CAREY OLSEN

Muted voices: can beneficiaries of a STAR trust be empowered to play "devil's advocate"

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Disputes involving beneficiaries of STAR trusts are on the rise in the Cayman Islands, particularly as structures mature and families experiencing generational shifts in control wish to revisit the robust structuring put in place many decades ago. In the Cayman Islands, the unique "STAR" (Special Trusts Alternative Regime) legislation in Part VIII of the Trusts Act, provides for the establishment of trusts for specific purposes, with or without named beneficiaries. One of the features of the STAR regime is that certain rights, such as the right to trust information and to take action to enforce the trust, are reserved to the enforcer of the trust rather than the beneficiaries. Such trusts are very popular with clients looking for privacy and robust asset protection. While the STAR regime has been in place in the Cayman Islands since the late 1990s, judicial commentary on its provisions has been minimal until now.

In *In the Matter of the G Trust*[1] the Grand Court of the Cayman Islands was asked by the trustee of a Cayman STAR trust to give directions in relation to the question of who should participate, and in what capacity, in an application for rectification of a deed supplemental to the trust (the "**rectification application**"). The trust itself was already the subject of ongoing litigation involving the trustee, the enforcer, and two factions of beneficiaries: the "A beneficiaries" and the "B beneficiaries". *Beddoe* proceedings had been commenced by the trustee to which the enforcer was a party, and the trustee had invited both groups of beneficiaries to participate in the *Beddoe* proceedings so that they too might be bound. An issue arose along the way about the interpretation of a supplemental deed of addition that the trustee identified which might require rectification to clarify the identity of the beneficiaries of the trust – a point that would be relevant in the ongoing litigation.

In an earlier Ruling[2], the trustee had obtained *Beddoe*-type relief to proceed with the rectification application if so advised. However, during the *Beddoe* hearing, counsel for the B beneficiaries submitted that adversarial argument should be presented to the court in opposition to the rectification application, and it was the B beneficiaries themselves who were best placed to present opposing arguments to the court. Kawaley J concluded his ruling by noting he had reached a preliminary view, that the B beneficiaries should be nominated to oppose the rectification application with the protection of a pre-emptive costs order. However, the judge invited written submissions from the parties on three points: (1) whether there was in fact a need for adversarial argument; (2) if so, which party should advance any such counter-arguments, and (3) whether it was appropriate to issue a pre-emptive costs order.

1. The need for adversarial argument

Having reflected on the detailed written submissions of all parties, the court confirmed on the first point that there is no requirement for counter arguments to be advanced to the court when a party is seeking rectification under Cayman Islands law.

1 Unreported, Kawaley J, 15 December 2023
2 Unreported, Kawaley J, 11 December 2023

It is well settled under Cayman Islands law, based on the observations of Smellie CJ (as he then was) in *In re Golden Trust*[3], that rectification can be granted even if there is no issue in dispute between the parties interested in the matter. The court had noted in that case that the UK courts had discouraged the rectification of settlements in that jurisdiction where there was no issue or contention between the parties and the rectification was solely for the sake of vesting a retroactive fiscal benefit which was not genuinely contemplated and intended at the time of settlement. In the *Golden Trust* case, the court had noted the tax neutrality of the Cayman Islands and determined that local courts need not subject themselves to the same fetter as that adopted by the UK courts "*in deference to the imperative of domestic fiscal policy as articulated by HMRC*" because "*such imperatives of fiscal policy do not arise in this jurisdiction*".

2. The appropriate party to advance a counter position in relation to a STAR trust

The judge then considered the important question of whether the B beneficiaries could be elevated to the role of "devil's advocate" in order to present any adverse arguments if they did indeed arise and require ventilation in due course. The trustee, the enforcer, and the A beneficiaries had submitted that it would not be appropriate to elevate the B beneficiaries to this role for a number of reasons, including in light of the fact that they were subject to the restrictions of the STAR regime.

The court noted that section 100 of the Trusts Act provides that a beneficiary of a STAR trust "*does not, as such, have standing to enforce the trust or an enforceable right against a trustee or an enforcer, or an enforceable right to the trust property*". In fact, the only persons who have standing to enforce a STAR trust are the enforcers, who have a fiduciary duty to act in the best interests of a special trust. The court noted that section 102 goes on to confirm that enforcers have the same rights as a beneficiary of an ordinary trust to (for example) make applications to the court concerning the trust, to receive information concerning the trust, and the same personal and proprietary remedies against the trustee and third parties.

In this case, the A beneficiaries and the B beneficiaries had been invited by the trustee to participate in the hearings in question and had permission to appear. However, Kawaley J agreed that this participation did not necessarily increase their rights before the court and that "*the voice of a beneficiary in relation to a STAR trust is far more muted compared with the standard position in relation to an ordinary trust.*" Noting his rights and duties under the STAR regime, the enforcer was deemed to be the appropriate party to advance the counter arguments if it became necessary to do so in due course.

3. Case management issues and pre-emptive costs

The court noted that, as counter arguments would not be a necessary part of the anticipated rectification application based on the conclusions reached above, and the B beneficiaries were not the appropriate parties to advance such arguments were they to be made, the court found that there was "*no discernible basis on which the Beddoe Court could properly usurp the jurisdiction of the Rectification Court*" on matters of case management. Accordingly, the question of the costs of the parties would be deferred to the court hearing the rectification application in due course.

Lessons

Collaborative trustees might wish to consult with STAR beneficiaries and invite them to participate in any court applications to give certainty of outcomes. However, care should be taken to ensure that such beneficiaries are aware that these participation privileges do not confer on them rights and entitlements not envisaged by the STAR regime. The rights of beneficiaries of a STAR trust remain firmly muted.

Carey Olsen appeared for the B beneficiary group in the proceedings.

3 [2012 (2) CILR 355]

FIND US

Carey Olsen
PO Box 10008
Willow House
Cricket Square
Grand Cayman KY1-1001
Cayman Islands

T +1 345 749 2000
E cayman@careyolsen.com

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Visit our trusts and private wealth team at careyolsen.com

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