



CAYMAN ISLANDS LAW REFORM COMMISSION



TRUSTS LAW REFORM

Discussion Paper

Wednesday, April 05, 2017



THE CAYMAN ISLANDS LAW REFORM COMMISSION

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TRUSTS LAW REFORM

DISCUSSION PAPER

Section I - Introduction

1. Following upon recent developments in the law of trusts in other jurisdictions, the Law Reform Commission has been asked to consider to what extent the Trusts Law (2011 Revision) (“the Law”) could benefit from amendment. The Trusts (Amendment) Law, 2016 (“the Amendment Law”) is now in force but that deals principally with correcting inconsistencies in the transitional provisions of earlier trusts legislation and certain other matters falling within a fairly narrow compass.

2. Generally, we believe the Law has served this jurisdiction well and that it is in no need of drastic overhaul. Nevertheless, there are certain discrete areas where, with a view to remaining competitive as an off-shore trusts jurisdiction, we need to consider possible amendments. To the extent that amendments are proposed, an ancillary question arises as to whether those amendments should be retrospective, that is, apply both to trusts established before as well as after the amendments come into effect. There is no problem with those amendments which are only prospective since all those involved, the settlor, the trustees and, to the extent that they could have any cause for complaint, the beneficiaries, must take the law as they find it. To the extent that the amendments are retrospective, consideration needs to be given to the question whether those amendments do or may prejudice the interests of existing beneficiaries and, if so, whether such prejudice or possible prejudice can be justified¹. In the event, with one exception, we do not believe that any of the possible amendments which we have considered do prejudice the interests of existing beneficiaries, we give below our reasons for that belief in respect of each of the areas considered.

3. In preparing this paper we have had regard to the trusts legislation of England and Wales,² Jersey,³ Guernsey⁴, Bermuda,⁵ the British Virgin Islands,⁶ and the Bahamas⁷.

4. We consider in the following paragraphs the areas where there might be room for improvement.

¹ A half-way house, which has some legislative precedent in the Islands, is to give the trustees of existing trusts power to adopt the amending legislation: see Part X of the Law (introduced by section 10 of the Amendment Law). This effectively shifts the decision-making from the legislature to the trustees.

² Variation of Trusts Act 1958; Trustee Act 2000.

³ Trust (Jersey) Law, 1984 (as revised as at 1 January 2014).

⁴ The Trusts (Guernsey) Law, 2007.

⁵ Trustee Act, 1975 (as revised as at 27 October 2016).

⁶ Trustee Ordinance, 1961, as amended by the Trustee (Amendment) Acts 1993 and 2003.

⁷ Trustee Act 1998, as amended by the Trustee (Amendment) Acts 2011 and 2016.

Section II - Codification of Trustees' duties

5. The UK, Jersey and Guernsey (but not Bermuda, the BVI or the Bahamas) have codified, in whole or in part, the duties which trustees owe to their beneficiaries. Those duties consist primarily of, first, the duty of a trustee to act with reasonable care in exercising his powers (“the care duty”) and, secondly, the trustee’s duty of good faith, including such principles as the avoidance of a conflict between his position as a trustee and his personal interest (“the good faith duty”).

6. The UK Act defines the care duty⁸ and then specifies the powers or discretions to which it applies⁹. The Jersey Law defines the care duty in slightly more comprehensive terms¹⁰ but does not limit the powers and discretions to which it might apply. The Jersey Law goes further than the UK Act in that it also defines the good faith duty. The Guernsey Law also appears to cover both duties.¹¹

7. We doubt that there is any need in the Islands for trustees’ duties to be codified either in whole or in part. This is not the place to have a general discussion on the merits and demerits of codification. However, it should be noted that codification suffers from alternative disadvantages: either the language will be expressed in such wide terms as to be of little value – judges will invariably interpret such language having regard to previous decisions – or with such precision that it does not cover a situation which was not encompassed by any previous authority but which, the codification apart, might merit a finding either of liability or non-liability. Of course, there may be some areas of the law which merit codification but, based on such decisions of the Grand Court as have been reported, we do not believe that trustees’ duties is one of them. In a constantly shifting world, particularly in the development of cross-border jurisdictions, we do not believe that there is any justification for departing from the traditional incremental approach of the common law.

8. If trustees’ duties are to be codified, in whole or in part, we can see no reason why it should not apply to all trusts whenever established. After all, any codification purports to be a general statement of the pre-existing position.

9. Do consultees see any need for the law of the Islands relating to the duties of trustees to be codified?

If so, should that codification extend to the good faith duty as well as the care duty?

Should any attempt be made, in the case of either duty, to limit the extent of the codified duty by reference to particular powers or discretions?

⁸ UK Act, section 1.

⁹ Ibid., Schedule 1.

¹⁰ Jersey Law, section 21.

¹¹ Guernsey Law, sections 22, 24. Section 22 imposes a duty to act “en bon pere de famille” which we assume would include the care duty.

Should the codification be retrospective, that is, apply to all trusts whether they are established before or after the codification?

Section III - The Hastings Bass Rule

10. To what extent does the court have jurisdiction to correct the mistakes of trustees in the exercise of their fiduciary powers? Frequently, this issue arises because the trustees have made a disposition, based on erroneous professional advice, which has adverse fiscal consequences for one or more of the beneficiaries.¹² As a result of the decision of the UK Supreme Court in Futter/Pitt¹³, the so-called rule in Hastings Bass¹⁴ has been severely restricted.

11. On the assumption that the UK authorities are followed, the principal restriction is that the court's ability to correct such a mistake depends upon a finding that in exercising the power the trustees have acted in breach of their fiduciary duties. If the reported cases are anything to go by, this would be almost impossible to establish since most exercises of dispositive powers by the trustees are based on professional advice from relevant service providers and, as long as those service providers are not such that no reasonable trustee could seek their advice, there is no room for the court to exercise its correcting jurisdiction.

