate planning requirements have become increasingly complex and sophisticated. This has sparked the evolution of a diverse and flexible range of structures for holding and managing wealth and has helped to maintain the major international

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<sup>2</sup> Commonly known as the '*irreducible core*' of the trust, a reference to the dicta of Millett LJ (as he then was) in *Armitage v Nurse* [1998] Ch 241

financial centres at the forefront of the development of international trusts law.

The rapid evolution of wealth planning structures to keep pace with changing social and economic circumstances has, one might say inevitably, come with an increase in regulation and the drive to ensure fiscal and financial probity and transparency. This regulatory movement, which began in the natural defence of nations against international crime and the threat of terrorism, gathered even greater momentum since the financial crash in 2009, as developed nations have been striving to maintain their fiscal regulatory systems and augment their sources of domestic tax revenue. A central component of those efforts has been the introduction of fiscal legislation in the USA and Europe seeking to extend their reach extra-territorially to overseas states, including within the offshore financial centres<sup>3</sup>. Those countries, in turn, have imposed internal reporting laws and procedures on their local

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<sup>3</sup> Spearheaded by the OECD's Global Forum on Transparency and Exchange of Information for Tax Purposes and its Standard for Automatic Exchange of Financial Account information in Tax Matters (the AEOI Standard), developed by the OECD working with G20 countries. The United States enacted the Foreign Account Tax Compliance Act (FATCA) for implementation, since 2015 of its obligations. However, according to the OECD's AEOI Implementation Report 2017 at [9] "All jurisdictions asked to commit to the Global Forum's AEOI Standard have now done so, except the United States. As of 2015 the United States exchanges certain information automatically pursuant to its various Model 1 FATCA intergovernmental agreements, which includes recognition by the government of the United States of the need to achieve full reciprocity." Is this OECD speak for "what is sauce for the goose is not necessarily sauce for the gander"? Note for instance, that in the meantime, Cayman has entered into tax information exchange treaties with some 33 countries, including all the G20 nations.

financial services providers, not only for the purpose of fighting international crime but also with a view to assisting the USA and Europe, in their tax and regulatory efforts. Put bluntly, this has become assistance to identify assets held by their citizens in offshore structures and thus assist, albeit indirectly, in the enforcement of their revenue laws. Aimed at achieving the automatic exchange of financial information, the G20 nations have in one highly effective campaign, collaborated to reverse the long-established principle of private international law, that one state has no obligation to assist in the enforcement of the revenue laws of another<sup>4</sup>. For a detailed discussion of the principles as they were once understood, one need look no further than the Cayman Islands case of *Wahr-Hansen*<sup>5</sup> in 2007, principles derived from the English House of Lords case involving the Government of India in 1955 and the U.S. case of *Moore v Mitchell* in 1929<sup>6</sup>.

Some might say that despite, or perhaps because of, this period of rapid development and change, the concerns of settlors of trusts have

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<sup>4</sup> *The Govt of India v Taylor* [[1955] 1 All ER 292

<sup>5</sup> *Wahr-Hansen and others v Compass Trust Company Limited and others* [2007] CILR 55, per Henderson J. in the Grand Court.

<sup>6</sup> *Moore v Mitchell* (1929) 30 F (2d) 600

remained remarkably consistent. There is a continuing expectation of privacy and confidentiality, albeit consistent with the new legislative framework and reporting obligations. There remain concerns about personal security. This often involves protection of children and grandchildren, not only from physical threats but also from perceived potentially malign influences, through social media and especially from those who might seek to take advantage because of their family's wealth. Settlers still wish to make charitable donations or establish charitable or philanthropic organisations, to ensure that their family's wealth is shared with those most in need and that the family's personal ethos of charitable giving persists long after the original settlor has died. Settlers may be prudently concerned by the damage a divorce might do to their family structure and to their carefully structured wealth planning. They may also be driven by a desire to ensure, that whatever wealth planning structure they put in place is consistent with their religious or spiritual beliefs.

As I discussed in a paper given to a conference in France almost ten years ago<sup>7</sup>, offshore legislation seeks to keep up with the demand to adapt wealth planning structures to meet the needs and expectations of the global market, consistent with the evolving regulatory obligations of jurisdictions and the fight against international crime and terrorism. In the Cayman Islands this past year alone, we have seen a new revision of our Trusts Law – the first since 2011, a Confidential Information (Disclosure) Law, a Data Protection Law, a Non-Profit Organisations Law (the first charities legislation to reach the statute books in the Cayman Islands) and last but by no means least, a new Foundation Companies Law: each of these legislative developments being of interest and relevance to everyone in this room and of course, to the international market.

This reminds me of the period of almost constant legislative innovation in the 1990s, when the Cayman Islands saw the introduction of statutory provisions for reserved powers, foreign elements provisions protecting

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<sup>7</sup> The Trusts and Estates Litigation Forum, Provence, March 2008: "Form and Substance: The Cayman Islands Perspective in the debate about offshore trusts"- [www.caymanjudicial-legalinfo.ky/publications/papers](http://www.caymanjudicial-legalinfo.ky/publications/papers).

Cayman Islands trusts from forced heirship and other conflicts of law attacks, now more commonly known as the 'firewall provisions' at Part VII of our Trusts Law, and a Law providing for the valid creation of non-charitable purpose trusts, known as STAR Trusts, now found at Part VIII of our Trusts Law.

