



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

FSD 270 OF 2023 (IKJ)

**IN THE MATTER OF THE G TRUST
AND IN THE MATTER OF SECTION 48 OF THE TRUSTS ACT (2021 REVISION)
AND
ORDER 85 OF THE GRAND COURT RULES (2023 REVISION)**

Before: The Hon. Justice Kawaley

Appearances:

Ms Rachael Reynolds KC and Ms Deborah Barker Roye of Ogier for the Trustee and ICTI (the “Applicants”)

Mr Robert Lindley and Mr Wesley O’Brien of Conyers, for the Enforcer

Ms Bernadette Carey and Ms Katie Turney of Carey Olsen for the A Beneficiaries

Mr John Machell KC and Mr Andrew Peedom of Collas Crill for the B Beneficiaries

Heard: 28 November 2023

Draft Judgment Circulated: 30 November 2023

Judgment Delivered: 11 December 2023

HEADNOTE

Beddoe application-whether Court should direct Trustee to apply for rectification of a deed of addition of beneficiaries- implications of Trustee's neutrality in related foreign proceedings concerning the ownership of majority of the Trust's assets-timing of rectification application- costs implications-Trusts Act (2021 Revision) sections 48, 90

RULING**Introductory**

1. On 28 November 2023, the Trustee obtained *Beddoe* relief directing that it could participate in the Hong Kong Trustee Proceedings subject to adopting a position of neutrality. Those proceedings concern the validity of the transfer of certain shares, which constitute the majority of the G Trust's assets, to the Trustee by the Trustee of the HK Trust. The B Beneficiaries are aligned with the Plaintiffs in the HK Trustee Proceedings, and the A Beneficiaries are aligned with the original Defendants to those proceedings. The Trustee was joined to those proceedings on 11 September 2023. That relief was granted in relation to the Ex Parte Originating Summons issued by the Trustee on 8 September 2023 (the "*Beddoe* Summons") and the terms of the Order were (subject to certain parties confirming whether they had express instructions from clients who could not be contacted during the hearing for time zone reasons) either agreed or not opposed. Earlier in the hearing, I granted an Order which was not opposed for the joinder of ICTI to these proceedings.
2. The 'Beddoe Rectification Summons' was issued on 27 October 2023 and was also heard at the same hearing as the *Beddoe* Summons. It was issued initially by the Trustee and joined by ICTI as a co-applicant. It was contentious. The Trustee, based in part on advice received from Chancery counsel in London and which was addressed very briefly at a confidential hearing, sought leave to apply to this Court to rectify a Deed of Addition (the "Deed"), based on evidence that the discrepancies which exist between the beneficiary classes of the G Trust and the HK Trust were not intended when the Deed was executed. Again, it sought a *Beddoe* order permitting it to fund the application out of the disputed portion of the Trust assets. The Enforcer and the A Beneficiaries supported the Applicants' position and the B Beneficiaries opposed it. The following somewhat nuanced issues fell to be resolved (albeit the second contention was raised by Counsel for the B Beneficiaries for the first time at the hearing):

- (a) should the Rectification Summons be issued now, as the Applicants contended or only when it became clear that the apparent discrepancy between the beneficiary classes of the G and HK Trust respectively had become a live issue in the HK Trustee Proceedings;
- (b) would the costs of determining the Rectification Summons be modest, as the Applicants contended, or substantial as the B Beneficiaries contended?
3. These issues were nuanced because (1) a *Beddoe* order was sought by the Applicants from disputed assets and a pre-emptive costs order was sought by the B Beneficiaries (if they were appointed to argue in opposition), (2) the proposed application was in part non-contentious administration of the Trust and in part ancillary to the hostile proceedings to which the *Beddoe* Order related and (3) the issue of costs was only canvassed in oral argument and I had no firm sense of the form rectification proceedings typically take and whether the B Beneficiaries could properly be appointed to argue in opposition to the proposed application as they contended.