12. Following the decision in Futter/Pitt, Jersey, Bermuda and the Bahamas have introduced provisions defining the circumstances in which the courts of their respective jurisdictions can correct mistaken exercises by the trustees of their fiduciary powers. The Jersey Law covers not only the exercise of the trustee's powers but also transfers of property to the trust whether by the settlor, a person exercising a power on the settlor's behalf or a person who owes a fiduciary to the settlor¹⁵. But, apart from minor variations, the terms of the relevant provisions are largely repetitive. The Bermudan Act¹⁶ and the Bahamian Act¹⁷ apply to any exercise of fiduciary powers. Although invariably the powers in question will be of a dispositive nature, the legislation referred to is not so limited. More importantly, the exercise of the court's jurisdiction is not dependent on a finding of breach of duty or other fault on the part of the persons exercising the power or of any person advising them.

13. We see no reason why any such legislation should not apply to all trusts whenever established. In certain circumstances, certain beneficiaries of existing trusts may be

¹² For a recent example of the exercise of the jurisdiction in the Islands see Re Ta-Ming Wang Trust [2010(1)] CILR 541.

¹³ Futter v HMRC; Pitt v HMRC [2013] UKSC 26.

¹⁴ We call it "so-called" simply because, in Fitt/Putter, the Supreme Court expressed the view that Hastings Bass did not decide what many subsequent decisions – notably the judgment of Warner J in Mettoy Pension Trustees Ltd v Evans [1990] 1 WLR 1587 - claimed that it did decide.

¹⁵ Jersey Law, sections 47B-47J : see **Appendix A.**

¹⁶ Bermudan Act, section 47A: see **Appendix B.**

¹⁷ Bahamian Act 2016, section 4 (inserting new section 91C into the 1998 Act): see **Appendix C.**

disadvantaged by the exercise of the Court's jurisdiction but only to the extent that they are deprived of an unintended bonus.

14. Should the Islands introduce legislation specifying the circumstances in which the Grand Court has jurisdiction to correct mistakes by trustees in the exercise of their fiduciary powers?

If so, should that legislation also encompass mistakes made in connection with the transfer of property to the trust?

In either case, what conditions, if any, should be imposed on the exercise of the Court's jurisdiction?

Should any such legislation apply to all trusts whenever established?

Section IV - Judicial Variation of Trusts

15. Absent the compromise of a genuine dispute, the court has no inherent jurisdiction to vary the terms of an established trust.¹⁸ Of course, if all the possible beneficiaries are adult and sui juris, they can vary the trust for themselves but that is rarely the case since most family trusts provide for beneficiaries who, at the relevant time, are either minors or as yet unborn.

16. Following the decision of the UK House of Lords in Chapman v Chapman, the UK enacted the Variation of Trusts Act 1958, which conferred on the court a limited statutory jurisdiction to vary trusts. For present purposes, the most significant limitation was that no variation could be approved by the court unless it was established that it was for the benefit of those who were not adult and sui juris, that is, minors and unborns¹⁹. The equivalent legislation in Jersey, Guernsey, Bermuda and the Islands²⁰ follows, almost word for word, the terms of the UK 1958 Act. Those who have appeared for minors and unborns in the Chancery Division of the UK High Court will be aware of the lengths that can be gone to in convincing the court that a proposed variation which is, in truth, neutral so far as minors and unborns are concerned, is in fact for their benefit. If the adults are agreeable, a separate fund can be established, usually by way of an insurance policy, to provide for those minors and unborns who eventually acquire a vested interest. Absent that, reliance would be placed on those authorities which established that the benefit did not necessarily have to be financial.²¹ But at the end of the day, what the submission came down to was "what was good for little Johnny's dad, was good for little Johnny".²²

¹⁸ Chapman v Chapman [1954] UKHL 1.

¹⁹ We use the expression "minors and unborns" throughout this paper to include all those who for whatever reason are not capable of consenting to what is proposed.

²⁰ Law, section 72.

²¹ See, for example, Re Clore's S.T.[1966] 1 WLR 955.

²² Applications under the Variation of Trusts Act were invariably disposed of in chambers although, if a point of principle arose, a judgement, suitably redacted, might be given in open court. [The Chairman recalls a story told to him by the head of his former chambers, the late Charles Sparrow QC, who, appearing in chambers on such an application for minors and unborns, was told by the judge (Wyn-Parry

17. Although the position as stated above remains the law in the UK, Jersey, Guernsey, Bermuda and the Islands, it is no longer the law in the BVI or the Bahamas. Section 58 of the BVI 1981 Act, as amended by section 5 of the 2003 Act, now provides that an arrangement can be approved by the Court on behalf of minors and unborns provided that it is not detrimental to them.²³ Bahamas law is to the like effect.²⁴ Thus the “benefit test” has been replaced by a “no detriment test”.

18. We have no problem with a similar amendment to section 72 of the Law and, for the reasons given above, we see no reason why such an amendment should not be retrospective.

19. Should section 72 of the Law be amended so as to substitute the “no detriment test” for the “benefit test”?

Section V - Extra-Judicial Variation of Trusts

20. Most trust deeds contain provisions which, in one way or another, permit amendments to their terms. A power to add or exclude discretionary beneficiaries is common place. The exercise of an overriding power of appointment enables fresh sub-trusts to be created. There may be an express power of amendment although we believe it to be rare for such a power to extend to the alteration of beneficial interests. These powers will usually be exercisable by the trustees, possibly requiring the consent of any protector, and as such will be fiduciary powers. But, subject to that, minor and unborn beneficiaries enjoy their interests subject to the exercise of those powers: no question of benefit or lack of detriment arises.

