

UPDATE

# Interpretation of the Cayman Islands' firewall provisions in the Trusts Act (2021 Revision) – The Stingray Trust

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The decision in *Stingray Trust*<sup>1</sup> is the latest in a line of recent case law considering the effect of the Cayman firewall provisions in the Cayman Islands Trusts Act (2021 Revision) (the **Act**). The Grand Court of the Cayman Islands (the **Cayman Court**) determined that section 90 of the Act does not confer exclusive jurisdiction on the Cayman Islands courts to determine issues of validity arising under trusts governed by Cayman Islands law. Accordingly, in a case for the determination of the validity issue, section 90 of the Act does not abrogate the English common law principles of *forum non conveniens* on the question of whether a foreign court, applying Cayman Islands law to the validity issue, is a more convenient forum for determining the issue than the Cayman Islands courts.

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## What are the practical implications of this case?

This decision is the most recent in a line of decisions considering the proper interpretation of the firewall provisions in the Act. The Cayman Court determined that section 90 of the Act does not provide the Cayman Islands courts with exclusive jurisdiction to determine issues relating to Cayman Islands trusts, including issues of validity. The Cayman Court also found that the question whether a forum for administration clause confers exclusive jurisdiction on the relevant court must be considered in the context of the dispute. In this case, the Cayman Court found the Guardian's claim was not covered by the forum of administration clause at clause 10.2 of the Declaration of Trust (the **Forum Clause**) as it was made in IDF's court appointed Guardian (the **Guardian**)'s capacity as a stranger to the Trust, rather than as a beneficiary.

Further, section 90 does not abrogate the English common law principles of *forum non conveniens*. The Cayman Court is entitled to find that a foreign court is the appropriate forum for the determination of a dispute involving the question of validity of a trust governed by Cayman Islands law if: the foreign court will apply Cayman Islands law to the determination of the question; the issues are largely factual in nature (rather than complex issues of Cayman Islands law); and the foreign proceedings are far advanced. A decision of the foreign court which applies Cayman Islands law on the issue of validity may be recognised and enforced by the Cayman Islands courts without breaching the firewall provisions.

The decision represents a departure from the long-standing approach previously taken by the Cayman Court on the issue whether it is competent for a foreign court to determine any question falling within section 90 of the Act. The decision cannot however be said to have definitively answered all questions relating to this issue.

As shown below, section 90 applies not only to issues of validity, but also to issues of capacity, administration and the existence and extent of conferred or retained powers. Notwithstanding the Cayman Court's unequivocal position that the Cayman Islands courts do not have exclusive jurisdiction to determine the question of validity, it makes a distinction between a validity question and a question arising on an application for *Beddoe*-type relief, being a question of administration falling within section 90 of the Act. The Cayman Court did so, without clear explanation, by what it described as the combined application of

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<sup>1</sup> *Geneva Trust Company (GTC) SA v IDF & Anr* (unreported, 21 December 2020, Kawaley J).

section 90 and section 48 (which provides that any trustee may seek the Cayman Court's '*opinion, advice or direction on any question respecting the management or administration of the trust money...*').

The question arises whether the Cayman Court's reasoning on the absence of exclusive jurisdiction to determine a validity question is to be applied to the determination of issues of capacity and issues as to the existence and extent of retained or conferred powers. The answer would appear to turn on whether either issue is, or arises in the context of '*a question respecting the management or administration of the trust money...*' which, applying the Cayman Court's reasoning in *Stingray*, by virtue of section 48, would render the question a so-called *Beddoe*-type application, thus falling within the Cayman Court's exclusive jurisdiction.

Since that question was not expressly addressed in the *Stingray* judgment, it may well be the subject of future consideration in a future case, either by the Grand Court or the Cayman Islands Court of Appeal Court of Appeal. The true extent of the integrity of the Cayman firewall may therefore be yet to be determined.

## Background

The *Stingray* Trust (the **Trust**) is a trust governed by Cayman Islands law. IDF, the elderly settlor of the Trust, by her court appointed Guardian, issued proceedings against the Trustee in Switzerland in 2015 seeking disclosure of information and the transfer of the Trust assets to the Guardian on the basis that the Trust was invalid (the **Swiss Proceedings**). The Swiss Proceedings concluded before the Appeal Court of the Republic and Canton of Ticino in 2016 and the Guardian was ultimately unsuccessful. Subsequently, in 2017, the Guardian issued a second set of proceedings challenging the validity of the Trust before the Court of Milan, Italy (the **Milan Proceedings**).

