

Firewalls and Foreign Courts – a new judgment from the Grand Court of the Cayman Islands

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

Location / [Cayman Islands](#)

Date / [20 November 2019](#)

In a judgment published on 7 November 2019¹, the Grand Court of the Cayman Islands (the **Court**) has provided helpful new guidance as to the way in which the Cayman Islands “firewall” legislation will operate to protect Cayman Islands trusts from orders which may be made by foreign courts without reference to the operation of Cayman Islands law. In summary, the Court found that:

- The Court will readily provide *Beddoe* relief where foreign proceedings may lead to orders being made in respect of a Cayman Islands trust.
- Where a foreign court will not give up jurisdiction in a matter concerning a Cayman Islands trust, the Court will be prepared to act as an auxiliary for the purpose of determining questions of Cayman Islands law relevant to the trust.²
- Due to the firewall legislation contained in the Trusts Law³, any order made by a foreign court in respect of a Cayman Islands proper law trust will not be recognized if Cayman Islands law has not been applied.
- Whether issues in respect of Cayman Islands trusts can be determined by foreign courts (applying Cayman Islands law) or whether it is only the Cayman Courts that can do so remains an open question; and
- In addition to the statutory protections for Cayman Islands trusts found in the Trusts Law, there is a separate and

freestanding common law principle that a foreign judgment will not be enforced to the extent it conflicts with public policy in the Cayman Islands.

The facts

The need for *Beddoe* relief in this case arose because of proceedings issued in Singapore by the Third Defendant, one of the adult beneficiaries of the Tan Kim Choo Family Scholarship Trust (the **Trust**), seeking an order that the Trust be terminated (the **Singapore Proceedings**). The proper law of the Trust is the law of the Cayman Islands, and the trust deed and contains a provision stating that the Cayman Islands shall be the initial forum for the administration of the Trust. The trustee of trust (the **Trustee**) was therefore concerned to enforce and give effect to these jurisdiction provisions and initially applied for a stay of the Singapore Proceedings. However that application (which also sought time for the Trustee to seek *Beddoe* relief) was refused by the courts of Singapore, and a very short timetable was set down for evidence to be filed and an oral hearing to take place in that jurisdiction.

In these circumstances, the Trustee filed an originating summons with the Court seeking, among other things, *Beddoe* relief on an urgent basis and various declarations (the **Cayman Proceedings**). Upon the filing of the Cayman

¹ In the Matter of HSBC International Trustee Limited v Tan Poh Lee et. Al – FSD 175 of 2019 (IKJ)

² Albeit, there is no mention of how this would work in practice.

³ (2018 Revision).

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Proceedings, confidentiality orders were made to protect and anonymise the identities of the minor beneficiaries as well as the young adult beneficiaries. The Cayman Proceedings were then served on all adult beneficiaries and the court was satisfied that all significant parties had notice but had decided not to participate. The Third Defendant sought an adjournment of the Cayman Proceedings, initially on the grounds he was having difficulty obtaining legal representation and then because he was applying for legal aid. However, neither ground was accepted as meriting an adjournment and the hearing proceeded (with orders granted for a Guardian *ad Litem* to be appointed to represent the interests certain minor and unborn beneficiaries). At the hearing, the Trustee sought:

1. *Beddoe* relief, including authorisation to challenge the Singapore Proceedings on the grounds of *forum non conveniens* (i.e. jurisdiction) as a preliminary issue;
2. In the alternative to the *forum non conveniens* challenge, orders inviting the Court in Singapore to direct that the Courts of the Cayman Islands act as an auxiliary Court for the purpose of determining various questions concerning the settlor's capacity, the identity of the Trustee, the proper administration of the Trust, and decisions regarding distributions from the Trust (with such questions being acknowledged as questions which must be determined in accordance with Cayman Islands law and without reference to any other law); and
3. Various orders declaring *inter alia* that all questions concerning the Trust must be determined in accordance with the law of the Cayman Islands without reference to any other law, that the Court has the exclusive jurisdiction in connection with all such questions, and that an order of any foreign court (including a Singapore court), which does not result from an application of Cayman Islands law, will not be enforced or recognized or give rise to any estoppel in the Cayman Islands.

