

# FIREWALLS AND FAMILIES: ANALYSIS OF RECENT CAYMAN CASE LAW AND LEGISLATIVE CHANGES TO CAYMAN'S FIREWALL PROVISIONS IN RELATION TO FOREIGN DIVORCES WITH A CAYMAN CONNECTION.



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Matrimonial disputes can be a trying and traumatic state of affairs for all involved, including trustees. Where a family trust is involved, the more contentious of marital disputes can quickly draw trustees into the ring for a bout over rights to information regarding, or even to assets held in, the trust. If foreign matrimonial proceedings seek to encroach on the administration of a Cayman Islands ("Cayman") trust, the trustee is protected in many respects by what are known as the "firewall provisions" of the Trusts Law (2020 Revision) ("Trusts Law"). Judgments delivered by the Grand Court of the Cayman Islands ("Cayman Court") in 2016 & 2019 and recent legislative reform have affirmed the operation and robustness of the firewall provisions and reinforced the need for a trustee of a Cayman trust under attack in foreign matrimonial proceedings to ensure that its response is, at all times, in the best interests of the trust.

## Extension of the "firewall" provisions

Cayman's firewall legislation in Sections 90-93 of the Trusts Law confirms that a Cayman trust can only be varied in accordance with Cayman law and only by a Cayman court, and any foreign order would not be enforceable against the trustee, the beneficiaries of the trust or the trust fund. Prior to its recent reform, the Trusts Law's firewall legislation protected Cayman trusts from being attacked because a foreign law conferred a party with an interest in the trust's assets by virtue of their personal relationship with the settlor. Because the provision only made reference to

a personal relationship with the settlor, questions arose as to the protection afforded to the settlor's descendants once the settlor was no longer living. In order to avoid any technical difficulties in this regard, the relevant provision (being sub-section 91(b)) was amended in 2019 by extending the reference to a "personal relationship to the settlor" to include a personal relationship to any beneficiary including a discretionary beneficiary. The legislative amendment has enhanced the protection offered by the "firewall" so that it is clearly available to all beneficiaries in countering any potential claims against a trust's assets such as financial awards in foreign divorce proceedings.

## The Cayman Court's Approach

The cases discussed in this article are helpful affirmations of the approach previously taken by the Cayman Court in *RBS Coutts (Cayman) Ltd -v- W and Others* (known as "Re B Trust"), which confirms that an order of the English High Court is unenforceable in Cayman, whether or not the trustee submits to the jurisdiction because of the terms of the firewall legislation. In that case, the Cayman Court held that a trustee must "jealously guard" its independence and noted that it would be unwise and inappropriate for a trustee to allow itself to be placed in a situation where its trust obligations come into conflict with an obligation to obey an order of a foreign court.

## In the Matter of the A Trust

This 2016 case concerned a Cayman STAR Trust (the "Trust") which was the subject of proceedings in Cayman commenced by the trustee. In establishing the Trust, its settlor had executed various Letters of Wishes, which set out his very detailed views about who should and should not benefit from the Trust, how the assets should be applied and grow from generation to generation, and to also provide support for specified charitable objects.

The settlor and his wife, N, both of whom were excluded from the Trust, subsequently became involved in divorce proceedings before the English High Court ("English Proceedings"). The main asset of the Trust was shares in a Cayman company, which itself owned shares in other companies holding legal title to very substantial property assets in the UK. In the course of the English Proceedings, N was seeking orders to vary the Trust and set aside her exclusion as a beneficiary of the Trust so that she might have an interest in it. Flowing from that, requests were made of the Cayman trustee to release Trust information for the purposes of the English Proceedings.

The trustee determined that it was not in the best interests of the beneficiaries to submit to the jurisdiction of the English High Court or to disclose confidential information to the parties to the English Proceedings. Its concern was that, in doing so, it would confer, on the English High Court, an enforceable

<sup>1</sup>Following the Royal Court of Jersey in *Mubarak v Mubarak, the Craven Trust Company Limited, S Mubarak, N Mubarak and Renouf* [2008] JLR 430.