In response to the Milan Proceedings, in November 2017, the Trustee filed an originating summons before the Cayman Court, that sought a declaration that the Trust was valid and subject to the exclusive jurisdiction of the courts of the Cayman Islands. The originating summons further sought *Beddoe* directions in relation to the Milan Proceedings (the **Cayman Proceedings**).

In 2018, the Cayman Court granted *Beddoe* relief enabling the Trustee to defend the Guardian's application for a pre-trial determination by the Supreme Court of Cassation, Milan, of the Trustee's challenge to the jurisdiction of the Milan courts. The Supreme Court of Cassation subsequently determined that the Milan court had jurisdiction over the validity dispute.

The Cayman Court then made further *Beddoe* directions in July 2019 for the Trustee to continue to defend the Milan Proceedings on their merits.

In August 2019, the Trustee applied to the Cayman Court to amend its originating summons to include an anti-suit injunction restraining the Guardian from further pursuing the Milan Proceedings and sought directions for the determination of the validity issue by the Cayman Court.

In September 2020, before the amendment application had been heard, the Guardian sought orders staying the Cayman Proceedings on grounds that the Cayman Islands is not the appropriate forum for the determination of the validity dispute and that the more appropriate and convenient forum is the Milan Court.

## Issues

The following issues fell to be decided by the Cayman Court:

- (a) Whether section 90 of Part VII of the Act provides that all questions relating to, inter alia, the validity of a Cayman Islands trust can only be adjudicated by the Cayman Islands courts;
- (b) Whether the Declaration of Trust contains an exclusive jurisdiction clause which was binding on the Guardian in relation to the validity issue; and
- (c) Whether the Cayman Islands is a more convenient forum than Italy to adjudicate the validity issue in any event.

## What did the court decide?

### Section 90 of the Trusts Act (2021 Revision)

Section 90 of the Act provides, *inter alia*, that 'All questions arising in regard to a trust which is for the time being governed by the laws of the [Cayman] Islands or in regard to any disposition of property upon the trusts thereof including questions as to — (a) the capacity of the settlor; (b) any aspect of the validity of the trust...; (c) the administration of the trust...; or (d) the existence and extent of powers conferred or retained...are to be determined according to the laws of the [Cayman] Islands, without reference to the laws of any other jurisdictions with which the trust or disposition may be connected...'.

The Guardian argued that section 90 did not confer express statutory jurisdiction over all trusts governed by Cayman Islands law to the Cayman Court. Section 90 merely expressed that Cayman Islands law shall apply to a trust that is governed by Cayman Islands law.

The Trustee argued that section 90, and in particular by the inclusion of the words '*without reference to the laws of any other jurisdictions with which the trust or disposition may be connected...*', required that questions as to the validity of a Cayman Islands law governed trust must be determined in accordance with Cayman Islands law and by the courts of the Cayman Islands. Further, that the effect of section 90 was to abrogate the English common law principles of *forum non conveniens* on the question whether a foreign court applying Cayman Islands law to the validity issue is a more convenient forum for determining the issue than the Cayman Islands courts. The Trustee primarily relied on a number of prior decisions of the Cayman Court (dating back over twenty years) that interpreted the so called 'firewall provisions' of the Act as conferring exclusive statutory jurisdiction on the courts of the Cayman Islands to determine all matters concerning Cayman Islands law governed trusts that fall within the scope of section 90 of the Act: *Grupo Torras SA v Bank of Butterfield International (Cayman) Limited et al* [2000 CILR 452], *Merrill Lynch v Demirel* [2010 (2) CILR 75], *Re B Trust* [2010 (2) CILR 248], *Re B Trust* [2010 (2) CILR 248], *Re The A Trust* (unreported, 1 December 2016). See also *HSBC International Trustee Limited v Tan Poh Lee et al* (unreported, 16 October 2019), where Justice Kawaley adopted a more ambiguous position in relation to the effect of the firewall provisions.

The Cayman Court's primary construction of the statutory provisions (without reference to previous authorities) was that section 90 was not intended to confer exclusive jurisdiction on the courts of the Cayman Islands. In the Cayman Court's view, sections 88 and 89 together made it clear that Part VII of the Act is intended to apply to trusts governed by Cayman Islands law by virtue of the fact that either local law is expressly selected as the governing law or the forum is expressly selected as the forum for the administration of the trust. However, none of these provisions (including section 90 itself), expressly deal with the Cayman Court's jurisdiction at all, let alone confer exclusive jurisdiction over all trusts governed by Cayman Islands law.