21. It is in this context that we have considered section 58A of the BVI 1981 Ordinance (inserted by section 6 of the BVI 2003 Act).²⁵ Section 58A is far-reaching and, to the extent that it applies, effectively by-passes the court’s statutory jurisdiction to vary trusts, a jurisdiction which is nevertheless retained in the amended section 58.²⁶ In summary, section 58A states that where a trust instrument provides for the appointment of a person to approve any arrangement varying a trust on behalf of minors and unborns the giving of that approval is equivalent to the court approving the arrangement on behalf of such persons pursuant to section 58. The only condition to the exercise of this power of approval is that the person giving the approval is of the opinion, “formed in good faith”, that the arrangement “would not be detrimental to the person or persons on whose behalf it is given”.

22. We have considerable reservations about the wisdom of introducing a similar provision into the law of the Islands. Although we have no problem with the introduction

J): “Well, Mr Sparrow, there are some things you can do at the seaside which you can’t do at home”. The application succeeded.]

²³ See **Appendix D**. Section 6 of the BVI 2003 Act introduces an extra-judicial method of varying trusts which we consider below: see paragraph 21.

²⁴ Bahamian Act 1998, section 70: see **Appendix E**.

²⁵ See **Appendix D**.

²⁶ See paragraph 17 above.

of the “no detriment test”, it seems to us that the “good faith opinion” of the appointee is not enough: what is required is an impartial assessment of whether the proposed arrangement is or is not to the detriment of those on whose behalf the approval is sought. That assessment can only be made in the context of a court application where more than one mind, including that of the judge hearing the application, is brought to bear on the question. In that context, the court will be assisted by those representing the trustees, who will be impartial, as well as those representing those on whose behalf approval is sought. So far as we are aware, no other jurisdiction has introduced a similar provision and, applications pursuant to section 72 of the Law being relatively rare here, we question the need for its introduction into the law of the Islands.

23. Section 58A is not retrospective if for no other reason than that existing trusts would not contain the provision for appointment on which section 58A is predicated. Nor, if anything like section 58A is to be introduced into the law of the Islands, would we think it appropriate to give the trustees of existing trusts the power to introduce such a provision.

24. Should any provision along the lines of section 58A of the BVI 1961 Ordinance be introduced into the law of the Islands?

If so, to what extent, if at all, should such a provision be made retrospective?

Section VI - Dispute Resolution

25. In this Section we deal with the means by which trust disputes can be resolved whether by judgment or compromise. We use the expression “trust disputes” to cover claims by beneficiaries against the trustees alleging breaches of trust as well as the more usual applications by trustees seeking the directions of the Court in relation to some issue which has arisen between the beneficiaries and themselves or between the beneficiaries inter se.

26. If minors or unborns are involved in trust litigation they will either be parties to that litigation and represented by a guardian ad litem or, without them being a party, represented by a party pursuant to a representation order.²⁷ In either event, any judgment in the action will be binding on them. Again, in either event, if a compromise is reached, it will only be binding on minors and unborns if the Court is satisfied that the compromise is for their benefit.²⁸ A question arises as to whether, if section 72 of the Law is to be amended to substitute a “no detriment test” for the existing “benefit test”, a provision should be introduced into the Law to enable the Court to apply a similar test in deciding whether to approve a compromise pursuant to its inherent jurisdiction and GCR Order 15, rule 13(4) amended accordingly. Although a variation and the approval of the compromise of a genuine dispute represent separate jurisdictions, one statutory and the

²⁷ GCR Order 15, rule 13.

²⁸ Oddly, Order 15, rule 13(4), as published online, provides the exact opposite, namely, that the Court must be satisfied that the compromise “will not be for the benefit of the absent persons” – emphasis supplied – but the inclusion of the word “not” must be a mistake.

other inherent, we can see no justification for having different tests. If anything, the statutory test should be stricter.

27. It remains to consider alternative dispute resolution in its application to trust disputes. Where none of the possible beneficiaries are minors or unborns, there is no reason why they should not agree to submit their disputes to arbitration or attempt to resolve them by mediation as in the case of any other type of dispute. The difficulty arises if the possible beneficiaries include minors or unborns. The Arbitration Law (2012 Revision) is not equipped with the necessary machinery to enable trust disputes which may impact the interests of minors or unborns to be resolved whether by an arbitral award or a compromise. Necessarily, the minors and unborns cannot be parties to an arbitration agreement and the arbitral tribunal lacks the powers of the Court which ensure that a decision or compromise will be binding on all possible beneficiaries. In theory, either arbitration or, more appropriately, mediation could be used to resolve the disputes as between the adult beneficiaries in the hope that a compromise is reached and that that compromise is then approved by the Court on behalf of the minors and unborns. But the expense of such a two-pronged approach is likely to be prohibitive.

28. Two jurisdictions, Guernsey and the Bahamas, have introduced provisions designed to facilitate the resolution of certain trust disputes extra-judicially. Section 63(1) of the Guernsey 2007 Law²⁹ provides that where (a) the terms of a trust direct or authorize, or the Court so orders, any claim against a trustee founded on breach of trust may be referred to alternative dispute resolution³⁰ (b) such a claim is so referred and (c) a settlement of the claim results, then, that settlement is binding on all the beneficiaries including minors and unborns. However, sub-section (2) goes on to provide that, in so far as minors and unborns are concerned, sub-section (1) only applies if the arbitral tribunal or the mediator certifies that they were “independently represented by a person appointed by a court of law”.³¹ Thus, the provision is of limited effect applying as it does only to claims founded on a breach of trust. Nor, notwithstanding the inclusion of a reference to “adjudication” in the definition of “alternative dispute resolution”, would it appear to confer upon the arbitral tribunal or the mediator the necessary power to resolve the claim by way of a decision binding on all possible beneficiaries. Finally, we note that if minors or unborns are involved, an application to the Court will still be required to enable them to be represented at the arbitration or mediation.

29. Sections 91A – 91C of the Bahamas 1998 Act (inserted by section 18 of the 2011 Act)³², although limited to arbitration as opposed to mediation, is of more general application. Section 91A states that where a trust instrument provides that any dispute or administration question³³ arising between any of the parties in relation to the trust shall be submitted to arbitration, that provision shall have effect as if it were, for all the purposes

²⁹ See **Appendix F**.