I am aware that you will be hearing a great deal about our recent legislative developments over the coming days, so I will not attempt to dwell on the detail here. I do, however, wish to say that it is of great credit to the practitioners and their collaborative work with Government, that the Cayman Islands remain at the cutting edge in the development of complex, new and exciting wealth planning structures.

But what of the role of the courts and the judicial response to the challenges of this ever-changing landscape? As we have commented before<sup>8</sup>, judges speak to the issues through their decided cases and so, it is to a brief update on the international case law that I turn now, with emphasis of course, on Cayman cases. What follows is necessarily my

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<sup>8</sup> In the aforementioned paper entitled 'Cayman Courts and Resolving International Trust Disputes' delivered by the Hon. Ingrid Mangatal J. at the International Trusts and Private Client Forum in October 2016

personal choice of cases<sup>9</sup> as there have been a great number of interesting decisions over the last few years.

One theme which has clearly emerged from the cases is that the debate on the privacy of trust proceedings continues. It has been a settled principle of common law in our jurisdiction for decades, following the House of Lords decision in *Scott v Scott*<sup>10</sup> in 1913, that the proceedings of the courts are open to the public. The court here has expressly approved the analysis of Lord Haldane in *Scott v Scott*<sup>11</sup> that '*...in public trial is to be found ...the best security for the pure, impartial and efficient administration of justice, the best means for winning for it, public confidence and respect.*'

Modern case law has not derogated fundamentally from this principle. Indeed, it has, if anything, become more focussed and refined in the cases over the last decade. This is as a direct consequence of the European Convention on Human Rights and its emphasis on the right to

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<sup>9</sup> And I here acknowledge the invaluable assistance of attorney Morven McMillan, in the selection and analysis of the cases in preparation for this paper.

<sup>10</sup> [1913] AC 417

<sup>11</sup> In *AHAB v Saad Investments* [2011] (1) CILR 326, in *In Re Sphinx* 2017 (1) CILR 176 and most recently in *TIBC (in admin.) (as intervenor for inspection of documents) v AHAB*, Cause FSD 54 of 2009 (ASCJ), judgment delivered 28 November 2017.



a fair and public trial, underpinned by the *'freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers'*.<sup>12</sup> This principle has also been enshrined in the Constitution of the Cayman Islands at sections 11<sup>13</sup>, and 7(1) where the latter provides that *'Everyone has the right to a fair and public hearing in the determination of his or her legal rights and obligations by an independent and impartial court within a reasonable time.'*

This means, in essence, that the open and public administration of justice, is the starting point in any court proceedings in the Cayman Islands. Consequently, every judgment of the Cayman Islands court is freely available for everyone to see, either by attending at the court office to take a copy from the Register of Judgments or accessible online on the Courts Services' website. Once proceedings are issued, a copy of the Writ or Originating Summons is published on a Register of Writs and Originating Process, again open to public inspection. Counterclaims

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<sup>12</sup> at Article 10

<sup>13</sup> Enshrining the democratic right to information about government to enable the freedom of expression of ideas and scrutiny about government.

and third-party notices are also required to be placed on the Register, meaning that the existence of all legal proceedings, the identity of the parties and the general nature of the claims in the action, are all matters of public record<sup>14</sup>. At the culmination of the proceedings, the trial is open to the public.

There are however, limits to public access: it is notable that only the originating process and the final judgment in the proceedings are automatically available to the public. The balance of the court file will only be made available to non-parties, if they can demonstrate to the court that they have a sufficient interest in the proceedings and it is in the interests of justice or some other public interest (e.g. investigative journalism) that they be granted access<sup>15</sup>.

How then does the emphasis on open justice sit in the context of trusts applications, confidentiality having long been a central theme in the fiduciary relationship of trust and confidence, which exists between beneficiary and trustee?

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<sup>14</sup> GCR O. 63 rules.3, 7 and 8.

<sup>15</sup> TIBC v AHAB (above)

There is no express exception made for trust proceedings to the overarching principle of open justice. There are however, proceedings in the Cayman Islands that will automatically be heard in camera and the procedure governing those, is set out in Practice Directions which accompany the Grand Court Rules. Those categories of proceedings are automatically private and prohibited from publication – e.g., wardship, adoption or custody proceedings involving an infant; mental health law applications; proceedings involving issues of national security or commercial secrecy<sup>16</sup>. The same Practice Directions allow any party involved in a particularly sensitive matter, to apply for an order prohibiting or limiting publication of any judgment or order or documentation generated in the proceedings. There is also a separate rule, GCR O.63 r.3 (4), which permits application to have the court file sealed, so that no other party to the proceedings nor any third party, can obtain access without an order of the court. It is then a matter for the court's discretion whether to allow the application and many such

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<sup>16</sup> Practice Direction (Publication of Chambers Proceedings) 1997 CILR Notes 1-3.

applications have been allowed in trusts cases. Recent Cayman cases illustrate clearly the balancing exercise which the court undertakes between the requirements of open justice and the requirements in individual trust applications.

