

Enhancing Cayman's trusts law

Service area / [Trusts and Private Wealth](#)

Location / [Cayman Islands](#)

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Approved by the Legislative Assembly on March 8 2019, and gazetted on 15 May 2019, the Trusts (Amendment) Law 2019 (the "**Amendment Law**") amends the Trusts Law (2018 Revision) (the "**Trusts Law**") in a number of important ways and is designed to enhance the inherent jurisdiction of the Grand Court of the Cayman Islands (the "**Grand Court**") in relation to the administration of trusts. The amendments, which will come into force on a date to be confirmed by way of a commencement order shortly, provide clarity and flexibility in a number of key respects, and serve to continue the evolution of the Cayman Islands as a leading offshore jurisdiction and international financial centre.

The most important changes cover four main areas, each discussed further below:

- Statutory provisions concerning trustee mistake
- Variation of trusts
- The resolution of trust disputes, including by arbitration
- The extension of the foreign element and "firewall" provisions.

Hastings Bass and trustee mistakes

The principle known as "the rule in *Re Hastings-Bass*", which concerns the validity or otherwise of the exercise of powers of trustees in reaching a fiduciary decision has long been good law in Cayman. Pursuant to this common law rule, the courts have intervened in connection with the exercise of a power by

trustees and held that the trustees' exercise of their power was invalid, not only where the power was exercised in bad faith or excessively, but also where the trustees, in exercising their powers, took into account irrelevant matters or failed to take into account relevant matters. However, as a result of the decision of the UK Supreme Court in *Futter v HMRC; Pitt v HMRC* [2013] UKSC 26, the rule in *Hastings Bass* has been restricted under English law, in that that the court's ability to correct such a mistake now depends upon a finding that in exercising the power the trustees have acted in breach of their fiduciary duties.

The Amendment Law introduces statutory provisions in Cayman, which confirm that the Grand Court can now set aside the exercise of a fiduciary power where the Grand Court is satisfied that the person who has the right to exercise it did so mistakenly. A fiduciary power is defined by the Amendment Law as a power which the holder of the power must exercise for the benefit of someone other than themselves. Subject to certain exceptions, the Grand Court can set aside a mistaken exercise of a fiduciary power in whole or in part and in doing so it may impose any terms or conditions or make any order it considers appropriate. If such orders are made, the exercise of the fiduciary power is treated as never having occurred. Importantly, there is no requirement under Cayman law to allege or prove that the person who exercised the fiduciary power (or anyone advising him or her) acted in breach of trust or otherwise breached any duties owed vis a vis the trust. The Grand Court will instead look to whether, in exercising his or

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her fiduciary power, that person did not consider relevant considerations or took into account irrelevant considerations and, as a result, would not have exercised his or her power, or would have done so differently.

Variation of trusts

An issue which regularly arises in relation to applications made to the Grand Court for the variation of Cayman Islands trusts is how best to ensure that minor and unborn beneficiaries are not adversely affected by the proposed variation. The test applied by the Grand Court, pursuant to the Trusts Law, is whether the proposed variation would be for the “benefit” of those beneficiaries (for example by providing greater financial certainty or achieving family harmony). A difficulty associated with this test is that, in some cases, the variation proposed may be necessary for a number of reasons but will not result in any particular benefit to the minor or unborn beneficiaries. The Amendment Law addresses this issue, and introduces greater flexibility into the process of varying Cayman Islands trusts, by providing that the Grand Court now need only be satisfied that the proposed variation will not be “to the detriment” of those persons.

Resolution of trust disputes

Similarly, the Grand Court has been empowered to sanction the settlement or other compromise of trust litigation if it was satisfied that doing so would be to the “benefit” of the beneficiaries of a Cayman trust. Reflecting the changes introduced concerning the variation of trusts, the Amendment Law requires the Grand Court to instead apply a “no detriment” test when considering the exercise of this sanction power. The distinction is helpful, particularly in circumstances where the settlement of trust litigation is reached following commercial negotiations and aimed at avoiding long-running and expensive multi-party litigation. As part of this change, the Amendment Law introduces the concept of trust litigation as a defined statutory term – under Cayman law it means *“litigation invoking the inherent jurisdiction of the Court in relation to the administration of trusts”*.

Firewall

The Amendment Law also expands the application of the “firewall” provisions of the Trust Law. The firewall provisions generally operate to protect trusts governed by Cayman Islands law and dispositions of assets into such trusts from attack pursuant to the provisions of foreign laws which: do not recognize the validity of trusts, or impose ‘forced heirship’ restrictions or otherwise confer rights or interests capable of furnishing claims against persons desiring to establish such trusts. Up until now, one key aspect of the firewall operated to protect Cayman Islands trusts from attack by persons claiming rights or interests in the assets subject to the trust by reason of

a personal relationship with the settlor of the trust (whether by blood or by marriage). However, the Amendment Law extends this aspect of the firewall so that it protects Cayman Islands trusts from attack by persons claiming such rights or interests through a personal relationship with not only the settlor of the trust, but also any beneficiary of the trust (whether that beneficiary is a discretionary beneficiary or otherwise). As the firewall provisions also apply to foundation companies, the extension of the protection afforded by the firewall provisions will also extend to companies incorporated under the Foundation Companies Law 2016 which have individual beneficiaries and will be a further welcome addition to local legislation.

Commencement

Introducing important changes, the Amendment Law improves and further refines the provisions of the Trusts Law and provides professional trustees and practitioners alike with greater certainty as to the scope of local statute particularly in the context of trust litigation. The date on which the Amendment Law is to commence will be notified shortly.

Continued



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