³⁰ Defined so as to include mediation, adjudication and arbitration: section 63(5).

³¹ There is no, or no express, requirement of a finding that the settlement is for the benefit or not to the detriment of minors and unborns.

³² See **Appendix G**.

³³ Defined so as to effectively include any relief or question relating to a trust which could be brought before the court: section 91C.

of the Bahamian Arbitration Act, an arbitration agreement and those parties were parties to that agreement. That section goes on to adapt the provisions of the Arbitration Act to the resolution of trust disputes and administration questions. Section 91B confers upon the arbitrator all the powers of the Court appropriate to the resolution of a trust dispute including powers of appointing next friends and guardians ad litem. Any award will be binding on, in effect, all possible beneficiaries including minors and unborns. A compromise affecting minors and unborns will require the approval of the tribunal which will only be forthcoming if it is satisfied that the compromise is for their benefit.

30. We do not consider that mediation is appropriate for the resolution of trust disputes save where the only possible beneficiaries are in existence and adults. It is not the function of a mediator to decide anything including the approval of a compromise on behalf of minors and unborns. His function is simply to facilitate the reaching of an agreement between adult parties. It would no doubt be possible to introduce legislation adapting the Arbitration Law (2012 Revision) so as to confer upon the arbitral tribunal all the powers of the Grand Court required for resolving trust disputes. If that course were to be adopted we would prefer the Bahamian approach to that of Guernsey which, even if restricted to arbitration, seems to us to raise more questions than it answers. But our principal reservation is that to introduce either would be fulfilling a need which simply does not exist. This is not the place to discuss the respective merits of arbitration and litigation although in the case of the resolution of most trust disputes we would suppose that they are, at best, pretty evenly balanced. Most trust disputes are heard and resolved in chambers and thus confidential. Litigating such disputes in the Financial Services Division of the Grand Court may involve significant court fees but they are unlikely to be anything like the arbitral tribunal's fees.³⁴ To our minds the most significant factor is that the Grand Court has significant experience of adjudicating trust disputes and its judgments are rightly treated with respect in other common law jurisdictions. We doubt whether that could be matched by any arbitral tribunal other than one comprised of the members, or retired members, of the judiciary from this or other such jurisdictions.

31. Should the Law be amended so as to provide for the resolution of trust disputes by arbitration?

If so, should that amendment be in the form of the Bahamian legislation or some other, and if so, what form?

Section VII - The Law, section 6(c)

32. Section 6 of the Law deals generally with the appointment of trustees. Section 6(c) provides, in so far as is material, that, save in certain excepted circumstances, a retiring trustee "shall not be discharged from his trust unless there is either a trust corporation or at least two individuals to act as trustees to perform the trust".³⁵

³⁴ Not to mention the cost of hiring a suitable venue for the hearing.

³⁵ This provision is not affected by section 3(a) of the Amendment Law which amends section 6(c) of the Law in certain other respects.

33. The difficulty arises because of the definition of a “trust corporation” in section 2 of the Law. That definition requires that the relevant company be either incorporated in the Islands or registered as a foreign company under Part IX of the Companies Law (2009 Revision) and, in both cases, holds a licence to carry on trust business under the Banks and Trust Companies Law (2009 Revision) (“the BT Law”). Section 10 of the Amendment Law amends the definition of “trust corporation” in section 105(2) of the Law so as to include not only a company licensed to conduct trust business under the BT Law but also a company registered “under [the BT Law] as a controlled subsidiary or private trust company”. However, section 10 of the Amendment Law only extends to STAR trusts established pursuant to Part VIII of the Law. We can see no reason why this extended definition should not apply for the purposes of section 6(c) of the Law or, indeed, replacing the definition in section 2 of the Law, for all purposes.

34. We see no reason why such a change, which is administrative in nature, should not apply to all trusts whenever established.

35. Should the definition of “trust corporation” for the purposes of section 6(c) be extended so as to include a company registered under the BT Law as a controlled subsidiary or a private trust company?

Alternatively, should the definition of “trust corporation” in section 2 of the Law be similarly extended so as to apply generally?

Section VIII - The Law, section 91(b)

36. Section 91(b) is contained in Part VII of the Law which deals generally with the “foreign element”. Section 91 provides, in so far as is presently material, that no trust governed by the laws of the Islands is liable to be impugned by reason that it defeats rights, claims or interests conferred by foreign law “upon any person by reason of a personal relationship to the settlor”³⁶. Examples of such rights would be those arising out of a community of property regime or by virtue of orders made in foreign divorce proceedings. The Islands have existed as a recognised offshore trust jurisdiction for some considerable time. In many instances, the settlor is no longer living. A question arises whether the protection afforded by the reference to “a personal relationship to the settlor” should be extended so as to include a personal relationship to any beneficiary including a discretionary beneficiary.

37. Should section 91(b) be so extended?

³⁶ “Heirship rights” are mentioned separately in section 91(b) and we are not presently concerned with them.

Section IX - Miscellaneous

38. Are there any other areas where amendment of the Law should be considered?

Wednesday, March 15, 2017

APPENDIX A

TRUSTS (JERSEY) LAW 1984

Revised Edition

13.875

Showing the law as at 1 January 2014

This is a revised edition of the law

TRUSTS (JERSEY) LAW 1984

Powers of the court

47B Articles 47D to 47J: Interpretation^[62]

- (1) In Articles 47D to 47J –
 - (a) references to a transfer or other disposition of property to a trust, do not include a testamentary disposition;
 - (b) “power” includes a discretion as to the way in which an obligation is performed.
- (2) In Articles 47E and 47G, “mistake” includes (but is not limited to) –
 - (a) a mistake as to –
 - (i) the effect of,
 - (ii) any consequences of, or
 - (iii) any of the advantages to be gained by,a transfer or other disposition of property to a trust, or the exercise of a power over or in relation to a trust or trust property;

- (b) a mistake as to a fact existing either before or at the time of, a transfer or other disposition of property to a trust, or the exercise of a power over or in relation to a trust or trust property; or
- (c) a mistake of law including a law of a foreign jurisdiction.