Governing principles

Ongoing administration of disputed trust assets

4. It cannot be doubted that when there is a dispute about the ownership of a trust fund, a trustee is entitled to continue to administer the disputed fund in an appropriately proportionate manner. In *Re a Settlement* [2021 (2) CILR 259], upon which Ms Reynolds KC relied in support of another point, I stated:

“Continuing to administer the trust while claims are extant

11 Trustee L v. Att. Gen. (10) ([2015] SC (Bda) 41 Com, at paras. 115–117), an earlier Beddoe judgment of Hellman, J. in the same case where directions were given for the continued administration of a trust, was aptly cited in support of the contention that the trustee could continue to administer the trust despite the extant claims about the terms of the trust.”

5. Rectifying a trust instrument is clearly in general terms the sort of application that a trustee would make as part of the administration of a trust. In some cases it might be agreed that an application funded by the disputed assets is in the best interests of the true beneficial owners of the trust, whoever the owners may turn out to be. If the matter were to be viewed solely as a trust administration matter, the Court would have to be satisfied that the proposed application would be in the best interests of the Trust, whatever the outcome of the foreign hostile litigation may be.
6. The Applicants' counsel initially accepted that the Applicants could not properly rely on this ground alone (Skeleton paragraph 47.1). As Mr Machell KC submitted, there was no genuine urgency in trust administration terms for the identity of the beneficial class to be clarified before the HK Trust Proceedings concluded.

Public policy considerations

7. Ms Reynolds KC in oral argument essentially pinned her colours to the public policy mast in terms of the primary governing principles she invited the Court to find tipped the scales in favour of her client's application. She heavily relied on the local case of *Re a Settlement* [2021 (2) CILR 259], another case involving a STAR trust, where I observed:

*“23. The provisions of Part VII of the Act (**‘Trusts—Foreign Element’**) have often been described as ‘firewall provisions.’ Not only does s.90 mandate the application of Cayman Islands law to certain questions relating to Cayman Islands trusts. Section 91 provides that no trust governed by Cayman Islands law shall be held to be invalid by reason of a foreign law which does not recognize trusts or by reason of claims based on a personal relationship with the settlor or heirship rights, the latter which rights are further circumscribed by s.92. Section 93 provides that any foreign judgments which are inconsistent with ss. 91–92 of the Act shall be unenforceable. These elements of legislative scheme are a manifestation of a legislative intention of ensuring that the validity of trusts governed by Cayman Islands law will be determined in accordance with Cayman Islands law, being a system of law which has explicitly been designed to encourage foreign settlors to establish trusts here. It is a notorious fact that financial services is a (if not the) major pillar of the economy and that trust services play a not insubstantial role. While much of Cayman Islands trusts law is indistinguishable from the corresponding English law position, Cayman Islands trusts*

law has important *sui generis* statutory rules. The most pertinent examples for present purposes are:

(a) Part VIII (“**Special Trusts—Alternative Regime**”), which provides for what are colloquially known as “STAR” trusts, which can only be enforced by “enforcers.” The trust is a STAR trust;

(b) s.14 of the Act expressly provides that the fact that certain powers are reserved by the settlor or conferred on a protector “shall not invalidate the trust.”

24 As I observed in the course of the hearing, in my judgment this legislative scheme implicitly reflects a public policy imperative for this court, whenever invited to do so, to determine questions relating to the validity of trusts which involve the construction of *sui generis* questions of Cayman Islands statutory law. Apart from the general consideration that this will ordinarily be the natural forum for claims against trustees who are resident and administering trusts here, it seems self-evident that this court will normally be the appropriate court to develop Cayman Islands trusts law.

25 Not only will there be no need for expert evidence to be adduced, but this court can draw on its experience of similar distinctive trusts instruments and its well documented and longstanding appreciation of the public interest requirement to balance the “local” interests of professional service providers with the “international” interests of third party creditors contending that a trust has been improperly founded in violation of their rights.”

