

## New Judgments from the Cayman Islands Courts

Service area / [Dispute Resolution and Litigation, Trusts and Private Wealth](#)

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Just two months into 2020, the Grand Court of the Cayman Islands (the Court) has already released a number of new judgments that will be of great interest both to trustees of Cayman Islands trusts and to private clients more generally. Covering issues of construction of trust deeds, letters of wishes, and the surrender of a trustee's discretion to the Court, these latest decisions of the local judiciary are in characteristically robust form and provide helpful guidance on trust law principles as presently in operation in the Cayman Islands.

### Distributions and terminations

In the first of the new judgments, anonymized as “AA v BB”<sup>1</sup> the Court considered an application by a trustee of a Cayman Islands trust (known as the **1990 Trust**) for the approval or blessing by the Court of a proposed plan of liquidation and distribution of all of the assets of the 1990 Trust among certain members of the discretionary class of beneficiaries, followed by the winding up of the 1990 Trust.

#### The Trust

The 1990 Trust was a long-standing Cayman Islands trust, which had been established as a holding structure for the settlor's personal wealth and held “an eclectic range of international assets” previously owned personally by the settlor and all of substantial value. The settlor was the patriarch of a Middle Eastern Arab Muslim family, and the principal

beneficiary named in the 1990 Trust. The settlor was a devout Muslim and was educated in and familiar with the Islamic law principles applied in his home country. Over time, a series of letters of wishes were prepared on the settlor's instructions, which recorded in express terms his dispositive intentions, in particular for the ultimate disposition of the 1990 Trust's assets after his death to be amongst the settlor's heirs in accordance with the rules of inheritance of Islamic law.

The settlor had passed away some time before the trustee made its application, and was survived by his wife and adult children (referred to in the judgment as the **Heirs**). The Heirs had been officially identified as the settlor's heirs under the Islamic law of inheritance applied in the Middle Eastern country of which they were all nationals, and it was to the Heirs (rather the wider group of members of the beneficial class as a whole) that the trustee intended to distribute all of the assets of the 1990 Trust.

#### The application

The application before the Honourable Chief Justice in this case was a “Category 2” *Public Trustee v Cooper* application, made pursuant to Order 85 of the Grand Court Rules and section 48 of the Trust Law (as Revised), pursuant to which the trustee was seeking the sanction of the Court for a particularly momentous decision. The parties were in agreement in this case that the trustee's proposed course of action was indeed

<sup>1</sup> Unreported, the Hon Chief Justice, 14 February 2020

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“momentous” in nature, given that it would involve the realization and distribution of all of the 1990 Trust’s assets and thereafter the termination of the 1990 Trust. However, the focus at the hearing was on whether the view taken by the trustee was a view that a reasonable trustee could properly have arrived at (the third limb of the well-traversed *Public Trustee v Cooper* test). The question was whether the trustee, in the exercise of its discretionary powers to distribute the assets and wind up the trust, was obliged to inquire into and consider the circumstances of each and every member of the wider class of beneficiaries with a view to benefitting them or whether it could – 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 those beneficiaries who were the settlor’s heirs under Islamic Law.<sup>2</sup>

### The evidence

The evidence before the Court was that the efforts undertaken by the trustee were entirely sufficient to enable the trustee to satisfy itself that the actions it would be taking would be reasonable. In particular:

- The trust deed enabled the trustee to pay or apply the trust fund to or for the benefit of some members of the beneficial class to the exclusion of the other members. This was not disputed, and it was acknowledged that the trustee was acting for a proper purpose in seeking to honour the wishes of the settlor by distributing to the Heirs alone.<sup>3</sup>
- Before making its decision, the trustee had conducted sufficiently extensive inquiries into the settlor’s dispositive intentions especially those as expressed in his letters of wishes, the religious and family traditions that those wishes reflected, and the current composition of the discretionary beneficial class. It was not disputed that the settlor’s family as a whole already held significant wealth even without taking into account the assets in the 1990 Trust and the settlor’s free estate.
- The trustee had also fulfilled its duty of adequate deliberation before exercising its specific fiduciary dispositive powers by surveying a range of objects including:
  - a. Contacting and speaking with the person responsible for the original concept of a Cayman Islands trust, and consulting the Cayman Islands attorney who had created the settlor’s structure about his recollection of events. Those witnesses confirmed that the settlor had studied Shari’a law under instruction of a Shari’a scholar

and was both familiar with the Islamic rules of inheritance and had made it clear on many occasions that he wished those rules to govern how the trust assets were distributed among family members.