In *Barclays Private Bank and Trust (Cayman) Limited v C, K and the Attorney General*<sup>17</sup>, the trustee applied pursuant to section 48 of the Trusts Law for directions from the court, to 'bless' its decision to make significant distributions out of a family trust to charity. The family and trustee were concerned to avoid publicising the magnitude of the proposed distribution, as it would have revealed publicly the extent of the family's wealth, thereby giving rise to all of the concerns I mentioned earlier (in this paper), about personal security and protection of children. The magnitude of the proposed distributions also gave rise to concerns from the parents of the minor beneficiaries involved, that they themselves might be adversely influenced by knowledge of the extent of their family's wealth, which might affect the development of their personal values and attract acquaintances who might seek to take

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<sup>17</sup> [2014] CILR (1) 144

advantage of them. Accepting the justification, I granted their request for confidentiality orders.

Confidentiality will also be a concern when a trustee consider whether to bring or defend a claim relating to the trust, because of concerns about the funding and recoverability of its costs of doing so. A court application for permitting their payment from the trust fund (widely known as a *Beddoe*<sup>18</sup> application) is a sensible protection for a trustee, removing any doubt in the event of an unsuccessful claim or defence of a claim, that the trustee may have acted in breach of trust or otherwise improperly, in litigating at the expense of the fund. A decision whether to pursue or defend a claim can be complicated by any number of factors, including a division of opinion among the beneficiaries as to the correct course of action, the possibility that the costs of the action will exceed the value of the claim and the possibility that there are insufficient assets in the trust fund to pay the costs of an action, which if unsuccessful, could include the costs of the opposing parties.

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<sup>18</sup> *Re Beddoe, Downes and Cottam* [1893] 1 Ch 547, CA

Traditionally therefore, trustee *Beddoe* applications have been heard in private. This is designed to encourage trustees to discuss freely with the court, sensitive or difficult questions about the conduct of litigation at the expense of the trust fund<sup>19</sup>. This practice is adopted also to prevent parties adverse to the trustee in the main action, finding out what the trustee and its advisers thought of the strengths and weaknesses of the claim in the main action. Deemster Doyle, in the Isle of Man case of *Delphi Trust Ltd*<sup>20</sup>, in his detailed examination of the case law from a variety of jurisdictions, reached the same conclusion, such that it may now be regarded as widely accepted in Offshore jurisdictions, that *Beddoe* proceedings should generally continue to be heard in private.

A notable *Beddoe* application came before the Cayman Grand Court last year in the case of *X v Y* (unreported), written judgment published on 15 March 2017<sup>21</sup>.

The Cayman Islands trustee in that case had been sued in foreign proceedings, in which the plaintiff asserted a contingent but non-

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<sup>19</sup> And will sometimes be to the exclusion even of the beneficiaries if they are likely to act adverse to the interest of the trust: see *In re Moritz* [1960] Ch 251, long adopted and applied in Cayman, see: *In re Ojeh Trust* 1992-93 CILR 348

<sup>20</sup> (2014) CHP 13/0120.

<sup>21</sup> A cause filed in the FSD, judgment published in anonymized form to protect confidentiality.

proprietary claim to the trust assets. The trustee applied for *Beddoe* relief to allow it to defend<sup>22</sup>. The trustee also sought confidentiality orders to preserve confidentiality in the material placed before the court on the *Beddoe* application. I granted the confidentiality orders, as I was satisfied about the propriety of the application and that the principles of open justice, including the public interest in the open administration of justice, would not be offended by their grant.

The need for the *Beddoe* application was based on the fact that an adverse judgment in the foreign action would be enforced against the only realizable asset in the trust fund, thus depriving the beneficiaries of all of the assets in the fund. With this firmly in mind, I granted the trustee orders (1) permitting it to defend the foreign action; (2) permitting it to borrow funds from another connected trust to defend the foreign action and (3) pre-emptively, for an indemnity for any costs and expenses properly incurred, ultimately to be reimbursed to the trustee from the trust concerned. Reflecting on the position of the claimant in

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<sup>22</sup> The application was brought on informal notice by letter being given to the claimant in the foreign proceedings who was allowed to make written representations but no formal notice was given such as to allow the claimant the right to appear in the *Beddoe* proceedings.

the foreign action who objected to the use of the trust funds to defend, I found that a judgment creditor who cannot assert a proprietary claim to the trust assets, takes them as it finds them at the time of judgment and if by that time, the assets are depleted in the proper administration of the trust, then so be it. The interests of a putative creditor did not, in the particular circumstances of that case, outweigh the interests of the beneficiaries in the trustee defending the claim against the trust assets.

Coincidentally, only last week, another application for *Beddoe* relief to permit a trustee to defend foreign proceedings and allowing it to bring separate claims on behalf of the trust, was granted, with the same principles in mind<sup>23</sup>.

Other trust related applications have also commonly been heard in private, for example, applications under the Variation of Trusts Act 1958 in England, the equivalent application made here in the Cayman Islands, under s72 of our Trusts Law.

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<sup>23</sup> In *Safeguard Management Corp (as trustee) v. Timis et al*, Cause FSD 5 of 2018(ASCJ) ,orders made on 23 January 2018.

Here although no notice of the *Beddoe* application was given to the claimant in the foreign action, the application would have been expected because an exemption from injunctive orders made in those proceedings anticipated and allowed the use of trust funds to defend the action.



