

Cayman trusts: A toolbox for tough times

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

Legal jurisdiction / [Cayman Islands](#)

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With trust assets becoming more unusual in nature, beneficiaries establishing careers and family homes across the globe, and the regulatory environment growing increasingly complex, the modern trustee can be faced with a wide range of issues to address and challenges to overcome. In the course of administering a Cayman Islands (Cayman) trust in this modern world, a trustee may be asked to, among other things, deal with risky assets, respond to requests for information from new corners of the world, make distributions contrary to letters of wishes, and form an opinion in respect of obscure trust provisions. Helpfully, Cayman offers a range of options and solutions to guide trustees through any tough times.

Risky or speculative assets

As part of their remit, trustees of Cayman discretionary trusts can hold a range of assets on behalf of the beneficiaries of the trust. However, where those assets are more speculative or subject to greater volatility, the risk of claims against the trustee can become very real. Such assets can include, by way of example, shares in a trading company operating a business which the trustee is not familiar with, a disproportionately large position in one public company where a significant drop in value could be catastrophic for the trust, or even cryptocurrencies which have shown to be capable of dramatic short term decreases.

There are of course mechanisms which can be inserted into trust deeds at the time of drafting to protect a trustee asked to hold riskier assets (such as anti-*Bartlett* provisions, although care is needed as to the precise wording of the clause in question as was shown in the DBS Bank case¹). However, such protective mechanisms may not be iron-clad. A beneficiary's appetite for litigation may increase in times of financial uncertainty and market crashes, particularly if assets drop rapidly in value and questions arise as to the solvency of the trust itself². In those circumstances, a trustee may need to act quickly to protect the trust assets – and itself. Helpfully, there are a number of ways in which the Grand Court of Cayman (the Court) may be able to assist a trustee which is administering a trust in a precarious financial situation:

- The trustee could seek the blessing of the Court, by making a “Category 2” Public Trustee v Cooper³ application to approve its loss mitigation strategy, a restructuring of trust assets or a general refinancing or a sale of assets at a loss, thereby protecting itself from claims by beneficiaries in the future for having taken those decisions.
- If a trustee is suffering from some sort of conflict, for instance because one beneficiary has asked it to adopt a risk mitigation strategy and another has threatened to sue if it does, the trustee may need to consider a surrender of its discretion in a similar way to the trustee in the HSBC v

¹ *Zhang Hong Li and others v DBS Bank (Hong Kong) Limited and others* [2019] HKCFCA 45.

² Noting that the term ‘insolvent trust’ is a something of misnomer as a trust is not a separate legal entity.

³ [2001] W.T.L.R. 901.

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Tan Poh Lee & Ors⁴ case. In this way, the trustee would effectively ask the Court to exercise its discretion for it, with protections from claims and costs in following that direction.

If the trustee is facing an insolvency situation in respect of the trust assets (to be assessed on a cash-flow basis rather than a balance sheet basis), it may seek to rely on the rulings from the Jersey litigation known as the Z Trusts litigation⁵ and establish a plan for (and seek directions in respect of) the future administration of the trust.

Unexplained wealth orders (UWOS)

In an era of increased global transparency, trustees must also be ready to deal with requests from new avenues of authority. A range of new tools have emerged to assist in the cross-border sharing of information and one such tool is the UWO, originating from the United Kingdom (the UK) for the purposes of fighting money laundering. In reliance on a UWO, UK agencies such as the National Crime Agency (NCA) can, with 'reasonable grounds', require the owner of a property (including trustees) to prove they purchased it with legitimate funds. If the recipient of a UWO does not respond or if their response is unsatisfactory, the property will be deemed to be the proceeds of crime and could be confiscated.

Because of the presumptive manner in which a UWO operates, a trustee of a Cayman trust served with one could not simply ignore it; in fact, doing so could lead to trust property being confiscated and expose the trustee to a claim by the beneficiaries of the trust based on a perceived failure to protect trust assets. However, taking active steps to stop the property (which may well have been legitimately obtained) being confiscated may also be risky: criminal penalties can be incurred if the evidence given in response to a UWO is misleading or inaccurate. The trustee will also need to consider its anti-money laundering obligations as the receipt of a UWO may be enough to trigger the need to file a suspicious activity report (SAR) particularly if the UWO contains a 'gagging' provision limiting the trustee's ability to communicate with the settlor or beneficiaries. Compounding the problems highlighted above, UWOs often impose very short timeframes (30 days or less) for compliance.

If served with a UWO a trustee will need to act quickly in determining how to respond, an exercise which will likely require local advice as well as UK advice as to the validity of the UWO (at a minimum). In doing so, a Cayman trustee may require the assistance of the Court through:

- Seeking directions pursuant to section 48 of the Trusts Act (as revised) (Trusts Act), which provides for the Court to have general jurisdiction to provide relief to a trustee in relation to the management or administration of Cayman trusts; or

- If the UWO is connected with, and might require the trustee to take part in, proceedings involving a third party:
 - making a Beddoe application to direct that it should take part in those proceedings and to confirm that its costs in doing so can be met from the trust fund; or
 - seeking approval for disclosure of the information under the Confidential Information Disclosure Act (as revised).

Letters of wishes

Faced with a new generation of beneficiaries who may be more rigorous and demanding in their interactions with trustees, trustees of Cayman trusts may increasingly receive requests for decisions or distributions from the trust that may, at first glance, appear to push the boundaries of the trustee's powers. When contemplating such requests, the trustee should rely on the trust deed to determine the best path, but any letter of wishes left by the settlor will also have an important role to play.

In respect of the latter, a settlor's letter of wishes is considered to be a helpful but non-binding guide as to the appropriate steps for the trustee to take and the Court is available to assist in approving the trustee's proposed path. In the recent case of AA v BB⁶ the Court considered an application by a trustee of a Cayman Islands trust for the approval or blessing by the Court of a proposed plan of liquidation and distribution of all of the assets of the trust among a limited number of members of the discretionary class of beneficiaries (the settlor's wife and adult children), rather than the discretionary class as a whole (the members of which numbered over a hundred). The settlor had left a series of letters of wishes that recorded in express terms that his dispositive intentions were that the assets should be distributed amongst his heirs in accordance with the rules of inheritance of Islamic law. The trustee intended to comply with those wishes, and applied to the Court pursuant to Order 85 of the Grand Court Rules and section 48 of the Trust Act for sanction of the decision to distribute to the limited number of beneficiaries. The Court agreed that the decision was one at which a reasonable trustee could properly have arrived and, in providing the requested sanction, held that the trustee was not obliged to enquire into and consider the circumstances of each and every member of the wider class of beneficiaries with a view to benefitting them but could instead – in keeping with the 'rationality standard' applied in cases such as this and compliant with the wishes of the settlor – reasonably decide to benefit only specific beneficiaries. The decision confirms that the Court is available to guide trustees in respect of important, and potentially controversial, steps to give effect to a settlor's wishes.

⁴ *In the matter of HSBC International Trustee Limited v Tan Poh Lee and Ors* – FSD 175 of 2019 (IKJ).

⁵ Likely to be considered persuasive in Cayman.

⁶ Unreported, the Hon Chief Justice, 14 February 2020

Ambiguous trust provisions

A further trouble now commonly faced by trustees of Cayman trusts is how best to interpret the provisions of a trust deed that may have been drafted decades earlier and perhaps without the careful eye of the modern draftsman. The recent judgment of *A v B*⁷ confirms that the Court can assist in determining the true construction of provisions in trust deeds. In that case, a trustee of a Cayman Islands trust sought directions from the Court concerning the extent of a power conferred on the trustee by the trust deed. The trustee's application to the Court, also made pursuant to section 48 of the Trusts Act, sought directions as to whether the trust deed provided for the power to be exercisable after the settlor's death. The decision is a helpful one, in that it sets out how the Court will interpret trust deeds (in summary, by considering the intention as expressed, giving words in the English language their ordinary meaning, taking into account the wider factual matrix and when considering the surrounding circumstances which are relevant taking into account only those which exist or are in the reasonable contemplation of the settlor when the settlement is made, not future unforeseen circumstances). Help is therefore also readily at hand for trustees of Cayman trusts tangled in old-fashioned legalese.

Conclusion

While administering a Cayman trust in the modern world can be a minefield, particularly in tough times, issues of trusts law arising in the jurisdiction are capable of being carefully managed in reliance on an expansive range of statutory tools and with access to bespoke solutions offered through the exercise of the inherent jurisdiction of the Court.

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⁷ Unreported, McMillan J, 13 February 2020