8. Where a trustee seeks relief which overlaps with relief which may be granted by a foreign court in pending proceedings, the position will often be as follows. If the foreign court is fully seised of the relevant issue and the trustee has tarried too long before seeking advice from this Court under section 48 of the Trusts Act, this Court may decline jurisdiction on forum grounds. For instance:

(a) in *Re Stingray Trust*, FSD 248 of 2017 (IKJ), Judgment dated 21 December 2020 (unreported), I stayed local proceedings brought without prior *Beddoe* relief in favour of longstanding Italian proceedings;

(b) in *Maples FS Limited-v- B & B Protector Services Limited*, FSD 213 of 2021 (DDJ), Judgment dated 14 July 2022 (unreported), David Doyle J stayed proceedings commenced after I had (on 27 July 2021) granted a *Beddoe* Order permitting the

trustee to seek declaratory relief from this Court. Doyle J found that England and Wales was the appropriate forum “*taking into account the wider dispute which has been making its way through the English court since June 2019 and noting the issues raised in the proceedings including the construction application...*” (paragraph 121).

9. Which forum is most appropriate for determining a legal issue about the validity or terms of a trust will, despite what I would regard as a starting assumption in favour of this forum, depend to a material extent upon whether a foreign court is seised of the relevant issue and, if so, how far advanced the foreign proceedings are. As Mr Machell KC rightly submitted in reliance upon Doyle J’s observations in *Maples FS Limited* at paragraph 114, the location of parties and witnesses in the modern era is of declining significance as a potentially dispositive factor.
10. There is in my judgment a distinction to be made, affecting the weight to be given to the desirability of this Court assuming jurisdiction with a view to developing this forum’s trust law, between (1) disputes involving generic trust law matters, and (2) disputes relating to (a) distinctive questions concerning bespoke trust vehicles like STAR trusts and/or (b) novel questions of uniquely Cayman trust law, such as the provisions of section 90 of the Trusts Act disapplying foreign laws. The public policy weighing in favour of this forum will generally be stronger in the latter category of case.
11. The present case does not appear to me to be a case where it can be contended that the fact the Trust instrument contains a Cayman Islands forum for administration clause is dispositive. The position might be different if the Trustee was seeking to determine a matter relating to the ‘internal’ administration of a trust where there was no ‘external’ controversy about ownership of the Trust assets.
12. How these considerations impact on any particular case will of course depend on the distinctive characteristics of the factual and legal matrices of each case.

Rectification actions: who has a right to be heard?

13. Ms Reynolds KC submitted, without reference to authority, that only the parties to the instrument sought to be rectified had the right to be party to the proceedings where those with the relevant intentions were all before the Court. Mr Machell KC submitted, without reference to authority, that

there should be a party nominated to argue against the rectification proposed by the Applicants; he argued his clients were the appropriate parties.

14. It seems to be clear that the draft Summons seeks to invoke this Court's equitable jurisdiction to rectify a document. That jurisdiction is essentially the same as the jurisdiction vested in the High Court of England and Wales by virtue of section 11 of the Grand Court Act (2015 Revision). In *RBC Trustees (CI) Limited-v- Stubbs* [2017] EWHC 180 (Ch), Rose J (as she then was) stated:

“38. The principles to be applied when considering rectification of a unilateral document such as a deed of revocation and appointment are those set out in the decision of the Court of Appeal in Racal. Those principles have recently been summarised by Barling J in Giles v RNIB [2014] EWHC 1373 (Ch) [2014] STC 1631. Barling J noted that while equity has power to rectify a written instrument so that it accords with the true intention of its maker, as a discretionary remedy rectification is to be treated with caution. He set out the criteria, which he described as closely related, for the grant of rectification.

39.First, because the remedy must be treated with caution, the claimant's case should be established by clear evidence of the true intention to which effect has not been given in the instrument. Such proof is on the civil standard of balance of probability. But as the alleged true intention of necessity contradicts the written instrument which is ordinarily regarded as the only manifestation of the party's intent, there must be convincing proof to counteract the evidence of a different intention represented by the document itself.

40.Secondly, there must be a flaw in the written document such that it does not give effect to the parties'/donor's agreement/intention, as opposed to the parties/donor merely being mistaken as to the consequences of what they have agreed/intended. For example, it is not sufficient merely that the document fails to achieve the desired fiscal objective.

41.Thirdly, the specific intention of the parties/donor must be shown; it is not sufficient to show that the parties did not intend what was recorded; they also have to show what they did intend, with some degree of precision.

42.Fourthly, there must be an issue capable of being contested between the parties notwithstanding that all relevant parties' consent to the rectification of the document.”