In keeping with the trend towards open justice, in *V v T, A*<sup>24</sup> in England, Justice Morgan considered that this practice had gone too far in relation to variation of trusts applications. He considered that the starting point for variation of trust applications, is that they should be dealt with in public. Derogations from this principle would only be allowed in exceptional circumstances and, even then, only to the extent strictly necessary.

With that judgment of Justice Morgan in *V v T, A* firmly in mind, the Chancellor of the High Court in England issued a Practice Note dated 9 February 2017, directing that parties should attend before a deputy Judge (known as a Master in England) before they issue a variation application, to consider whether interim confidentiality orders might be appropriate. If the Master is then satisfied by evidence that there is real prospect of the court directing that the main hearing should be in private or that there should be restrictions on reporting of the proceedings, then interim orders can be made to preserve confidentiality.

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<sup>24</sup> [2015] WTLR 173, [2014] EWHC 3432 (Ch).

The Practice Note makes it clear, that whether it is appropriate to make an interim confidentiality order, will depend on the circumstances in each case. It explains that these orders will not be made automatically and applicants are required to provide evidence which justifies the making of such an order. The court at the final hearing, could then allow the continuation of the confidentiality order or disallow it.

This was the position until 2 March 2017, when the *ex tempore* judgment of Justice Rose in *MN v OP*<sup>25</sup>, appeared to tighten the grounds for making confidentiality orders in variation applications even further. Upon an application by the trustee for variation and anonymity orders, Justice Rose held that:

- (a) there was no presumption in favour of anonymity even in cases where children were involved; and
- (b) the question was always whether the case was an exceptional one requiring a derogation from the principle of open justice.

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<sup>25</sup> Chancery Division, unreported judgment, 2 March 2017. The court approved a variation of the settlement but refused to grant an anonymity order for the parties concerned.

As it was already publicly known that the claimant's estate was substantial, the instant application was unlikely to add materially to information that was already publicly available and the Judge regarded it as far-fetched to suggest that children could not be identified by internet searches, despite their different surnames. Furthermore, there was no evidence of steps taken by the family to conceal or withhold that connection. The Judge also decided that there was a clear public interest in the transparency of tax arrangements (such as those that might be facilitated by the variation<sup>26</sup>), even where they were not improper and this was not limited to cases of aggressive tax avoidance. The anonymity order was therefore refused although an interim order was continued for 21 days, to allow the claimant to pursue an appeal. The appeal has been filed but I am told that the hearing is not expected until late February<sup>27</sup>. The judgment, likely to be the first at the appellate level

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<sup>26</sup> As the consequence of extending the perpetuity and accumulation periods under the Perpetuities and Accumulations Act 2009

<sup>27</sup> I am informed by Mathew Slater of Counsel (10 Old Square Chambers) who appeared for the trustee, that the appeal is set to be heard on 27-28 February 2018. As an indication of the potential effect of the decision in MN v OP, an article published by 10 Old Square Chambers on 1 November 2016 ("The Variation of Trusts, Onshore and Offshore"), reported that "In general, since V v T,A, matters have calmed down and Masters are making anonymity orders as a matter of course in most applications. Whilst these are interim orders, by the time the application comes on for final hearing they have (so far) been kept in place and made permanent."

on this issue of confidentiality for trust variation applications, is keenly awaited.

Another judgment of the Cayman Islands court in which an anonymity order was obtained, was the case of *A, B, C, D, E v D1 and D2*, written reasons delivered on 22 February 2017<sup>28</sup>. The court is occasionally asked to assist in circumstances where a change of trustee, whether by way of substitution, removal or retirement, becomes “*inexpedient, difficult or impracticable*”. This was such a case.

In the case, Madam Justice Mangatal considered an application made jointly by the beneficiaries of various trusts, for orders substituting a new trustee in the place of the original. The beneficiaries were all members of the same family and beneficiaries of a number of trusts, all of which are governed by Cayman law. The Cayman Islands court therefore had exclusive jurisdiction over any proceedings concerning the trusts.

The outgoing trustee was a company incorporated outside the Cayman Islands, facing allegations made by the US Department of Justice that

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<sup>28</sup> Cited as *In the Matter of Various Trusts*, Cause FSD 206 of 2016 (IMJ).

some of the assets of the trusts were proceeds of a conspiracy to launder money; money which was alleged to have been misappropriated from a company, wholly owned by the government of another country. This conspiracy was alleged to involve the settlor, who was also one of the applicant beneficiaries, in particular. While the allegations were strenuously denied, forfeiture applications had been issued in the California Central District Court in respect of the trust assets. The trustee had however, elected to take no part in the proceedings and the California court, had rejected attempts by the beneficiaries to intervene. The upshot was that there was a concern that judgment might be entered against the trust in default of a defence. The trustee was said to be “paralyzed”, either from performing its functions as trustee or from resigning, for fear that it would be accused by the U.S. Government, of involvement in money laundering and would otherwise be exposed to civil or criminal liability. The beneficiaries therefore made an application to the Grand Court, as the forum of the governing law, that an alternative trustee who could act to defend the trust, be installed by the Court.

The Court's primary focus was to consider whether, in light of the trustee's failure to take any steps in the forfeiture proceedings or to resign, it was “*expedient*” to effect the appointment of a new trustee with the assistance of the Court. The Court did not concern itself with the merits of the applications made in the California Court nor with any defences available to the trustee, although Justice Mangatal acknowledged that the case involved very serious allegations. She held that there was clearly a statutory provision at section 10 of the Trusts Law, permitting the appointment of a new trustee by the Court in circumstances where it would be “*inexpedient, difficult or impracticable*” to do so, without the assistance of the Court and that under section 64, any party with an interest in the trust assets could make such an application. While the allegations remained unproven, the guiding principle for the Court in exercising its discretion under section 10, would be the welfare of the beneficiaries and the proper administration of the trusts in their favour. In circumstances where the trustee was refusing to act in the discharge of the trusts, the Court could

and should intervene to replace the trustee, in order to protect the trust property and the welfare of the beneficiaries.

In Bermuda, the court recently examined the principles governing the making of confidentiality orders in trust cases in Bermuda *In the Matter of the G Trusts*<sup>29</sup>. The substantive applications primarily related to a proposed restructuring of certain family trusts and an interim confidentiality order had been made earlier in the proceedings. Chief Justice Kawaley had on the interim application, relied on a previous decision of the Bermuda court in *Re BCD Trust (Confidentiality Order)*<sup>30</sup> finding there to be '*no obvious public interest in knowing about an internal trust administration matter*'. While the Bermuda Constitution proclaimed the general principle that hearings should be in public, it also allowed for the protection of '*countervailing interests*' like the '*welfare of persons under the age of eighteen years or the protection of the private lives of persons concerned in the proceedings*'.

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<sup>29</sup> [2017] SC (Bda), 15 November 2017

<sup>30</sup> [2015] Bda LR 108

By the time the substantive application came on for final hearing, the so-called *Paradise Papers* had been published. This gave Chief Justice Kawaley, cause to consider whether what he described as '*popular onshore attacks on offshore secrecy*', undermined the Court's approach to the confidentiality of trust proceedings. The Judge considered Bermuda's Constitution and related provisions for fundamental rights, including Article 1 of the European Convention on Human Rights. This Article provides that '*every natural or legal person is entitled to the peaceful enjoyment of his possessions*,' subject to the right of the State to enforce such laws as it deems necessary to control the use of property in the public interest or to secure the payment of taxes.

Reciting the most common bases for the granting of confidentiality orders, the Judge pointed out that it was important to add that such orders were made on the implicit understanding that:

- a) the trustees, the trust and the beneficiaries were compliant with any applicable onshore tax or reporting obligations;
- b) the trust is a genuine trust and not being administered in an artificial way;



- c) the trustees are regulated persons compliant with their own AML obligations in relation to the source of funds in the trust; and
- d) should the trustees, beneficiaries or any other person linked with the trust become subject to foreign criminal, tax or investigative proceedings, a confidentiality order may be set aside.

The Judge therefore concluded that he should confirm the confidentiality orders made at the beginning of the case, holding that *'the present proceedings concern the internal administration of a private trust into which the general public have no right to pry. Persons administering, interested in or settling Bermuda trusts, should rest assured that this Court's firmly established practice of making confidentiality orders in appropriate cases, which is merely designed to enable law-abiding citizens to peaceably enjoy their actual and contingent property rights, has a venerable legal basis ....'*

Further, citing dictum from his earlier judgment in *Re BCD Trust (Confidentiality Orders)*<sup>31</sup>, the Judge expressed the following sentiments which will resonate more readily in jurisdictions like Bermuda and

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<sup>31</sup> Above.

Cayman perhaps than they would in the United States and Europe, where the public interest in the revenue having access to trust information is more obvious and immediate:

*“The notion of a more open approach to Chambers hearings has developed in the public interest within a constitutional framework which specifically blesses the idea of departing from the public hearing principle in the interests of privacy and other countervailing public interests.*

*It seems to me that in this type of case, it is inherently consistent with the public interest and the administration of justice generally, that applications such as these should be anonymised and dealt with as private applications, where there is no obvious public interest in knowing about an internal trust administration matter.”<sup>32</sup>*

Speaking from the Cayman Islands judicial perspective, those are views which I consider to be eminently sensible, subject always of course, to

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<sup>32</sup> Here citing section 6 of the Bermuda Constitution.

the court's obligation, in an appropriate case, to conform to Her Majesty's international tax treaty obligations<sup>33</sup>.

In my view, and I think as the cases show, judges are well aware of the complexity of issues faced by trustees in the modern field of trust administration, not only as regards the need for confidentiality, but also, increasingly now-a-days, the need for appropriate application of fundamental trust principles, in the context of cross-border claims against trust assets. Another recent example before the Cayman court<sup>34</sup> involved an application by a creditor, seeking to enforce its foreign arbitral award obtained against trust assets by the appointment of a receiver by way of equitable execution over the assets and to apply the assets in satisfaction of the award. The premise of the application was that the defendant to the arbitral proceedings was also the settlor and a beneficiary of the trust and it was argued that it was only equitable that the assets of the trust should be applied to satisfy his judgment debts which the award embodied. The creditor relied upon the decision of the

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<sup>33</sup> A point of view which Kawaley CJ also expressed in the same case.

<sup>34</sup> Y v R, In the Matter of an application for the Enforcement of an Arbitral Award dated 5 July 2016, judgment delivered 9 January 2018.

Privy Council (on appeal from the Cayman Islands) in *TMSF v Merrill Lynch*<sup>35</sup> (which I will refer to as the “Turkish case”, as TMSF acted on behalf of the Turkish government). In the Turkish case, it was decided that the Grand Court had jurisdiction to appoint a receiver by way of equitable execution over a power to revoke a revocable discretionary trust, which power was vested in the settlor, a Mr. Demerill, who also was the judgment debtor failing to pay his debts owed to the Turkish government. As he was expected to refuse to exercise the power of revocation himself, the power was ordered to be exercised by the court so that the assets of the trust would be deemed to have returned to him and so available to his receiver. In the instant case, Justice Mangatal refused to appoint the receiver for two very sound reasons in particular. The first was that, unlike in the Turkish case, where the power of revocation which Mr. Demerill the settlor had reserved to himself, could be regarded as tantamount to continued ownership of the trust assets, there was no evidence of such a power or any similar right being vested in the judgment debtor in the instant case. Indeed, there was no

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<sup>35</sup> 2011 (1) CILR 467., which approved and applied *Masri v Consolidated Contractors International (UK) Ltd (No. 2)* [2009] QB 450

evidence that the trust was a sham<sup>36</sup>. Second, as this was a fully discretionary trust, there was no basis for a finding that the judgment debtor, as a beneficiary, had a vested proprietary interest in the trust fund such as could be the subject of receivership by way of equitable execution.

Here I think it timely that I should touch on the most recent decision in the long running *Pugachev* litigation, of particular interest to trust lawyers, as the High Court in England considered amongst other things, whether five trusts established by Mr. Pugachev to hold very valuable residential properties were “illusory trusts” or shams<sup>37</sup>. The Judge, Justice Birss, found that he would have declared the trusts, to be shams. However, he did not need to do so because on the proper construction of the trust deeds and bearing in mind, the fact that Mr. Pugachev had reserved certain powers to himself as protector, in the nature of personal not fiduciary powers, he considered, when the “*true effects of the trusts*”

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<sup>36</sup> Albeit, perhaps somewhat abstrusely, this was not found to be a prerequisite in *TMSF v Merrill Lynch* (above)

<sup>37</sup> *JSC Mezhdunarodniy Promyshlenniy Bank, State Corp. “Deposit Insurance Agency” v Pugachev et al.* [2017] EWHC 2426 (Ch)

were examined, that they were in reality, bare trusts for the benefit of Mr. Pugachev.

The claimants – Russian state agents claiming on behalf of a defrauded bank ( in strikingly similar circumstances to the claims of the government in the Turkish case) – argued that (a) the trusts were not effective to deprive Mr. Pugachev of beneficial ownership; (b) that the trusts were shams<sup>38</sup>; and (c) that if the trusts were effective to deprive Mr. Pugachev of beneficial ownership, then the transfers into trust were designed to prejudice or defraud the interests of creditors and so should be set aside under section 423 of the English Insolvency Act 1986.

I am told that this case has caused a great deal of debate among trust practitioners, as to whether the correct approach was taken to the first two parts of the claim. To the extent that the judgment appears to give rise to a new doctrinal basis – “the true effects of the trust basis” – for the setting aside of otherwise formally and validly constituted trusts, I think I understand the concern. One immediately wonders whether the High Court – in circumstances less controversial than those involving a

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<sup>38</sup> Although this was not argued in the Turkish case.

Russian oligarch known as “Putin’s banker”, the subject of criminal allegations in Russia and a worldwide freezing order and a fugitive also from British justice committed to prison for two years for contempt of court, will be willing to declare formally and validly constituted trusts, to be shams.

The case must therefore come as a timely reminder to the drafters of trust deeds of the need to ensure that their deeds of settlement are faithful to the “irreducible core” trust principles.

But however controversial, Justice Birss’s judgment certainly contains a useful restatement of the legal principles governing the concept of a “sham” trust, as well as an examination of the scope and nature of a trust protector’s powers and duties, citing in the process earlier decisions from far and wide, including those of the Cayman Grand Court in *Re Circle Trust*<sup>39</sup> and *Re Z Trust*.<sup>40</sup>

The nature of the relief finally to be granted in the case was not settled in the judgment. While prepared to grant declaratory relief as to the true

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<sup>39</sup> 9 ITEL R 676,

<sup>40</sup> 1997 CILR 248

effects of the trusts, Justice Birss was unpersuaded that he should order that the trust assets be transferred in favour of the claimants, to a receiver by way of equitable execution, in the manner settled by the Privy Council in the Turkish case (*TMSF*)<sup>41</sup>. Not surprisingly, given the complex circumstances, he was unclear as to whether such an order would redound ultimately in favour of Mr. Pugachev's true creditors (rather than, as Mr. Pugachev alleged, to satisfy the confiscatory agenda of the Russian government).<sup>42</sup>

Whatever one makes of the decision in the circumstances of the *Pugachev* case, it is clear that there is now a settled line of demarcation between trusts which are not only formally and validly constituted but also intended to be used for bona fide trust purposes and those which, although formally and validly constituted with the attributes of a trust, are intended or later become intended by way of reserved powers, for use by the settlor as an instrument of fraud.

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<sup>41</sup> *TMSF* (above)

<sup>42</sup> As explained at [450] of the judgment.