The judgment

In considering the Cayman Proceedings, the Court had little difficulty approving the majority of the orders sought by the Trustee with reference to the provisions of the Trusts Law. In particular:

1. The *Beddoe* orders sought by the Trustee were granted, with the Court noting that those directions contemplated that, depending on the outcome of the Singapore Proceedings, the Trustee would return to the Court for further more substantive directions (if both the forum challenge and the proposed auxiliary role for the Court were rejected). The Court also noted that the basis for seeking *Beddoe* relief in the circumstances was found in section 90 of the Trusts Law which provides *inter alia* that all questions arising in relation

to a Cayman Islands law trust are to be determined in accordance with Cayman Islands law and without reference to the laws of any other jurisdiction.

2. Kawaley J had no difficulty making the order that the Cayman Islands courts are willing to act as an auxiliary to the court in Singapore for the purposes of determining any questions falling in paragraph 5 of the application so as to ensure these questions would be dealt with in accordance with Cayman Islands law (an option that would only be contemplated if the forum challenge was to fail).
3. In relation to the declaratory relief more generally, Kawaley J was content to grant most of the declarations sought by the Trustee to the effect that the Trust is governed by Cayman Islands law and that all of the questions raised by the Trustee were matters requiring the application of Cayman Islands law. For the more nuanced declarations sought, the Court held that:
 - a. the declaration sought that the Court has exclusive jurisdiction in connection with all such questions under the trust deed and as a matter of Cayman Islands law was granted on the basis of the combined effect of section 90 of the Trusts Law and the provisions of the trust deed.
 - b. The declaration that any orders made by the Singapore court which did not result from the application of Cayman Islands law not be recognised or enforced was justified because it would be “manifestly contrary to public policy of this jurisdiction to recognise or give effect to an attempt by a foreign court to effectively administer a Cayman Islands trust without applying Cayman Islands law”. On this front, Kawaley J also recognised the general common law principle operating in the Cayman Islands that the enforcement of a foreign judgment may be refused on public policy grounds, which is in any event a freestanding legal principle separate from the statutory grounds contained within sections 90 to 95 of the Trusts Law.
 - c. The declaration sought that an order of a Singapore court will not be enforced, recognised or give rise to any estoppel in the Cayman Islands, was found to be difficult to justify at this stage on the basis that “it was not clear that the legal position is that a foreign court cannot under any circumstances, even applying Cayman Islands law, deal with the issues that appear to arise for determination in the present case, and in those circumstances, I would instead grant a declaration substituting the word “may” for “will” because it seems to me that the position is certainly arguable.”
 - d. On point (c) above, In reaching this conclusion, Kawaley J made reference to the decisions of Henderson J in *In the Matter of the B Trust*⁴ and Mangatal J in *In the Matter of*

⁴ [2010] 2 CILR 348. In *Re B Trust*, Henderson J held that an order of the Hong Kong court purporting to vary a Cayman Islands trust cannot be recognised by the trustee, even if the trustee was to return to the jurisdiction of the Hong Kong court. Henderson J went further and held that a Cayman Islands trust can only be varied in accordance with Cayman Islands law and only by a Cayman Islands court, noting that “these overarching rules are provided for expressly in the Trust Law of 2009 revision in sections 90, 91 and 93”.

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*the A Trust*⁵, noting that both cases suggest that not only is it a statutory requirement that Cayman Islands law should be applied where the governing law of a trust is that of the Cayman Islands but also that those issues can only be determined by the Cayman Court. While Kawaley J noted that it is arguable that they should be followed, his view was that the decisions of Henderson J and Mangatal J did not fully consider the question of the mandatory need for the Cayman Islands court to deal with such matters. In those circumstances, the Court determined that the best way to proceed was to adjourn the proceedings and await further argument before finally deciding that particular issue.

Conclusion

Overall, the judgment very helpfully confirms the robustness of the firewall provisions that form such an integral part of trusts law in the Cayman Islands. However it will nonetheless be very interesting to see whether the Court will soon be asked to fully and finally determine the question of whether a foreign court can make enforceable orders in respect of a Cayman Islands trust so long as it properly applies Cayman law. Should the Court be asked to tackle the question, further updates will follow on this front in due course.

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⁵ [2016] 2 CILR 416. In this case, Mangatal J approved the observations in *Re B Trust*, but noted that where a trustee had submitted to the English High Court, the Cayman Islands firewall legislation could lead to a conflict between the trustee's duty to observe the terms of the trust and an order of the High Court.



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