47C Determination of “mistake”^[63]

The doctrine of “erreur” in Jersey customary law as applied to the law of contract, shall not apply to any question concerning the meaning of “mistake” for the purposes of determining an application under Article 47E or 47G.

47D Application of powers under Articles 47E to 47I^[64]

Articles 47E to 47I apply in relation to the transfer or other disposition of property to a trust, or the exercise of any power over or in relation to a trust or trust property that occurs either before or after the coming into force of the Trusts (Amendment No. 6) (Jersey) Law 2013^[65].

47E Power to set aside a transfer or disposition of property to a trust due to mistake^[66]

- (1) In this paragraph, “person exercising a power” means a person who exercises a power to transfer or make other disposition of property to a trust on behalf of a settlor.
- (2) The court may on the application of any person specified in Article 47I(1), and in the circumstances set out in paragraph (3), declare that a transfer or other disposition of property to a trust –
 - (a) by a settlor acting in person (whether alone or with any other settlor); or
 - (b) through a person exercising a power,is voidable and –
 - (i) has such effect as the court may determine, or
 - (ii) is of no effect from the time of its exercise.
- (3) The circumstances are where the settlor or person exercising a power –
 - (a) made a mistake in relation to the transfer or other disposition of property to a trust; and
 - (b) would not have made that transfer or other disposition but for that mistake, and

the mistake is of so serious a character as to render it just for the court to make a declaration under this Article.

47F Power to set aside a transfer or disposition of property to a trust exercised by fiduciary power⁶⁷ⁱ

- (1) In this paragraph, “person exercising a power” means a person who exercises a power to transfer or make other disposition of property to a trust on behalf of a settlor and who owes a fiduciary duty to the settlor in relation to the exercise of his or her power.
- (2) The court may on the application of any person specified in Article 47I(1), and in the circumstances set out in paragraph (3), declare that a transfer or other disposition of property to a trust by a settlor (whether alone or with any other settlor) through a person exercising a power, is voidable and –
 - (a) has such effect as the court may determine, or
 - (b) is of no effect from the time of its exercise.
- (3) The circumstances are where, in relation to the exercise of his or her power, the person exercising a power –
 - (a) failed to take into account any relevant considerations or took into account irrelevant considerations; and
 - (b) would not have exercised the power, or would not have exercised the power in the way it was so exercised, but for that failure to take into account relevant considerations or that taking into account of irrelevant considerations.
- (4) It does not matter whether or not the circumstances set out in paragraph (3) occurred as a result of any lack of care or other fault on the part of the person exercising a power, or on the part of any person giving advice in relation to the exercise of the power.

47G Power to set aside the exercise of powers in relation to a trust or trust property due to mistake⁶⁸ⁱ

- (1) In this paragraph, “person exercising a power” means a person who, otherwise than in the capacity of trustee, exercises a power over, or in relation to a trust, or trust property.
- (2) The court may on the application of any person specified in Article 47I(2), and in the circumstances set out in paragraph (3), declare that the exercise of a power by a trustee or a person exercising a power over, or in relation to a trust, or trust property, is voidable and –
 - (a) has such effect as the court may determine; or
 - (b) is of no effect from the time of its exercise.
- (3) The circumstances are where the trustee or person exercising a power –
 - (a) made a mistake in relation to the exercise of his or her power; and
 - (b) would not have exercised the power, or would not have exercised the power in the way it was so exercised, but for that mistake, and

the mistake is of so serious a character as to render it just for the court to make a declaration under this Article.

47H Power to set aside the exercise of fiduciary powers in relation to a trust or trust property^[69]

- (1) In this paragraph, “person exercising a power” means a person who, otherwise than in the capacity of trustee, exercises a power over, or in relation to a trust, or trust property and who owes a fiduciary duty to a beneficiary in relation to the exercise of that power.
- (2) The court may on the application of any person specified in Article 47I(2), and in the circumstances set out in paragraph (3), declare that the exercise of a power by a trustee or a person exercising a power over, or in relation to a trust, or trust property, is voidable and –
 - (a) has such effect as the court may determine; or
 - (b) is of no effect from the time of its exercise.
- (3) The circumstances are where, in relation to the exercise of his or her power, the trustee or person exercising a power –
 - (a) failed to take into account any relevant considerations or took into account irrelevant considerations; and
 - (a) would not have exercised the power, or would not have exercised the power in the way it was so exercised, but for that failure to take into account relevant considerations, or that taking into account of irrelevant considerations.
- (4) It does not matter whether or not the circumstances set out in paragraph (3) occurred as a result of any lack of care or other fault on the part of the trustee or person exercising a power, or on the part of any person giving advice in relation to the exercise of the power.

47I Applications and orders under Articles 47E to 47H^[70]

- (1) An application under Article 47E(2) or 47F(2) may be made by any settlor or any of his or her personal representatives or successors in title.
- (2) An application under Article 47G(2) or 47H(2) may be made by –
 - (a) the trustee who exercised the power concerned, or the person exercising a power (as the case may be);
 - (b) any other trustee;
 - (c) a beneficiary or enforcer;
 - (d) the Attorney General in relation to a trust containing charitable trusts, powers or provisions;
 - (e) any other person with leave of the court.

- (3) Without prejudice to Article 51 and subject to paragraph (4), the court may, consequential upon a declaration made under any of Articles 47E to 47H, make such order as it thinks fit.
- (4) No order may be made under paragraph (3) which would prejudice any bona fide purchaser for value of any trust property without notice of the matters which render the transfer or other disposition of property to a trust, or the exercise of any power over or in relation to a trust or trust property, voidable.

47J Savings in respect of applications made under Articles 47E to 47H^[21]

Nothing in Articles 47E to 47H shall prejudice –

- (a) any application for a declaration that a transfer or other disposition of property to a trust, or the exercise of any power over or in relation to a trust or trust property, is void or voidable on grounds other than those specified in Articles 47E to 47H; or
- (b) any personal remedy which may be available against a trustee or any other person.

APPENDIX B

BERMUDA TRUSTEE ACT 1975

Jurisdiction to make other Orders

Jurisdiction of court to set aside flawed exercise of fiduciary power

47A (1) If the court, in relation to the exercise of a fiduciary power, is satisfied on an application by a person specified in subsection (5) that the conditions set out at subsection (2) are met, the court may—

- (a) set aside the exercise of the power, either in whole or in part, and either unconditionally or on such terms and subject to such conditions as the court may think fit; and
 - (b) make such order consequent upon the setting aside of the exercise of the power as it thinks fit.
- (2) The conditions referred to in subsection (1) are that—
- (a) in the exercise of the power, the person who holds the power did not take into account one or more considerations (whether of fact, law, or a combination of fact and law) that were relevant to the exercise of the power, or took into account one or more considerations that were irrelevant to the exercise of the power; and

- (b) but for his failure to take into account one or more such relevant considerations or his having taken into account one or more such irrelevant considerations, the person who holds the power—
 - (i) would not have exercised the power;
 - (ii) would have exercised the power, but on a different occasion to that on which it was exercised; or
 - (iii) would have exercised the power, but in a different manner to that in which it was exercised.

(3) If and to the extent that the exercise of a power is set aside under this section, to that extent the exercise of the power shall be treated as never having occurred.

(4) The conditions set out in subsection (2) may be satisfied without it being alleged or proved that in the exercise of the power, the person who holds the power, or any adviser to such person, acted in breach of trust or in breach of duty.

- (5) An application to the court under this section may be made by—
 - (a) the person who holds the power;
 - (b) where the power is conferred in respect of a trust or trust property, by any trustee of that trust, or by any person beneficially interested under that trust, or (in the case of a purpose trust) by any person appointed by or under the trust for the purposes of section 12B(1) of the Trusts (Special Provisions) Act 1989;
 - (c) where the power is conferred in respect of a charitable trust or otherwise for a charitable purpose, the Attorney-General; or
 - (d) with the leave of the court, any other person.

(6) No order may be made under subsection (1) which would prejudice a bona fide purchaser for value of any trust property without notice of the matters which allow the court to set aside the exercise of a power over or in relation thereto.

(7) The jurisdiction conferred upon the court by this section may be exercised by the court in respect of fiduciary powers, whether conferred or exercised before, on or after the commencement date of the Trustee Amendment Act 2014.

- (8) In this section—

“fiduciary power” means any power that, when exercised, must be exercised for the benefit of or taking into account the interests of at least one person other than the person who holds the power; and

“power” includes a discretion as to how an obligation is performed;

“person who holds the power ” includes any person on whom a power has been conferred, whether or not that power is exercisable by that person alone, and any person to whom the exercise of a power has been delegated.

APPENDIX C

TRUSTEE (AMENDMENT) ACT, 2016

SUPPLEMENT PART 1

OFFICIAL GAZETTE

THE BAHAMAS

PUBLISHED BY AUTHORITY

4. Inserts new section 91C into the principal Act.

The principal Act is amended —

- (a) by re-numbering section 91C as section 91D; and
- (b) by inserting, immediately after section 91B, the following as a new section 91C —

"91C. Power of court.

- (1) A person may apply to the court to declare the exercise of a fiduciary power voidable.
- (2) The court may, on an application made under subsection (1), declare the exercise of the fiduciary power void or voidable and make such determination as it deems fit, if the court is satisfied that —
 - (a) a person with the fiduciary power —
 - (i) has failed to take into account relevant considerations;
or
 - (ii) has taken into account irrelevant considerations; and
 - (b) such person —
 - (i) would not have exercised the fiduciary power;
or
 - (ii) would have exercised the fiduciary power, but on a different occasion, or in a different manner, to that in which it was exercised.
- (3) An application under subsection (1) may be made by —
 - (a) a trustee, protector, or any other person exercising the power;
 - (b) a successor in title of the trustee or protector;
 - (c) a power holder under section 81A;
 - (d) a beneficiary;
 - (e) an "authorised applicant" as defined in the Purpose Trusts Act (*Ch. 176A*);
 - (f) for a purpose trust, the Attorney-General if there is no

- authorised applicant;
 - (g) any person with leave of the court
- (4) Whether or not in the exercise of the power the person exercising the power, or any person advising such person, acted in breach of trust, in breach of duty or was otherwise at fault shall be immaterial to the making of a declaration by the court under subsection (1).
- (5) No order may be made under subsection (2) which would prejudice a *bona fide* purchaser for value without notice of any trust property without knowledge of the matters which allow the court to set aside the exercise of a fiduciary power."

APPENDIX D

BRITISH VIRGIN ISLANDS

TRUSTEE ORDINANCE, 1961

As Amended by the Trustee (Amendment) Act, 1993

Powers of the court

Jurisdiction of Court to vary trusts

58. (1) Where property, whether real or person, is held on trust arising whether before or after the passing of this Ordinance, under any will, settlement or other disposition, the Court may if it thinks fit by order approve on behalf of –

- (a) any person having, directly or indirectly, an interest, whether vested or contingent, under the trusts who by reason of infancy for other incapacity is incapable of assenting; or
- (b) any person (whether ascertained or not) who may have become entitled, directly or indirectly, to an interest under the trusts as being at a future date or on the happening of a future event a person of any specified description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the Court; or
- (c) any unborn person; or
- (d) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined,

any arrangement (by whomsoever proposed, and whether or not there is any other person beneficially interested who is capable of assenting

thereto) varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property subject to the trust:

Provided that except by virtue of paragraph (d) the Court shall not approve an arrangement on behalf of any person unless the carrying out thereof would be for the benefit of that person.

(2) In the foregoing subsection “protective trusts” means an interest specified in paragraphs (a) and (b) of subsection (1) of section 34 or any like trusts, “the principal beneficiary” has the same meaning as in the said subsection (1), and “discretionary interest” means an interest arising under the trust specified in paragraph (a) of the said subsection.

(3) Nothing in the foregoing provisions of this section shall apply to trusts affecting property settled by any law of the Colony.

(4) Nothing in this section shall be taken to limit the powers conferred by section 59 or by section 6 of the West Indies Associated States Supreme Court (Virgin Islands) Ordinance.

VIRGIN ISLANDS

TRUSTEE (AMENDMENT) ACT, 2003

Section 58 amended

5. Section 58 of the principal Act is amended

- (a) in subsection (1),
 - (i) in paragraph (b), by inserting after the words “shall not include any”, the word “ascertained”;
 - (ii) by deleting from the words “varying or revoking all or any of the trusts” to the end and substituting the words “varying, adding to, revoking or replacing all or any of the trusts, enlarging, restricting or removing all or any of the powers of the trustees of managing or administering any of the property subject to the trusts or all or any other powers of the trustees, or varying, adding to, removing or replacing any or all of the other provisions of the trusts: Provided that except by virtue of paragraph (d) the Court shall not approve an arrangement on behalf of any person if carrying it out would be detrimental to that person.”; and
- (b) by inserting after subsection (4), the following subsections:
 - “(5) The references to an interest in subsections (1)(a) and (1)(b) shall be construed to include references to a discretionary interest.
 - (6) This section applies to any trust, whether created before, on or after the date on which this subsection comes into force.”.

Section 58A inserted.

6. The principal Act is amended by inserting after section 58, the following section:
- 58A. (1) Where a trust instrument provides for the appointment of any person (including the holder of any office under the trust) to approve any arrangement described in section 58(1) on behalf of any of the persons referred to in paragraphs (a) to (d) thereof (whether specified by name or by description and whether or not the identity of such persons is ascertained or ascertainable), and where such approval is subsequently given pursuant thereto, such approval shall have the same effect as if the Court had approved such arrangement on behalf of such persons pursuant to the powers vested in it by section 58(1):

Provided that no such approval shall be given on behalf of any persons referred to in paragraphs (a) to (c) of section 58(1) unless, in the opinion formed in good faith of the person giving the approval, carrying out and giving effect to such arrangement would not be detrimental to the person or persons on whose behalf it is given.

- (2) Nothing in subsection (1), nor in any such provision in a trust instrument as is referred to in that subsection, shall be taken to limit the powers conferred by section 58 or 59 or by section 6 of the West Indies Associated States Supreme Court (Virgin Islands) Act.
- (3) References to the holder of any office under the trust in subsection (1) include references to a trustee or any protector or protective committee of the trust.
- (4) This section applies only to trusts created on or after the date on which this section comes into force.”.

APPENDIX E
BAHAMAS

CHAPTER 176

TRUSTEE

Powers of the Court

Jurisdiction of Court to vary trusts

70. (1) Where property whether real or personal is held on trusts arising before, on or after the commencement of this Act under any will, settlement or other disposition, the Court may if it thinks fit by order approve on behalf of —

- (a) any person having directly or indirectly an interest whether vested or contingent under the trusts who by reason of being a minor or other incapacity is incapable of assenting;
- (b) any person (whether ascertained or not) who may become entitled directly or indirectly to an interest under the trusts (whether discretionary or otherwise) as being at a future date or on the happening of a future event a person of any specific description or a member of any specified class of persons, so however that this paragraph shall not include any person who would be of that description or a member of that class, as the case may be, if the said date had fallen or the said event had happened at the date of the application to the Court;
- (c) any unborn person; or
- (d) any person in respect of any discretionary interest of his under protective trusts where the interest of the principal beneficiary has not failed or determined,

any arrangement (by whomever proposed and whether or not there is any other person beneficially interested who is capable of assenting thereto) varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts:

Provided that the Court shall not approve an arrangement on behalf of any person if carrying it out would be detrimental to that person.

(2) In the foregoing subsection “protective trusts” means an interest specified in paragraphs (a) and (b) of subsection (1) of section 39 or any like trusts, “the principal beneficiary” has the same meaning as in the said subsection (1), and “discretionary interest” means an interest arising under the trust specified in paragraph (a) of the said subsection.

(3) Where capital or income of trust property is or may be applicable for a charitable purpose or an authorised purpose the Court may if it thinks fit by order

sanction in respect of that purpose the carrying out of any arrangement (by whomever proposed and whether or not there is any person beneficially interested capable of assenting thereto) varying or revoking all or any of the trusts or enlarging the powers of the trustees of managing or administering any of the property subject to the trusts: Provided that the Court shall not sanction the carrying out of any arrangement if it would be detrimental to the purpose in respect of which such sanction is sought.

(4) In subsection (3) “charitable purpose” means an exclusive charitable purpose but does not include an independent charitable company, association or other separate entity or organisation, and “authorised purpose” means a purpose of an authorised purpose trust within the meaning of the Purpose Trusts Act.

(5) Nothing in the foregoing provisions of this section shall apply to trusts affecting property settled by any written law.

APPENDIX F

THE TRUSTS (GUERNSEY) LAW, 2007

(Registered on the Records of the Island of Guernsey
on the 18th February, 2008.)

Variation, etc. of trusts

Settlement of action against trustee by alternative dispute resolution to be binding on beneficiaries.