<sup>2</sup>*Saunders v Vautier* [1841] Cr & Ph 240.

<sup>3</sup>Specifically *Buschau v Rogers Communications Inc* [2006] 1 SCR 973 and *Thorpe v Revenue and Customs Commissioners* [2010] EWCA Civ 339.

power to act to the detriment of the beneficiaries and to the benefit, instead, of either the settlor or N. However, recognising that it was an important step for a professional trustee to refuse to submit to the jurisdiction of a foreign court, the trustee applied to the Cayman Court for Beddoe-type directions. The trustee's position was that any variation of the Trust's terms or any challenge to N's exclusion from the settlement should only be made in accordance with Cayman law by the Cayman Court and as such further disclosure was not necessary.

## The Cayman Court confirmed:

- The claims by N, to vary the trust and to set aside her exclusion using provisions in a foreign statute, were, in essence, third party claims, and it was the trustee's duty to protect and preserve the Trust from such claims.
- Pursuant to Cayman's firewall legislation, any order made by the English High Court against the trustee would not be enforceable against the trustee, the beneficiaries of the trust or the trust fund.
- N had already been given the trust deed and all supplemental instruments, and full financial information for the underlying companies in the structure. The Court found it was reasonable to conclude that N had sufficient information to understand the terms of the trust and its finances, and that for the trustee to submit to the jurisdiction of the English High Court or to provide further

information was not in the best interests of the beneficiaries, in all the circumstances.

## In the Matter of HSBC International Trustee Limited v Tan Poh Lee et al<sup>4</sup>

This 2019 case relates to a Cayman trustee's application for Beddoe-type relief in respect of proceedings issued in Singapore by one of the beneficiaries of a Cayman trust (the "Trust"), seeking an order that the Trust be terminated (the "Singapore Proceedings").

The Cayman Court affirmed that the basis for seeking Beddoe relief was in accordance with the firewall provisions<sup>5</sup> whereby all questions arising in relation to a Cayman law trust are to be determined in accordance with Cayman law and without reference to the laws of any other jurisdiction. Further, it was held that:


- the Cayman Court had exclusive jurisdiction in connection with all such questions relating to the Trust on the basis of the both section 90 of the Trusts Law and the provisions of the trust deed.
- any orders made by the Singapore Court which did not result from the application of Cayman law should not be recognised or enforced for reasons of public policy which runs contrary to any attempt by a foreign court to effectively administer a Cayman trust without applying Cayman law.
- in relation to the trustee seeking a declaration that a Singapore

court order will not be enforced, recognised or give rise to any estoppel in Cayman, the judge referred to the cases of Re B Trust and the A Trust (as referred to above) and considered that although those decisions did not fully consider the question of a mandatory need for the Cayman Court to deal with questions concerning a Cayman trust, the judge accepted that it is not clear that the legal position is that a foreign court cannot under any circumstances, even applying Cayman law, deal with such issues..

- the Cayman Courts are willing to act as an auxiliary to the Singapore Court for the purposes of determining any questions relating to, inter alia, the administration of the Trust so as to ensure these questions would be dealt with in accordance with Cayman law.

## Conclusion

Divorcing families and related cross-border disputes over asset-protection structures, including Cayman trusts, can place trustees in a challenging, and unenviable, position. However, given the robustness of Cayman's Trusts Law, and the decisions of the Cayman Court, there is a clear set of rules as to how trustees should approach a foreign challenge to a Cayman trust. While these rules may not assist in tempering the trauma of matrimonial proceedings, they will, nonetheless, give the parties clarity to their rights and standing in relation to any such challenge, and be of great support to the trustee in its decision-making processes.



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<sup>5</sup>Specifically, section 90 of the Trusts Law