[Emphasis added]

15. These principles appear to be well settled. For the purposes of the present application, I will assume (without formally deciding the matter), that even if the Settlor and the Trustee agree, the Court would want to have adversarial argument if the Rectification Summons were to be issued.

Findings: merits of application

Should the rectification issue be determined now or postponed for future determination?

16. The Applicants seek declarations as to the meaning of the Deed of Addition and, if necessary, rectification. The Deed itself is expressed to be governed by Cayman Islands law and section 90 of the Trust Act applies Cayman law to its interpretation. The Trustee's and Settlor's evidence is that it was intended that the beneficiaries of both the HK Trust and the G Trust should be the same. It was then discovered that the construction of "spouses", "children", "issue" and "lawfully married spouses" might be different under the Trust and the HK Trust. The intention contended for is supported by some contemporaneous evidence. There is clearly a serious issue to be tried in relation to the proposed Rectification Summons. In general terms, it appears to be the sort of mistake that would ordinarily warrant prompt attention in the interests of the due administration of any trust.
17. It is essentially common ground that the issue of whether the beneficiaries of the G Trust are different to those of the HK Trust is not an issue which is presently a live one in the HK Trustee Proceedings. The controversy centres on the extent to which it is likely to become a live issue. In assessing this question, I also consider it relevant to take into account the following factors:
- (a) the legal policy considerations arising from section 90 of the Trusts Act which make it desirable for this Court to adjudicate apparently novel questions of Cayman Islands law relating to the exclusion of foreign law;
 - (b) the fact that postponing determination of the issue until the issue becomes a live one before the foreign court or is shown not to arise at all increases the likelihood that the foreign court would become the more appropriate forum if the issue were to be postponed to a future date; and
 - (c) the fact that pursuing rectification now when it is unclear precisely how such application will impact on the HK Trustee Proceedings is a step the Trustee can

credibly pursue consistent with a position of neutrality in relation to those proceedings. Considering whether and how to deal with the issue when it has implications, for one side or the other in the foreign proceedings, will potentially expose the Trustee to accusations of partiality.

18. Subject to considering the issue of costs, the evidence canvassed in the open hearing about the likelihood of the beneficial class issue arising combined with (1) the three factors mentioned in paragraph 17 above and (2) a justifiable preliminary view that there is a serious issue to be tried on the case for rectification justify granting the relief sought by the Rectification *Beddoe* Summons. The scales tip more decisively in favour of acceding to the Applicants' application when the advice which was disclosed in the confidential hearing are taken into consideration, but not to a dispositive extent.

Would costs be disproportionate?

19. Proceeding on the assumption that adversarial argument is required, the rough and ready estimate of \$500,000 suggested by Mr Machell KC seemed closer to the mark than the not less than \$30,000 suggested by Ms Reynolds KC. On the other hand, the relevant evidence seems likely to fall within a fairly narrow compass and the Applicants' Rectification Summons is supported by a not insignificant segment of beneficiaries of the HK Trust. Directions can be given to ensure that only those parties who are essential to the determination of the proposed Rectification Summons participate in it at the expense of the disputed fund.
20. On any view there would be a cost saving achieved by having this Court determine the central legal questions without any need for expert evidence on Cayman Islands law. On the face of section 90, no need to consider foreign law would arise. Finally, as the Applicants' counsel pointed out, the 'worst case' estimate contended for by the B Beneficiaries would not be disproportionate having regard to the best estimates of the value of the disputed assets.
21. I accordingly find that the costs of dealing now in this forum with an issue which seems on balance likely to arise in the foreign proceedings at some uncertain future date does not neutralize the considerations (summarised in paragraph 17 above) which weigh in favour of acceding to the Applicants' Rectification *Beddoe* application.

Conclusion

22. The Applicants and ICTI are entitled to an Order substantially in the terms of the draft Order appended to their Skeleton Argument, subject to hearing counsel as to the terms of the Order and any matters arising from the present Judgment. My provisional view is that directions should be included in the Order for the B Beneficiaries to be nominated to oppose the application for declaratory relief and rectification, if required, with the protection of a pre-emptive costs order.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT