

TALES FROM THE COURTS: RECENT DEVELOPMENTS IN THE CAYMAN ISLANDS

Bernadette Carey – February 2010

The speed, reliability and efficiency of the available procedures for resolving disputes affecting Cayman Islands structures has long been one of the distinct advantages of the jurisdiction. In the private client sphere, a trip to court can be the key to avoiding problems or future hostility, saving money in the long run. In times of economic uncertainty or turbulence, practitioners specialising in commercial trust structures and investment vehicles may also benefit from the lessons learned. This article will summarise some of the more interesting new developments for the jurisdiction over the past twelve months.

Procedural developments

Ensuring that court proceedings involving commercial structures are resolved in an efficient and timely manner was the impetus behind the introduction of a new Financial Services Division (“FSD”) of the Grand Court of the Cayman Islands. Recent amendments to the Grand Court Rules provide that various categories of cases, including those involving any action against or application by a trustee or protector of a trust for breach of trust or breach of fiduciary duty, except those actions relating to a trust or estate whose net asset value is less than US\$1 million, must now be heard in the FSD. The FSD, which was formally established as of 1 November 2009, has its own dedicated infrastructure and specialist judges.

Cases of note

Revocable Trusts and Receivership

In *TMSF v Merrill Lynch Bank and Trust Company (Cayman Limited) and others*¹, a Turkish citizen resident in Turkey had established two Cayman discretionary trusts in respect of which he had reserved to himself a power of revocation. A Turkish court subsequently awarded judgment against Mr. Demirel in favour of the Plaintiffs, a Turkish Government entity responsible for failed Turkish banks, in the amount of USD \$30 million, reflecting the value of the trust assets plus interest and costs. Mr. Demirel was subsequently made bankrupt in Turkey at the request of the Plaintiffs.

The Plaintiffs then proceeded to apply to the Grand Court for the appointment of receivers over Mr. Demirel's power of revocation of the two Cayman Islands trusts by way of equitable execution of his judgment debt. At first instance, the Chief Justice of the Grand Court refused the application. However, the Chief Justice did appoint joint receivers by way of equitable execution over any income or capital that might in the future be appointed to Mr. Demirel from the two trusts and declared that if the power of revocation were to be exercised by Mr. Demirel, the assets of the Trusts that would revert to him would immediately become subject to the receivership.

An appeal to the Cayman Islands Court of Appeal was dismissed, with the learned judges agreeing with the Chief Justice that the court had no jurisdiction to appoint a receiver by way of equitable execution over a settlor's reserved power of revocation, and concluding that if the law was to be advanced in that manner, that task should be performed by the legislature and not the courts. Importantly, the trust structures in question were deemed to be duly constituted and valid, as were the reserved powers including that of revocation. The case is good authority for the point that the existence of settlors' reserved powers should not expose trust assets to attack unless specifically determined by the legislature to be appropriate and in the public interest to do so.

¹ 26 June 2009 (Smellie J)

Dealings with Trust Property

In *HSBC International Trustee Limited v. Registrar of Trusts, Earl of Dalkeith and Attorney General*², the trustee of an exempted trust applied for a variation to the terms of that trust such that it would include a power to appoint new trustees resident in the United Kingdom. The application was made pursuant to section 63 of the Trusts Law³, which broadly speaking, gives the court power to approve transactions and to confer administrative powers on trustees in cases where they have no suitable existing power pursuant to the relevant trust deed.

Foster, Ag.J. held that the section 63 jurisdiction had the effect of “*empowering the Court to confer on trustees any absent but, in its opinion, expedient powers, subject to any provisions and conditions it thought fit.*” The changes proposed by the Plaintiff were held to be administrative in nature and intended for the better administration of the trust. As such, the Court accepted that it was expedient to grant the power sought by the trustee.

In *MEP and another v Rothschild Trust Cayman Limited and others*⁴, the Plaintiffs applied for orders giving the trustee power to divide the trust fund into three equal shares and to appropriate one such share to each of three nominated sub funds. The Plaintiffs and their family members, as with many modern families, wished the trustee to be able to consider the “*divergent financial and practical needs of each branch of the family*”, who were located in different jurisdictions, held different investment objectives, and were subject to varying tax considerations. The proposed partition was also identified as being vital to preserving family relationships and avoiding disputes in the future.

While certain changes to the management and administrative provisions were proposed, there were to be no changes to the beneficial interests beyond those which were necessarily incidental to the proposed partition. The Chief Justice was persuaded that the proposed division and partition of the Trust would be expedient for the better and more efficacious management and administration of the Trust, and the section 63 jurisdiction could be relied upon.

Both cases, which are the first of their kind in the jurisdiction, confirm that the Grand Court will allow for greater flexibility in the administration of trusts where the court considers it expedient and in the interests of the administration or management of the trust as a whole to do so.

Conclusion

Legislative and case law developments in the jurisdiction over the past six to twelve months show unquestionably that the Cayman Islands remains a leading offshore jurisdiction offering legitimate protections and innovative solutions for private clients. Even as the recent global financial turmoil abates, the foundations for the resurgence in interest in the jurisdiction have been strengthened.

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This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.

Notes to Editors

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² [2008 CILR Note 5]

³ Section 63 is the Cayman Islands equivalent of section 57 of the Trustee Act 1925 (UK) which empowers the court to authorize otherwise unauthorized transactions where it would be “expedient” to do so.

⁴ (Not yet reported, 20 October 2009, Smellie CJ),

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