- b. Inquiring into the numbers and identities of the individuals within the class, which resulted in a determination that, given the number of Heirs, and their ages and marital status, the size of the beneficial class was likely to run to hundreds of individuals (the majority of whom were not Heirs).
- c. Considering the practical effect that these measures would have in the context of the specific religious and cultural beliefs and practices of the settlor’s family, which led to a conclusion that the operation of Islamic inheritance rules would mean that the ultimate disposition of the Heirs’ own wealth would in due course be such that the settlor’s remoter descendants would benefit from the same rules as the settlor and the Heirs.

Ultimately, the Court was satisfied that the trustee had undertaken proper inquiries and could quite properly have arrived at its decision to benefit the Heirs alone. Further it was well within the bounds of rationality for the trustee to have concluded that the wider ambit of the beneficial class as defined was simply to allow for flexibility of dispositive intent to be informed by the settlor’s wishes during his lifetime and should not be construed as contradicting his intentions as amply and clearly expressed in his letters of wishes. The Chief Justice accepted that the trustee could reasonably decide to take the action proposed and proceed to appoint the assets only to the heirs, and gave sanction to the trustee to do so.

### Surrender of a trustee’s discretion

The *Public Trustee v Cooper* jurisdiction was also engaged in the most recent instalment of the case of *HSBC v Tan Poh Lee*.<sup>4</sup> However, this new judgment is particularly interesting because the Court granted, for the first time in the Cayman Islands, a rare *Public Trustee v Cooper* “Category Three” application whereby the trustee was able to surrender its discretion to the Court. This is distinct from the more common “Category Two” applications such as that which was the subject of the *AA v BB* case discussed above.

### The Trust

In *HSBC v Tan Poh Lee*<sup>5</sup>, the trust under scrutiny was a standard discretionary trust governed by Cayman Islands law, with the primary beneficiaries stated to be the settlor’s

<sup>2</sup> The “rationality test” provides that the court will be concerned with limits of rationality and honesty, and will not withhold approval merely because it would not itself have exercised the power in the way proposed. See *Lewin on Trusts* (19th ed at section 27-079).

<sup>3</sup> A civil procedure point to note is that service upon the wider class of beneficiaries was not directed and so there was no opportunity for them to cross-examine the trustee. However, an *Amicus Curiae* was appointed to assist the Court in relation to the question of the right of the wider class of beneficiaries to be heard.

<sup>4</sup> Our earlier briefing regarding this matter can be accessed here: <https://www.careyolsen.com/briefings/firewalls-and-foreign-courts-new-judgment-grand-court-cayman-islands>

<sup>5</sup> In the matter of *HSBC International Trustee Limited v Tan Poh Lee and Ors* – FSD 175 of 2019 (IKJ).

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grandchildren and the secondary beneficiaries the settlor's children. Prior to his death, the settlor's wishes had been formally recorded as requesting that the trustee give consideration to allocating the trust fund so that one part was held to be for the settlor's grandchildren, and his children had no right to interfere with the trustee's management of that part of the trust fund. The other part of the trust fund was to be held for the benefit of the First Defendant (one of the settlor's daughters).

Sadly, various disputes arose between the settlor's children over the years, initially as to the control over their father and his affairs, and subsequent to his death in respect of the validity of the settlor's will. Flowing from these disputes, one of the beneficiaries of the trust (the Third Defendant), being the son of the late settlor, made an application in Singapore seeking orders that the trust be terminated and the assets distributed to him. The First Defendant then obtained an interim injunction in Malaysia staying the administration order and freezing the estate assets which included accounts held by the trustee. The litigation did not end there: as part of the Singapore proceedings, the Third Defendant sought a mandatory injunction compelling the trustee to distribute the assets and terminate the trust claiming the trustee was liable for breach of fiduciary duty in failing to comply with the Third Defendant's previous requests to do so.

### The application

As explained in our earlier briefing, against the background of this litigation the trustee had originally obtained *Beddoe* relief from the Court and declarations concerning matters of jurisdiction. However, subsequent steps taken by the Singapore Court meant that the trustee needed further guidance from the Cayman Islands court. While the Third Defendant had threatened to sue for breach of trust if the trustee did not accede to his request to terminate the trust and distribute the assets to him, the other beneficiaries were 'violently' opposed to that course of action. The trustee had made without prejudice settlement proposals in order to try and resolve the dispute however that was ultimately unsuccessful and the trustee surrendered its discretion to the Court and sought directions as to the stance it should adopt in relation to the Singapore proceedings.

In considering the matter, the Honourable Mr Justice Kawaley noted that the Singapore proceedings raised the following critical challenges for the trustee:

- Could the trustee properly decide whether or not to defend the Singapore proceedings when it was alleged that the resisting the Third Defendant's claims constituted a breach of fiduciary duty?
- Could the trustee properly admit the claim where to do so

would very arguably be both:

- a. At odds with the trustee's duties under the trust (which defined the grandchildren as "Primary Beneficiaries"), and
  - b. In violation of the Malaysian injunction?
- Could the trustee in light of the modest value of the trust fund find a way of mitigating the risks of depleting the trust assets through costly litigation?

