

## Clarification on the scope and meaning of Cayman firewall legislation and forum for administration c

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### Summary

The recent judgment in the case of *Geneva Trust Company v IDF and MF* or *Re Stingray Trust*<sup>[1]</sup> (the **Judgment**) is the latest in a line of decisions of the Cayman Islands courts considering the meaning and scope of the Cayman firewall provisions. The Grand Court has now provided important clarification about the effect of Section 90 of the Trusts Act 2020<sup>[2]</sup> – that it does not operate to bestow exclusive jurisdiction on the Cayman Islands courts (as previous cases have suggested) and that common law principles of *forum non conveniens* still have relevance and application in the context of disputes concerning Cayman Islands trusts.

The Court also provided further guidance on the application of forum for administration clauses in Cayman trusts.

### The Legislation

Section 90 of Part VII, the Trusts Foreign Element section, of the Cayman Islands Trusts Act <sup>[3]</sup> (**Section 90**) provides (as relevant in the present case) that "[a]ll questions arising in regard to a trust which is ... governed by the laws of the [Cayman] Islands or in regard to any disposition of property upon the trusts thereof including questions as to ... any aspect of the validity of the trust, ... whether the administration be conducted in the Islands or elsewhere ... are to be determined according to the laws of the islands, without reference to the laws of any other jurisdiction with which the trust or disposition may be connected."

### Decision

The Court gave detailed consideration to each of the previous Cayman Islands cases which had commented on the effect of Section 90. The trustee of the Stingray Trust (the **Trustee**) argued that these cases established, as a matter of Cayman Islands law, that questions concerning

Cayman Islands trusts must be determined by a Cayman court as well as in accordance with Cayman Islands law. Kawaley J held that the previous cases relied upon by the Trustee in this regard had been decided without the benefit of full or any argument on the issue. Following full argument in the *Stingray* case, and looking at each of those cases and the relevant *Hansard* report concerning the introduction of Section 90, together with the plain reading of the legislation, Kawaley J confirmed that Section 90 is expressed, and is intended, to be a governing law provision only and does not have the effect of conferring exclusive jurisdiction on the Cayman Court to adjudicate the issues which the section expressly requires to be determined as a matter of Cayman Islands law. Accordingly, Section 90 does not abrogate the court's power to stay proceedings on grounds of the common law doctrine of *forum non-conveniens*.

The Court also held that the wording of the forum for administration clause in this case (which provided: "*The courts of the Cayman Islands shall be the forum for administration of this Trust*") (the **Forum Clause**) was not an exclusive jurisdiction clause enforceable against a party suing in the capacity of a stranger to the trust.

## The Facts

The Stingray Trust (the **Trust**) is a Cayman Islands trust, which is the subject of a validity challenge in ongoing proceedings in Milan. The validity challenge is brought by the court appointed Guardian (the **Guardian**) of IDF an incapacitated elderly lady, who the Trustee claims to be the economic settlor of the Trust and one of the discretionary beneficiaries. The Guardian seeks to argue that the Trust was settled without IDF's consent or understanding.

The question for the Cayman Courts was whether, notwithstanding the Milan proceedings having been ongoing for over 3 years, and the Trustee having submitted to the jurisdiction of the Milan court, and having lost a jurisdiction challenge in the Milan courts, the Trustee should be permitted to pursue declaratory relief proceedings in the Cayman court to determine the question of validity of the Trust.

## The Issues

In terms of the usual factors relevant to whether a stay on grounds of *forum non conveniens* should be granted, the majority of the interested parties, witnesses and documents were in Milan, and the evidence was largely in Italian. However, the Trust is a Cayman trust governed by Cayman law (although the Trustee is Swiss and the Trust is administered in Switzerland).

In support of its argument that the question of validity should be determined by the Cayman courts, the Trustee argued (*inter alia*) (1) that the effect of Section 90 was that questions of validity of a Cayman trust were to be determined not only according to Cayman law but also only by the Cayman courts, and that Section 90 abrogated *forum non conveniens* principles which would otherwise apply in a case such as this and (2) the Forum Clause had the effect of bestowing exclusive jurisdiction on the Cayman courts.

The Guardian argued that (1) Section 90 was not an exclusive jurisdiction clause but merely dealt with the applicable law to be applied to any questions arising concerning a Cayman trust (2) the *forum non conveniens* principles pointed to Milan as the more appropriate forum and (3) the Forum Clause had no application where the very validity of the Trust was in issue and the person challenging the validity was therefore not bringing the claim pursuant to or under the Trust.

## The Judgment

### *Section 90*

The Court held, on a plain reading of the wording of section 90, (and noting that the *Hansard* report provided no evidence to the contrary), Section 90 was intended to be a governing law clause and did not purport to bestow exclusive jurisdiction on the Cayman Courts.

There were four older decisions of the Grand Court which the Trustee argued should be considered as having established that Section 90 has the effect of abrogating *forum non conveniens* principles or otherwise bestowing exclusive jurisdiction on the Cayman courts<sup>[4]</sup> – but Kawaley J was satisfied that the question was either obiter in those cases or had not been the subject of full or any argument. In the more recent case of *HSBC v Tan Poh Lee*<sup>[5]</sup> (HSBC) the Court had decided that it was possible that a decision of a foreign court which had applied Cayman law to the issues which fall within Section 90 could be enforceable in Cayman, but that full argument on this point was required. The Court in *Stingray*, following full argument on the point, found that "*Section 90, applying a purposive construction which is entirely consistent with the natural and ordinary meaning of the section in its wider statutory context, does not require all matters which must be determined under Cayman Islands law to be determined exclusively by [the Cayman] Court.*"<sup>[6]</sup> The Court was ultimately satisfied that Section 90 did not address jurisdiction and therefore the usual principles of *forum non conveniens* applied.

### *Forum for Administration Clause*

Kawaley J agreed that the nature or legal character of the dispute is relevant (applying the decision of *Crociani v Crociani* <sup>[7]</sup>) in deciding whether a jurisdiction clause in a trust deed applies or not – "*The question of whether a forum for administration clause, irrespective of whether it is expressed to be exclusive or not, confers exclusive jurisdiction on the relevant court is an arid debate if the context in which the question arises is not taken into account.*"<sup>[8]</sup>

The Court found that on the facts of the present case the Trustee would not be entitled to rely on the Forum Clause given the claim in question was not brought by someone claiming under the Trust – but rather as someone challenging the validity of it.

This is entirely consistent with the conventional position under both trust and contract law, that

someone claiming that the agreement or deed is invalid, should not be bound by a jurisdiction clause within its terms. As Lewin states: "*A jurisdiction clause plainly cannot be binding on persons unless in some way they claim under the trust*"<sup>[9]</sup> and, whilst recognising that *prima facie*, a trustee might be able to enforce an exclusive jurisdiction clause against a beneficiary Lewin goes on to say "*It is different where the claimant asserts a claim against the trust, as where he claims to be the beneficial owner of assets held by the trustee by reason of a prior title. In such a case there is no reason why he should be bound or affected by the terms of the trust against which he claims and under which he claims nothing. Accordingly, a jurisdiction clause in the trust instrument, whether exclusive or non-exclusive, has no direct significance.*"<sup>[10]</sup>

Further, KawaleyJ expressed the view that even if the Court had found that the Forum Clause was an operative jurisdiction clause it was nonetheless open to the Court to deny the Trustee's reliance on the clause on discretionary grounds, and it would have done so in this case given the wider litigation history: a factor which also played heavily in favour of granting a stay on the grounds of *forum non conveniens* (discussed below).

### *Forum Non Conveniens*

Having disposed of the Trustee's arguments in respect to Section 90 and the Forum Clause, the Court considered the *forum non conveniens* factors. The Court found that in the circumstances of the litigation history in *Stingray*, the merits of the Guardian's application to stay the Cayman proceedings did not depend upon the usual careful weighing of the standard *forum non conveniens* factors.

When considering which forum was the most appropriate the following factors were found to be dispositive of the application to stay proceedings:

- (a) the fact that jurisdiction has been challenged and lost by the Trustee in the foreign proceedings and
- (b) the more advanced status of those foreign proceedings.

A significant factor of the *Stingray* case was, therefore, the stage at which the application was being heard. The outcome in *Stingray* may be contrasted with that in the *HSBC* case. In *HSBC*, the Trustee had sought declaratory relief in the Cayman Islands at an early stage, as soon as an attack on the Cayman trust had been made in the foreign court, and sought declarations in Cayman which fully decided the matter before the jurisdiction challenge had come before the foreign court. By contrast, in *Stingray*, following a failed jurisdiction attempt in the Milan court, the Trustee sought directions in *Beddoe* proceedings in Cayman to participate and defend the claim in the foreign court, and submitted to the Milan jurisdiction for the purpose of doing so, and only at that stage brought on its application for declaratory relief in Cayman, even though the Trustee's Originating Summons had contained a claim for such relief at the outset. Accordingly, the fact that proceedings in Milan had been ongoing for a number of years in Milan

and that Beddoe orders had been made, at the Trustee's request, to direct the Trustee to defend the claim in Milan, were significant factors in the Cayman Court's decision that Cayman was not, at that point in time, the more appropriate forum.