The Cayman Court further stated that the firewall provisions did not provide support for the proposition that section 90 of the Act contained a statutory exclusive jurisdiction clause:

- Section 91 of the Act simply provided that no trust governed by Cayman Islands law should be held to be invalid or defective through the application of a foreign law on grounds that:
  - the laws of any foreign jurisdiction prohibited or did not recognise the concept of a trust; or
  - the trust or disposition avoided or defeated certain rights arising from a personal relationship with a settlor or beneficiary or other heirship rights which were inconsistent with Cayman trusts.
- Section 92 of the Act further provided an exclusion of foreign law in as far as foreign law conferred heirship rights on property in the Cayman Islands.
- Section 93 of the Act only expressly rendered as unenforceable foreign judgments that were inconsistent with sections 91 or 92 (and notably not section 90).

The Cayman Court held that an interpretation of the firewall provisions did not support an inference that section 90 conferred exclusive jurisdiction on the Cayman Courts.

The Cayman Court then considered whether its primary interpretation of section 90 was displaced by binding or persuasive authority. The Cayman Court considered a number of first instance decisions of the Cayman Court that observed that only the courts of the Cayman Islands had jurisdiction over a trust governed by Cayman Islands law. However, the Cayman Court considered that none of the authorities

referred to by the Trustee were binding on the Cayman Court as the question was not subject to full argument and/or the statements in the decisions were passing observations (*obiter dicta*).

The Cayman Court therefore held that there was no binding or persuasive authority that displaced the Court's initial interpretation of section 90 of the Act. Applying a purposive construction, the Cayman Court found that section 90 does not require all matters which must be determined under Cayman Islands law to be determined exclusively by the Cayman Court.

The Cayman Court emphasised that this conclusion did not undermine the proposition that a combination of sections 48 and 90 of the Act applied to a trust expressly governed by Cayman Islands law, will usually mean that an application for *Beddoe* relief is one which must be taken before the Cayman Court.

### Forum Clause

The Forum Clause in the Declaration of Trust provided that '*The courts of the Cayman Islands shall be the forum for the administration of this Trust*'.

The Trustee argued that the Forum Clause conferred exclusive jurisdiction on the courts of the Cayman Islands. The Guardian responded that the Forum Clause had no application where the very validity of the Trust was in issue and the person challenging it was not bringing the claim pursuant to, or under, the Trust.

The Cayman Court held that '*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. Clearly the nature of the dispute is relevant*'. (at para 58) The Cayman Court considered that the claim brought by the Guardian in the Milan Proceedings was not caught by the Forum Clause because it was made in the Guardian's capacity as a stranger to the Trust and not as a beneficiary.

If, assuming instead that the Guardian's claim was caught by the Forum Clause, the Guardian was found not to be bound by it as:

- (a) clause 10.2 of the Declaration of Trust was not by its terms expressed to be an "exclusive" forum for administration clause;
- (b) the validity issue had not arisen as an application for *Beddoe* type relief under section 48 of the Law; and
- (c) most significantly, it was too late for the Trustee to seek to compel the Guardian to have the validity issue determined in the forum for administration, having already obtained *Beddoe* approval for the dispute to be adjudicated on its merits in the Milan Proceedings.

The Cayman Court stipulated that this was not intended to undermine the effect of such jurisdiction clauses in relation to applications under section 48 of the Act for *Beddoe* relief made by the trustees of a Cayman Islands law governed trust.

### Forum Non Conveniens

As neither section 90, nor the Forum Clause, conferred exclusive jurisdiction on the Cayman Court, the English common law principles of *forum non conveniens* applied.

The general principles governing *forum non conveniens* were not in dispute between the parties. The Trustee's legal submissions were to emphasise the pre-eminent importance in this context of the governing law in a trust case. The Guardian responded that the significance of the governing law was diminished where the primary issues were factual and the legal issues were straightforward.

The Cayman Court held that, when considering which forum is more appropriate in the context of concurrent proceedings, (a) the fact that jurisdiction has been challenged and lost in the foreign proceedings and (b) the more advanced status of those foreign proceedings, may well be dispositive of a stay application.

In this case, according to the Cayman Court, the Milan Court was the more appropriate forum. The Trustee had already submitted to the jurisdiction of the Milan Court and the Milan Proceedings were far advanced. The scales may have been tipped in favour of finding that the Cayman Islands was the more appropriate forum if the application before the Cayman Court had been heard before or shortly after the Milan Proceedings were commenced.

For the reasons stated above, the Cayman Court stayed the Cayman Proceedings. It did so on the grounds that the Cayman Islands was not the appropriate forum for the determination of the matter, and that the Milan Court was the more appropriate forum, subject to the condition that the question of whether the Trust was valid or invalid be determined by the Milan Court through the application of Cayman Islands law.

*This update was first published by LexisPSL Private Client.*

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