### Surrender applications

The Court referenced the decision of Hart J in *Public Trustee v Cooper* regarding surrender applications by trustees, noting that the court will only accept a surrender of discretion for a "good reason", the most common being either that the trustees are deadlocked or because the trustees are disabled as a result of a conflict of interest. The Court confirmed that on such an application, the trustee should remain neutral with "its only role being to ensure that all matters are appropriately drawn to the Court's attention".<sup>6</sup> Further, when a trustee surrenders its discretion to the court, the court acts in its place by giving directions, and the court will act as a reasonable trustee could be expected to act having regard to all the material circumstances and is not bound by the wishes of any beneficiary. Importantly, the court does not have greater powers than those of the trustees either under the trust instrument or under the general law.

In this case, Kawaley J held that "it was clear that no reasonable trustee would accede to the Third Defendant's requests which appeared to be based on a fundamental misconception about the character of an irrevocable discretionary Cayman Islands trust." Kawaley J recognized that it was seriously arguable that the proposed distribution fell outside of the parameters of the settlor's wishes, and terminating the trust and distributing the bulk of the assets to the Third Defendant was wholly at odds with the best interests of the settlor's grandchildren (who were the 'Primary Beneficiaries' under the trust). There was also conflicting evidence as to the capacity of the settlor in relation to the power of attorney executed in favour of the Third Defendant and the Malaysian injunction purportedly froze the trust assets and prevented their disposal. Because the beneficiaries were not before the Court, Kawaley J found that in this case it was right for the trustee to adopt a more active role in the application whilst seeking to present the law and facts in a neutral manner. Taking all of this into account, the Court found that there was "good reason" for the trustee surrendering its discretion and that it was appropriate for the Court to accept that surrender in the circumstances. In exercising the trustee's discretion on behalf of the trustee, the Court, having regard to the duties under the trust deed, directed the trustee not to make the distribution sought by the Third Defendant, not to terminate the trust, and not to resign as trustee.

<sup>6</sup> Referencing the Jersey case of *In the Matter of X Trust* [2012] JRC 171.

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The judgment should provide real comfort that there is help available for trustees caught in precarious situations, or in circumstances where it seems that they may face claims by the beneficiaries no matter what decision they make.

## Construction of Trust Deeds

As a final note, the decision of *A v B*<sup>7</sup> addresses a more straightforward issue of construction of a trust deed. In that case, a trustee of a Cayman Islands trusts sought directions from the Grand Court of the Cayman Islands concerning the extent of a power of variation conferred on the trustee by the trust deed (the **Power**). In summary, the Power provided that the trustee “may, with the consent of the Settlor during his lifetime, at any time” vary, add to or modify the trust deed. The trustee’s application to the Court was made pursuant to section 48 of the Trusts Law (as revised), and sought directions as to whether the Power was exercisable after the settlor’s death.

### Principles of construction

In considering the construction of the clause conferring the Power, the Honourable Mr Justice McMillan helpfully confirmed that, as a general rule in construction cases, the Court will look for the intention as expressed, gives words in the English language their ordinary meaning, takes into account the wider factual matrix and, when considering the surrounding circumstances which are relevant, takes into account only those which exist or are in the reasonable contemplation of the settlor when the settlement is made, not future unforeseen circumstances. Evidence of intention is not admissible; instead the court will seek to give effect to the intention as expressed, by ascertaining the meaning of the words actually used.

In this case, the McMillan J found that the construction exercise it was faced with was not necessarily a difficult one, and it was “beyond any doubt whatever” that the Power was exercisable after the death of the settlor. This was primarily because the clause in question had been introduced into the trust deed by way of deed of amendment during the settlor’s lifetime, and was made in consultation with the settlor, who was taken to have understood that the trustee would continue to have the power to amend or vary after his death when, self-evidently, his consent would not be available. However, the syntax of the clause in question when considered closely also indicated that the Power was operative both while the settlor was alive and with his consent, and following his death.

While not packed with the high levels of contention found in *HSBC v Tan Poh Lee*, or requiring the detailed inquiries that took place in *AA v BB*, the judgment is nonetheless another helpful guide to trustees faced with difficulties in construing trust deeds and analyzing the nature and extent of the powers conferred on them. With a variety of active pieces of trust litigation presently before the Court, more helpful trust law judgments will undoubtedly be released by the Court over the course of 2020 and are eagerly awaited by trustees and practitioners alike.

<sup>7</sup> Unreported, McMillan J, 13 February 2020



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## 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](mailto:cayman@careyolsen.com)



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