This is now clear from cases going back at least 16 years to the Kuwaiti Government case from this jurisdiction<sup>43</sup>; from the *Masri* case in the English Court of appeal<sup>44</sup> as applied by the Privy Council in the *Turkish* case, the latter being a case which was followed and applied by Justice Birss in the *Pugachev* case.

These cases clearly reveal the risks of compliance with a settlor's instructions, to prepare trust deeds containing reserved powers which are blatantly prone to being abused to the detriment of third parties, and settlors who abuse their trusts in that manner may expect to find no refuge before the Courts.

I am however, pleased to be able to observe from long judicial experience, that the facilitation of such practices does not appear to accord with the high standard of trust practice in jurisdictions of the kind represented in this room today.

The judges in trust cases have also shown their sensitivity to the complexity of modern issues facing trustees and their beneficiaries,

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<sup>43</sup> In re al Sabah 2002 CILR 148 in the Grand Court, ultimately upheld on appeal in the Privy Council: 2004-05 CILR 373.

<sup>44</sup> *Masri v Consolidated Contractors Intl. Co. SAL* (no 2) [2008] EWCA Civ 303 .

especially in the context of family settlements where younger generations of beneficiaries become concerned that trust arrangements, put in place by their parents or grandparents, have fallen out of step with their personal circumstances and beliefs. I suspect that the case which I am about to describe from Jersey, will be the first of many based on similar considerations. In the case entitled the *Representation of Y Trust and Z Trust*<sup>45</sup> the Jersey Royal Court considered an application for a variation of two family trusts pursuant to Article 47 of the Trusts (Jersey) Law 1984.

As a preliminary point, although the original hearing took place in private, the court was concerned to hand down reasons in writing, albeit anonymised, so that those beneficiaries as yet unborn and other minor beneficiaries too young currently to understand, would have the court's reasons to consider once they reached their majority. The court also considered that there was a public interest in the court providing reasons in relation to the exercise of its discretion to sanction the variation of a trust, as there were few judgments available on this question.

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<sup>45</sup> [2017] JRC 100

The application raised by the Family Council on behalf of all the adult beneficiaries, was one for the trusts to be varied to allow for children of the family born out of wedlock or from same sex relationships, to be included as beneficiaries. These children, although regarded and treated for all other purposes as family members, were prohibited from inclusion by the definition of '*child*', '*issue*' or '*descendant*' in the original trusts. There was no power to add beneficiaries and the power of amendment was constrained by a prohibition on amendments to add beneficiaries or to alter the beneficial interests.

Supported by the settlor's widow, the Family Council argued that the firmly held views of the settlor had already caused strife within the family, in that a number of family members were already excluded from benefit under these particular trusts<sup>46</sup> as a consequence. Similarly, they argued the late settlor's views did not accord with modern day thinking and would cause unhappiness and dissension if the trusts were not varied as requested. They took the view that it was in the wider interests of

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<sup>46</sup> There were a number of other settlements referred to as the "General Family Trusts" which included these children as beneficiaries.

family harmony and of the minor, unascertained and unborn family beneficiaries, that all of their children should be entitled to benefit.

The court held that it was satisfied that the proposed arrangement would be beneficial to those on whose behalf the sanction of the variation was sought and thus the fact that the variation might run contrary to the wishes of the settlor, was not material. Invoking its wide statutory jurisdiction to vary trusts, the court confirmed that it had the power, with the consent of the adult beneficiaries, to vary to add beneficiaries of a class specified by the statute, even if of a class expressly excluded by the deed<sup>47</sup>. It could do so if the variation would 'benefit' such beneficiaries and the word "benefit" would be widely construed to include any kind of benefit, whether financial, physical, educational or social.

This case enabled the Royal Court to confirm its approach<sup>48</sup> as being one of tolerance and acceptance of the rights of others, acting within the law,

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<sup>47</sup> Following the settled line of English cases developed from the Variation of Trusts Act 1958, the court stated at [35] to [36]:

"The consistent theme of the English decisions is that the Court, in considering whether to exercise its discretion, will have regard to but will not necessarily follow the wishes of the settlor but only where those wishes are relevant to the question of whether the proposed arrangement is beneficial to those for whom the court is concerned [viz: the minors and unborns]. The other way of putting that test is that where the court is satisfied that a proposed arrangement is beneficial to those on whose behalf it is asked to sanction the variation, the fact that the variation might be contrary to the wishes of the settlor or testator is not material.

We accept and apply that analysis in Jersey."

<sup>48</sup> Reflective of modern judicial thinking around the Commonwealth of Nations. See for instance, the earlier decision of the English High Court in *Pemberton v Pemberton* [2016] EWHC 2345 (Ch) where, among other variations to the trust, the beneficial class was extended to include civil partners and same sex spouses, per HHJ Hodge QC, giving expression to the policy behind the Marriage (Same Sex Couples) Act 2013.

to live their lives as they choose. The court acknowledged that the exercise of its discretion could be influenced by public policy such as to whether it would be in the public interest that Jersey be regarded as a jurisdiction that protected the wishes of settlors as expressed, even discriminatorily, in their deeds of settlement. However, in circumstances where the financial services industry might be able to encourage trust business by indicating to potential settlors that their religious beliefs and cultural norms would be respected in perpetuity, that would be outweighed in this case by the court's policy of non-discrimination. This policy was found to be as mandated by the modern law of succession which confirmed the equal rights of children born out of wedlock, local legislation against non-discrimination on grounds of sexual orientation, as well as by the domestic legislation and international treaties on human rights, to which Jersey was bound.

