

Trusts (Amendment) Law, 2019

The Cayman Islands in keeping with its position as a leading financial services jurisdiction, recently updated its Trusts Law again, following its last set of revisions in 2017. A new Trusts Amendment Law 2019 came into effect on 14 June 2019.

In summary, the amendments to the Trusts Law (2018 Revision) and is focussed primarily on enhancing the inherent supervisory jurisdiction of the court over the administration of trusts in the Cayman Islands. A summary of the more significant changes is set out below.

Hastings-Bass

The amendments provide for a new section 64A in the Trusts Law. This section giving the so-called 'rule in Hastings-Bass' statutory form.

In summary, section 64A provides that if a powerholder does not take into account relevant considerations or takes into account irrelevant considerations in the exercise of a power and, but for those failures, the powerholder would not have exercised the power or would have done so on a different occasion or in a different way, then the court may set aside the exercise of that power. The court can order the exercise of the power to be set aside either in whole or in part or on whatever terms and subject to such conditions as the court considers appropriate. To the extent that the power is set aside, it will be treated as never having occurred, effectively turning the clock back on the exercise of the power.

The application to court to set aside the exercise of the power can be made by any powerholder, a trustee, beneficiary, or an enforcer of a STAR trust or in the case of a charitable trust, the attorney general.

Section 64A provides expressly for the fact that in any application to court to set the power aside, there will be no requirement for the applicant to prove or allege a breach of duty by the powerholder in the impugned exercise of the power. This is an essential distinction from the common law position in England and Wales following the Supreme Court's decision in *Futter v Futter* where it was decided that the court could only intervene in the mistaken exercise of a power by a fiduciary if that fiduciary had acted in breach of duty. The Supreme Court also held that the fiduciary in question, if it had relied on wrong professional advice in the exercise of his or her powers, should properly look to sue the professional concerned rather than apply to have the exercise of the power set aside on the grounds of mistake.

There had been some question over whether the Cayman Islands court would follow the line of authority that culminated in the *Futter* decision. The introduction of section 64A puts the question of the court's jurisdiction in these circumstances beyond doubt and should be welcomed by trustees and beneficiaries alike who would not

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want the trust fund to be put to the risk and expense of a potentially lengthy claim in professional negligence against advisers who may have given wrong advice to the trustee.

Compromise

The amendments also introduced a new section 64B: Where the compromise of 'trust litigation' is proposed and the approval of the court is required, the court will be entitled to approve the compromise

as long as it is satisfied that what is proposed will not operate to the detriment of the beneficiary for whom the court's approval is sought. Trust litigation is defined as "litigation invoking the inherent jurisdiction of the Court in relation to the administration of trusts".

The court currently has an inherent jurisdiction to approve a compromise involving a variation of the beneficial provisions of a trust, in circumstances where what is proposed is in settlement of a genuine dispute among the beneficiaries as to their entitlement under the trust. In those circumstances, the court can approve a compromise of that dispute on behalf of beneficiaries who do not have capacity to consent on their own behalf, for example minor or unborn beneficiaries, as long as the proposed compromise can be shown to be for their benefit. Pursuant to section 64B this inherent jurisdiction has been given statutory force and the test for approving such a compromise made less onerous to cover any proposal that is not to the detriment of the beneficiaries concerned.

Variation

The test for a variation of trust under section 72 of the Trusts Law has also been amended and it is consistent with the new criteria for the court's approval of compromises set out at section 64B. The court previously had a statutory jurisdiction under section 72 of the Trusts Law to approve any proposed arrangement varying or revoking all or any of the trusts or enlarging the powers of the trustee on behalf of those beneficiaries who did not have capacity to consent on their own behalf. The court was able to do so as long as all of the adult beneficiaries of full capacity agreed to the proposed variation and what was proposed was for the "benefit" of those beneficiaries for whom the court was being asked to approve the proposed arrangement.

The amendment has brought about a fundamental change to the longstanding criteria for approval of variations of trust. The amended law provides that the court will not approve any such proposed arrangement varying or revoking all or any of the trusts or enlarging the powers of the trustee unless the carrying out of that proposed arrangement would not be to the detriment of the beneficiary for whom the court is asked to approve the proposal.

In its previous form, "benefit" to beneficiaries would be assessed on behalf of each individual beneficiary for whom the court was asked to approve the variation and the court would look at the variation as a whole, taking a pragmatic approach to weighing the interests of the beneficiaries and the benefits to each in what was proposed. Although demonstrating financial benefit was often at the heart of the variation application, other perhaps less tangible benefits have been taken into account, for example, a social, educational or moral benefit. The court will no doubt continue to exercise the same level of scrutiny over what is being proposed in a variation application given its essential role in approving arrangements on behalf of beneficiaries who cannot consent for themselves, but with the additional flexibility to do so for arrangements that do not cause any detriment to the beneficiary concerned.

Firewall

A great deal has been written about the "firewall" provisions contained in Part VII of the Trusts Law. The Cayman Islands was the first international financial centre to introduce legislation of this nature.

Section 90 of the Trusts Law provides that if a trust is governed by Cayman Islands law and has a jurisdiction clause in favour of the Cayman Islands court, all questions arising in relation to that trust should be determined in accordance with Cayman Islands law without reference to the laws of any other jurisdiction with which

the trust has a connection. Such questions include the capacity of the settlor, any aspect of the validity or construction or effect of the trust or disposition of property to it, the administration of the trust, including questions as to the powers, obligations, liabilities and rights of trustees and their appointment and removal and the existence and extent of powers in the trust.

The new law provides for an amendment to section 91(b) so that it reads as follows:

"No trust governed by the laws of the Islands and no disposition of property to be held upon the trusts thereof is void, voidable, liable to be set aside or defective in any fashion ... by reason that ... (b) the trust or disposition avoids or defeats rights, claims or interests conferred by foreign law upon any person by reason of a personal relationship to the settlor or any beneficiary (whether discretionary or otherwise)."

Broadly, this amendment will widen the protections afforded by the "firewall" provisions of the Trust Law to include defence against claims by individuals against the trustee or trust assets, based on rights conferred as a consequence of their relationship with a beneficiary of the trust concerned. Those rights could include, for example, forced heirship rights or matrimonial rights.

In summary, the amendments are another example of the Cayman Islands' willingness to modernise its trusts laws to maintain the jurisdiction's position at the forefront of developments in international trusts law.



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