*Stingray* is also distinguishable from the *HSBC* case in that the matters in dispute in *Stingray* were not complex matters of Cayman law, but rather turned largely on a factual dispute as to what the settlor intended and understood. The evidence was largely comprised of Italian documentation and witnesses whose first language was Italian. In *HSBC*, on the other hand, the question brought before the Cayman court for declaratory relief concerned the legal rights of beneficiaries of a discretionary trust and which required the application of legal principles concerning the effect under Cayman law of a letter of wishes – it was thus more appropriate that the Cayman court determined such issues. In *Stingray*, to the extent any questions of Cayman law arose these were not complex, and all parties agreed that that Cayman Islands law would be applied to such questions by the Milan court (in accordance with Section 90).

### **Takeaways for Cayman trustees**

1. While the Firewall legislation provides robust protection for Cayman trusts against orders of foreign courts which seek to undermine the validity of Cayman trusts on grounds that such courts do not recognise trusts, do not apply Cayman law to matters which must be determined in accordance with Cayman law, or seek to enforce forced heirship right or rights arising out of a personal relationship which are inconsistent with Cayman trusts law, the Firewall does not prevent recognition and enforcement of all decisions of foreign courts concerning Cayman trusts. Where a court of competent jurisdiction applies Cayman Islands law to its proceedings concerning a Cayman trust, where the parties have fully submitted to its jurisdiction and had an opportunity to put their case in that forum, and where there are no complex issues of Cayman Islands law to be decided, it may be decided that the most convenient forum is that of the foreign court, and a decision by that court may well be recognised and enforced by the Cayman court.
2. A trustee facing proceedings abroad, wishing to seek declaratory relief from the Cayman Islands Court on the matters before the foreign court, would be well advised to apply to the Cayman court at the earliest stage, before time and cost have been spent by the parties litigating in the foreign jurisdiction<sup>[11]</sup>
3. It is important for trustees to recognise that whilst it would generally be preferable for the Cayman court to determine all questions of law concerning the meaning and effect of a Cayman trust, this would not necessarily apply where the dispute in question does not involve complex legal issues, but is rather a factual dispute between parties as to historical facts. In such cases, where the majority of documents and witnesses are elsewhere and documents are in a different language it is open to the Cayman court to decide that Cayman is not the most convenient forum to determine the dispute.

4. Forum for administration clauses are common in Cayman trusts and certain forms of such clauses, which refer to the Cayman courts being the forum for administration have been held to have the effect of exclusive jurisdiction clauses, which will bind the trustee and parties with interests under the Trust<sup>[12]</sup>. However, they will not apply to bind parties where the issue is the very validity of the deed itself.

## Conclusion

The *Stingray* case has given welcome clarity in relation to the proper interpretation and application of Cayman's firewall provisions, and in particular its interplay with common law principles of *forum non conveniens*. As this latest judgment confirms, the Cayman firewall does not mandate the exclusive jurisdiction of the Cayman Court to determine issues relating to a Cayman trust without regard to *forum non conveniens principles*, but rather the Court will apply those principles to ensure the matter is heard in the most appropriate forum in light of the facts of the case.

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[1] 21 December 2020, unreported

[2] Formerly known as the Trusts Law 2020. The Citation of Acts of Parliament Law 2020 now provides that all

Cayman Islands enactments formerly known as Laws will now be called "Acts"

[3] known as the 'Firewall' legislation – it has the effect of barring enforcement of foreign judgments against Cayman Islands trusts in certain circumstances such as where the foreign judgment seeks to enforce rights arising out of a forced heirship regime or a personal relationship with the settlor or beneficiary. This legislation has been replicated in similar form in almost all other offshore jurisdictions

[4] *Grupo Torras SA & Anor v Bank of Butterfield International (Cayman) Limited & Ors* 2000 CILR 452; *Merrill Lynch Bank v Demirel & Ors* 2010 (2) CILR 75; *Re B Trust* 2010 (2) CILR 348; *Re A Trust* 2016 (2) CILR 416

[5] *HSBC International Trustee Limited v Tan Poh Lee & Ors* (Unreported 7 November 2019)

[6] paragraph 54 of the Judgment

[7] *Crociani v Crociani* [2014] UKPC 40

[8] paragraph 58 of the Judgment

[9] Lewin on Trusts (20<sup>th</sup> Ed) 11-063

[10] Lewin on Trusts (20<sup>th</sup> Ed) 11-079

[11] see paragraph 82 of the Judgment

[12] For example, the forum for administration clause in the *HSBC* case, which included the term "*The Courts of the Cayman Islands shall be the initial forum for the administration of the Trust*", was held to be an exclusive jurisdiction clause.

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