I turn next, but only briefly, to reflect upon the decision of the English High Court in 2015 in *C v C*<sup>49</sup> in which the court, on behalf of the minor and unborn and with the approval of all adult beneficiaries, sanctioned

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<sup>49</sup> [2015] EWHC 2699, again per HHJ Hodge QC.

the variation of a trust which was recognised to be governed by the laws of Kenya. While the case was decided on highly peculiar if not unique circumstances, including the further concern that there were three other trusts domiciled in England the terms of which also required variation to be done most economically with the Kenyan trust without a further application to the Kenyan court and the opinion of a Kenyan lawyer that the courts of Kenya would likely recognise the orders of the English court varying the Kenyan trust to affect assets located in Kenya , the case must by any measure I think be regarded as an extraordinary and perhaps even exorbitant exercise of the English statutory powers of variation. From the perspective of the Cayman bench, it certainly raises the question how one should respond, in the event a similar order were purportedly made in respect of a trust governed by Cayman Law, in light of the ‘firewall provisions’<sup>50</sup> which reflect the terms of the *Hague Trusts Convention*<sup>51</sup> and which itself was recognised by the Court in *C v C* as

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<sup>50</sup> Already declared by the Cayman court as determining that the terms of a trust governed by Cayman law can be varied only by the Cayman Court: see for instance, *In Re Golden Trust* 2012 (2) CILR 355; *In the Matter of the A Trust* Cause FSD 163 of 2016 (IMJ); written judgment delivered on 1 December 2016, applying dicta from *In the Matter of the B Trust* 2010 (2) CILR 348, per Henderson J : “A trust in the Cayman Islands can only be varied in accordance with the laws of the Cayman Islands and only by a court in the Cayman Islands”

<sup>51</sup> The Convention concluded at the Hague on July 14, 1985 on the law applicable to trusts and their recognition.

incorporated into English law by the *Recognition of Trusts Act 1987* and so as determining that the trust in question was to be regarded as governed by the laws of Kenya.

Judge Hodge QC's judgment in *C v C*, though described by him as "ex temporary", has certainly sparked academic discussion<sup>52</sup> and provides interesting reading.

Finally, a word about a recent Australian case of the Supreme Court of Queensland, dated 9 October 2017 in which, once again, we can see how modern life and social change is finding its way into the issues which come before the court. In *Nichol v Nichol*<sup>53</sup> the court dispensed with the execution requirements for a valid will, finding that an unsent text message held in the deceased's draft messages on his telephone amounted to his valid will.

The facts of the case were this. The deceased and his wife had been married for a year and in a relationship for three years and seven months. The relationship had problems, his wife having left him on at

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<sup>52</sup> See for instance : "Long arm of the law: the English court's power to vary foreign trusts " Oxford Academic, Oxford University Press- <https://academic.oup.com>; J MacDougald, 2016.

<sup>53</sup> [2017] QSC 220

least three occasions, the last time only two days before his death. There was one child of the marriage, a son. The deceased suffered from depression and tragically, took his own life. The mobile telephone was found on the work bench in the shed where the deceased's body was discovered.

The message, which was written to his brother, said:

*"Dave Nic [the deceased's brother David Nichol], you and Jack [his nephew] keep all that I have house and superannuation, put my ashes in the back garden ... [wife] will take her stuff only she's ok gone back to her ex AGAIN I'm beaten. A bit of cash behind TV and a bit in the bank Cash card pin 3636 ... MRN190162Q [the deceased's initials and date of birth] ... 10/10/2016 ... My will."*

The court held, firstly, that a text message could constitute a document for the purposes of the Queensland Succession Act. Secondly, despite its informality, the text message did state the deceased's testamentary intentions – it disposed of the entirety of his estate and gave instructions as to how his ashes should be dealt with. Thirdly, the court was satisfied that the deceased intended the document to operate as his will, given that



it was created shortly before his death. The court rejected the suggestion that because it was saved as a draft that he did not intend it to operate as his will, finding that having the phone with him when he died and not sending the text message was consistent with wanting it to be found with his body and not alerting his brother to the fact that he was about to commit suicide.

Finally, the court rejected the argument that the fact that the deceased committed suicide gave rise to a presumption that he did not have the necessary mental capacity to make a will. The court heard evidence from the deceased's family and friends describing his behaviour leading up to his death and no one described him as acting so erratically, irrationally or afflicted by depression such as to affect his ability to think or function. He clearly understood the nature of his estate and appreciated those who might have a claim on it, facts supported by the terms of the text message itself and the fact that he was cognisant of the need to make a will. Despite there being no medical evidence, the court had little hesitation in finding, on the balance of probabilities, that the

deceased had the necessary mental capacity at the time of creating the text message.

Neither the Cayman Islands nor England have equivalent legislation allowing for informal (typically holographic) wills, that is, wills which have not been properly executed or witnessed but have been written by a testator, usually under extreme circumstance. Other commonwealth jurisdictions, like Australia and Canada, do. I mention this case as it is interesting on its own facts and clearly illustrates how the court strives to keep pace with developments in modern life and accommodates those developments in its decisions.

Honourable Anthony Smellie  
Chief Justice of The Cayman Islands

29 January 2018