63. (1) Where –
- (a) the terms of a trust direct or authorise, or the Court so orders, that any claim against a trustee founded on breach of trust may be referred to alternative dispute resolution ("ADR"),
 - (b) such a claim arises and, in accordance with the terms of the trust or the Court's order, is referred to ADR, and
 - (c) the ADR results in a settlement of the claim which is recorded in a document signed by or on behalf of all parties, the settlement is binding on all beneficiaries of the trust, whether or not yet ascertained or in existence, and whether or not minors or persons under legal disability.

the settlement is binding on all beneficiaries of the trust, whether or not yet ascertained or in existence, and whether or not minors or persons under legal disability.

- (2) Subsection (1) applies in respect of a beneficiary only if –
- (a) he was represented in the ADR proceedings (whether personally, or by his guardian, or as the member of a class, or otherwise), or

- (b) if not so represented, he had notice of the ADR proceedings and a reasonable opportunity of being heard,

and only if, in the case of a beneficiary who is not yet ascertained or in existence, or who is a minor or person under legal disability, the person conducting the ADR proceedings certifies that he was independently represented by a person appointed for the purpose by a court of law.

"Notice" in paragraph (b) means 14 days' notice or such other period as the person conducting the ADR proceedings may direct.

(3) A person who represents a beneficiary in the ADR proceedings for the purposes of subsection (2)(a) is under a duty of care to the beneficiary.

(4) For the avoidance of doubt, the ADR proceedings need not be conducted in Guernsey or in accordance with the procedural law of Guernsey.

(5) In this section –
"ADR" includes conciliation, mediation, early neutral evaluation, adjudication, expert determination and arbitration, and

"proceedings" includes oral and written proceedings.

APPENDIX G

TRUSTEE (AMENDMENT) ACT, 2011

AN ACT TO AMEND THE TRUSTEE ACT TO STRENGTHEN THE EXISTING
LAW AS IT RELATES TO THE ADMINISTRATION OF TRUSTS AND OTHER
MATTERS RELATED THERETO

Date of Assent - 301 h December, 2011
Enacted by the Parliament of The Bahamas

18. Insertion of new sections 91A, 918 and 91C into the principal Act.

The principal Act is amended by the insertion immediately after section 91 of the following new sections-

"91 A. Arbitration of trust disputes.

- (1) The object of this section is to enable any dispute or administration question in relation to a trust to be determined by arbitration in accordance with the provisions of the trust instrument.
- (2) Where a written trust instrument provides that any dispute or administration question arising between any of the parties in

relation to the trust shall be submitted to arbitration ("a trust arbitration"), that provision shall, for all purposes under the Arbitration Act, have effect as between those parties as if it were an arbitration agreement and as if those parties were parties to that agreement.

- (3) The Arbitration Ad shall apply to a trust arbitration in accordance with the provisions of the Second Schedule to the Act.
- (4) The Minister may by order amend the Second Schedule.

91 B. Powers of the arbitral tribunal.

- (1) This section shall except to the extent otherwise provided in the trust instrument.
- (2) The arbitral tribunal (hereinafter referred to as "the tribunal") may, in addition to all other powers of the tribunal, at any stage in a trust arbitration, exercise all the powers of the Court (whether arising by statute (including this Act), under the inherent jurisdiction of the Court or otherwise) in relation to the administration, execution or variation of a trust or the exercise of any power arising under a trust.
- (3) Without prejudice to subsection (2), and to any provisions made pursuant to subsection (4), the tribunal has the same powers to appoint one or more persons to represent the interests of any person (including a person unborn or unascertained) or class in a trust arbitration as the court has under Order 15 rule 14 of the Rules of the Supreme Court~ in relation to proceedings before the court.
- (4) The terms of a trust may provide for the appointment of one or more persons to represent the interests of any person (including a person unborn or unascertained) or class in a trust arbitration.
- (5) Where an appointment is made under subsection (3) or (4)-
 - (a) the approval of the tribunal is required in relation to a settlement affecting the person or class represented;
 - (b) the tribunal may approve a settlement where it is satisfied that the settlement is for the benefit of the person or class represented;
 - (c) any award given in the trust arbitration shall be binding on the person or class represented by the person or persons appointed.
- (6) A person under a disability may not –

- (a) bring or make a claim in a trust arbitration except by his next friend;
 - (b) defend, make a counterclaim or intervene in a trust arbitration except by his guardian ad litem ; or
 - (c) take any step in a trust arbitration except by his next friend or guardian ad litem, unless otherwise ordered by the tribunal.
- (7) The terms of a trust may provide for the appointment of a next friend or guardian ad litem, for the cessation of an appointment, and for the service of documents upon a person under a disability.
- (8) Subject to subsection (7), the tribunal may appoint a suitable person to be a next friend or guardian ad litem, may terminate an appointment, and may give directions for the service of documents upon a person under a disability.
- (9) Where a next friend or guardian ad litem has been appointed under subsection (7) or subsection (8), no settlement affecting the person under a disability shall be valid, without the approval of the tribunal.
- (10) Notwithstanding subsection (I), subsections (S), (6) and (9) shall apply irrespective of any provision in the trust instrument.
- (11) The Minister may make regulations to extend or clarify the powers of the tribunal in relation to trust arbitrations.

91C. Interpretation for sections 91A, 91B and the Second Schedule.

For the purposes of sections 91A, 91 B and the Second Schedule – "administration question" means any relief or question in respect of which an action, application or other reference to the court could, subject to section 91 A and the Arbitration Act", be brought or made under Order 74 of the Rules of the Supreme Court' under this Act or under the Purpose Trusts Act;

"beneficiary" includes an object of a power, whether or not ascertained or in existence and a charity;

"dispute" includes a difference;

"power holder" means any person holding a power in relation to a trust (including any power of appointment, consent, direction, revocation or variation, and any power to appoint or remove trustees or power holders) and includes a person in the position of a protector;

"the parties in relation to the trust" means any trustee, beneficiary or power holder of or under the trust, in their capacity as such .".

Wednesday, April 05, 2017