

Written in the STARs – blessing the exercise of an enforcer's power

Briefing Summary: Introduced in the jurisdiction in the 1990s, Cayman Islands STAR trusts are widely known as a unique and innovative form of statutory trust which offer great flexibility and increased privacy to those who use them. "STAR" is an acronym for the Special Trusts Alternative Regime, now contained in Part VIII of the Trusts Act (as revised) (the "**STAR Regime**"). STAR trusts are notable because they allow for trusts to be established for non-charitable purposes, and the STAR Regime restricts the rights of beneficiaries to enforce the trust or obtain information about the trust fund and its administration from the trustee. Until recently, there was little in the way of judicial commentary from the Grand Court of the Cayman Islands (the "**Court**") on the peculiarities of STAR trusts. However, following the recent judgment of the Honourable Mr Justice Kawaley in *AA v JTC (Cayman) Limited*^[1] greater clarity has been provided as to the rights of enforcers of STAR Trusts when it comes to exercising the powers conferred on them.

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The role of the Enforcer

Unlike ordinary Cayman Islands trusts, a STAR Trust is required to have one or more enforcers who are the only persons who have standing to enforce the terms of a STAR Trust. Enforcers are appointed by the settlor when the trust is established or pursuant to the terms of the trust instrument, and they can be corporate entities or individuals. The STAR regime expressly stipulates that an enforcer is deemed to have a fiduciary duty to act responsibly with a view to the proper execution of the trust, but this is subject to evidence of a contrary intention in the trust instrument.

Subject to the terms on which they are appointed, enforcers enjoy the same rights and remedies as beneficiaries under ordinary trusts. They have standing to seek the direction of the Court concerning the administration of the STAR Trust in appropriate cases, and rights to obtain information concerning the STAR Trust and its administration from the trustee and to take copies of trust documents. Enforcers also enjoy rights of indemnity out of the trust fund in the same way as trustees of an ordinary trust in discharging the performance of their duties.

Key Contacts



Bernadette Carey
PARTNER,
CAYMAN ISLANDS
+1 345 749 2025

[EMAIL BERNADETTE](#)



Graham Stoute
PARTNER,
BRITISH VIRGIN ISLANDS
& CAYMAN ISLANDS
+1 345 749 2014

[EMAIL GRAHAM](#)



Sarah-Jane Hall
SENIOR ASSOCIATE,
GUERNSEY
+44 1481 732072

[EMAIL SARAH-JANE](#)



Katie Turney
SENIOR ASSOCIATE,
CAYMAN ISLANDS
+1 345 749 2097

[EMAIL KATIE](#)

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AA v JTC

In this case, the Enforcer of a STAR trust made a decision to exercise one of the fiduciary powers conferred on him by the trust deed pursuant to which he would instruct the Trustee to exercise certain of its own powers. This decision related to the manner in which rights attached to shares in an underlying company were exercised. The Enforcer considered this decision to be a 'momentous' decision and, before implementing it, made an application to the Court in reliance on the principles set out in the landmark case of *Public Trustee v Cooper*.^[2]

The parties acknowledged that there were no published judgments on the principles applicable to such an application by an enforcer under the STAR Regime, and they sought the guidance of Kawaley J to ensure the application was an appropriate one with reference to section 48 and section 102 of the Trusts Act (2021 Revision). The latter states that "*...an enforcer has the rights of a trustee of an ordinary trust to protection and indemnity and to make applications to the court for an opinion, advice or direction or for relief from personal liability*".

Application of *Public Trustee v Cooper* to Enforcers of STAR Trusts

In considering the Enforcer's application, the Court laid out its analysis of the well-known legal principles in *Public Trustee v Cooper* and determined that the application before it was a "Category 2" case, noting in particular:

"...the application was a Category 2 case "where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers."

Having confirmed that the Enforcer had standing to make the application under sections 48 and 102(b) of the Trusts Act, and noted that the STAR trusts regime "*seeks to modify the general law relating to trusts in the way explicitly stated in the Act, rather than to create an entirely parallel legal regime*" the Judge then outlined the considerations which the Court must have when determining a *Public Trustee v Cooper* Category 2 application as follows:

1. Does the trustee (or enforcer) have the power to enter into the proposed transaction;
2. Is the Court satisfied that the trustee (or enforcer) has genuinely concluded that the proposed transaction is in the interests of the trust and the beneficiaries and/or in furtherance of its purposes;
3. Is the Court satisfied that a reasonable trustee (or enforcer) would arrive at the relevant conclusion; and
4. Does the trustee (or enforcer) have any conflict of interests which prevents the Court from granting the approval sought?

The Judge confirmed that he was satisfied that the exercise of certain rights attached to the shares held by the Trustee was central to the purpose of the Trust. In response to the four questions above, the Judge noted:

1. The Enforcer clearly had the power to give the relevant instruction, because the trust deed required the trustee to exercise the rights attaching the shares as instructed in writing by the Enforcer.
2. The Enforcer had genuinely decided that the decision he had made was in the best interests of the Trust and in furtherance of its purposes.
3. The Judge was satisfied that a reasonable Enforcer could have reached the same decision and the decision itself had only been reached after careful deliberation by the Enforcer and on his receipt of appropriate legal advice.
4. The Enforcer was not impeded by any conflicts of interest from reaching his decision to instruct the Trustee in respect of the shares and had in any event given full and frank disclosure of facts that might otherwise be considered as potential conflicts of interest.

Impact of the decision

The decision is the first of its kind in the Cayman Islands and a very helpful guide to enforcers of STAR trusts who may be concerned to ensure that any exercise of their powers does not come into question, particularly in circumstances where there is potential contention or actual hostilities within the trust environment. A welcome addition to any enforcer's toolbox, the judgment is likely to be a reference guide kept close to those who administer STAR trusts on a regular basis.

**Carey Olsen acted for the Enforcer in these proceedings alongside Macfarlanes and Serle Court.*

[1] Unreported, 12 February 2024, FSD 12 of 2024, Grand Court of the Cayman Islands (IKJ).

[2] [2001] WTLR 901

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