

Trust instruments: Choose your jurisdiction wisely

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The Grand Court of the Cayman Islands (the Court) has delivered a judgment that illustrates the importance of a trustee taking steps sooner rather than later to obtain declarations from the Cayman Islands courts as to:

- the trust's validity under Cayman Islands law; and
- the trust being subject to the exclusive jurisdiction of the Cayman Islands courts, particularly where the validity of a trust is challenged.

Importantly, it also construed s.90 of the *Trust Law (2020 Revision)* as not affording the Cayman Islands courts an exclusive statutory jurisdiction to determine such issues. [1]

In *Geneva Trust Company (GTC) SA v IDF (by her court appointed guardian GM) & Anor (The Stingray Trust)*, [2] the guardian successfully obtained an order that the trustee's summons be stayed on grounds that the Cayman Islands was not the appropriate forum for the trial of the matter, which it successfully contended was the Court of Milan, Italy.

The issues

The Court identified three issues for determination:

- whether s.90 provides that all questions relating to the validity of a Cayman Islands trust can only be adjudicated by the Cayman Islands courts;
- whether the trust contained an exclusive jurisdiction clause that was binding on the guardian in relation to her claim vis-à-vis the invalidity of the trust; and
- whether the Cayman Islands was the most convenient forum to adjudicate the trust in any event.

Facts

The first defendant, who was the guardian of the elderly settlor and beneficiary (who had lost capacity) (the Guardian), commenced proceedings against the trustee in the District Court of Lugano, Switzerland (the Lugano Proceedings). Those proceedings concluded in November 2016, following an unsuccessful appeal. In May 2017, the Guardian commenced a second set of proceedings in the Court of Milan, Italy, against the trustee and the second defendant, who was an Italian-resident beneficiary (the Milan Proceedings).

In November 2017, the trustee sought a declaration from the Court that the trust was validly established under Cayman Islands law and subject to the exclusive jurisdiction of the Cayman Islands courts. However, it also sought *Beddoe* relief in relation to the Milan Proceedings. In September 2018, the Court approved the trustee's challenge to the jurisdiction of the Milan court before that court, and directed the trustee to seek further directions if the jurisdiction challenge was unsuccessful.

As it was determined that the Milan court did have jurisdiction, further *Beddoe* relief was sought by the trustee. Such relief was granted in July 2019; namely, the trustee was at liberty to continue to defend the Milan Proceedings. However, in August 2019, the trustee applied to amend its summons to seek an anti-suit injunction restraining the Guardian from further pursuing the Milan Proceedings. This led to the Guardian's summons, filed in September 2020, by which it sought a stay of the trustee's summons on the grounds that the Cayman Islands courts were not the appropriate forum for the trial of the matter, and the more appropriate forum was the Milan court.

The Court identified what it considered were important factors in determining the issues. The writ filed in the Milan Proceedings expressly stated that Cayman Islands law should apply for the resolution of the case. The trustee had actively participated in the Milan Proceedings, which had included three interim applications. The trustee had commenced proceedings in the Cayman Islands only in response to the Lugano Proceedings and the Milan Proceedings, rather than pre-emptively. It had also obtained *Beddoe* relief in the form of approval from Justice Parker of the Court to challenge the jurisdiction of the Milan court by participating in that court and, subsequently, to continue to defend the beneficiaries' interests in that court.

Judgment

The trustee's conduct was central to the Court's analysis of the *forum non conveniens* issue. The Court attached significant weight to the fact the Milan Proceedings had been on foot for three years, before undertaking a comprehensive review of the authorities dealing with s.90, together with its related 'firewall' provisions. Section 90 provides, *inter alia*:

'All questions in regard to a trust which is for the time being governed by the laws of the Islands or in regard to any disposition of property upon the trusts thereof including questions as to –... (b) any aspect of the validity of the trust or disposition or the interpretation or effect thereof ... are to be determined according to the laws of the Islands, without reference to the laws ... of any other jurisdictions with which the trust or disposition may be connected ...'

The Court did not consider that s.90 could be properly construed as excluding a foreign court from exercising jurisdiction over a trust governed by Cayman Islands law, nor did it confer exclusive jurisdiction on the Cayman Islands courts to determine such issues in relation to Cayman Islands trusts. It was merely a governing law clause and no binding authority was identified that displaced that view.

The Court then conducted an analysis of the trust instrument's exclusive jurisdiction clause, which provided that 'the courts of the Cayman Islands shall be the forum for administration of this Trust'. Crucially, the question of whether the clause was exclusive or not was fact-sensitive. The fact that the issue of which jurisdiction the main litigation should take place in was ordinarily determined before (rather than after) the main proceedings had commenced was what the Court described as a 'pivotal factor'.

Citing with approval the principles enunciated by the UK Privy Council in *Crociani v Crociani*, [3] the Court held that:

- whether a dispute is caught by an exclusive jurisdiction clause will depend on the nature of the dispute; and

- it will be easier for a beneficiary to resist enforcement of such a clause than it will be for a party to resist a contractual exclusive jurisdiction of the courts, because of the court's power to supervise the administration of trusts.

In any event, the relevant administration clause was not expressed to be 'exclusive' and it was too late for the trustee to have the validity issue determined by the Cayman Islands courts, as it had already obtained *Beddoe* approval for the dispute to be adjudicated by the Milan court.

It was unclear why the trustee wished to have the same issue determined in concurrent proceedings, shortly after Parker J approved the decision to contest the validity issue in the Milan Proceedings.

Finally, the Court determined that the Cayman Islands courts were not the most appropriate forum. One of the key bases for that finding was the passage of time that had elapsed since the Milan Proceedings had commenced, together with the fact the trustee had already submitted to the jurisdiction of a foreign court. The Court readily acknowledged the potential for a very different outcome if the trustee's application had been commenced shortly after the Milan Proceedings.

Comment

Ultimately, there were two compelling factors that weighed heavily in support of the Guardian obtaining a stay:

- the effluxion of time since the commencement of proceedings in a foreign jurisdiction; and
- the fact the trustee had already obtained orders to defend the foreign proceedings on the validity issue in that jurisdiction.

The judgment once again illustrates why proactive, not reactive, steps in relation to the administration of a trust are vital. It also illustrates why the drafting of jurisdiction clauses in trust instruments requires careful consideration.

[1] That legislation is now the *Trusts Act (2020 Revision)*.

[2] Unreported, 21 December 2020, per Justice Kawaley

[3] [2014] UKPC 40

For more information please contact:



Andrew Peedom

Partner // Cayman

t:+1 345 914 9603 // **e:**andrew.peedom@collascrill.com