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IN THE GRAND COURT OF THE CAYMAN ISLANDS  
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. FSD 186 of 2010

IN THE MATTER of a Deed of Trust, known as the "B Trust"

AND IN THE MATTER of the Trusts Law (2009 Revision) and GCR  
Order 85, rule 7

BETWEEN:

RBS Coutts (Cayman) Limited

Plaintiff

AND:

W and others

Defendants

Appearances:

Ms. Rachel Reynolds of Ogier for the  
Plaintiff/Trustee

Mr. Bill Helfrecht of Bodden & Bodden  
for the 1<sup>st</sup> Defendant

Mr. Colin McKie of Maples and Calder  
for the 3<sup>rd</sup> Defendant

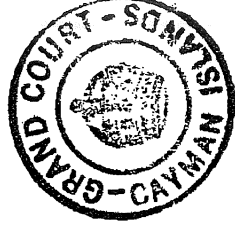
The 2<sup>nd</sup> Defendant did not appear

Before:

Hon. Justice Henderson

Heard:

November 26, 2010



**JUDGMENT**

1  
2  
3 1. The Plaintiff RBS Coutts (Cayman) Limited (“the Trustee”) is  
4 Trustee of the B Trust (the name of the Trust and the parties  
5 other than the Trustee have been anonymised). The B Trust  
6 was established in the Cayman Islands as a STAR trust, an  
7 acronym for a trust established under Part XIII of the *Trusts*  
8 *Law* (2009 Revision) which is entitled “Special Trusts –  
9 Alternative Regime”. The Trustee asks for directions as to  
10 whether, and to what extent, it should participate in matrimonial  
11 and ancillary relief proceedings in Hong Kong between the two  
12 settlors of the trust. They were formerly married. For  
13 convenience I will refer to them, I hope without causing any  
14 disrespect, as husband and wife.

15  
16 2. The wife has now made an application under the relevant Hong  
17 Kong matrimonial legislation seeking a variation of the trust,  
18 which she characterizes as a nuptial settlement. She has  
19 obtained an order in Hong Kong joining the Trustee as a party  
20 on this variation application. The threshold question is whether  
21 the Trustee should submit to the jurisdiction of the Hong Kong  
22 Court and participate in the wife’s application. The Trustee is

1 already a party to that application but has made no voluntary  
2 submission to the jurisdiction of the foreign court as yet. There  
3 are collateral issues, including the question of disclosure by the  
4 Trustee.

5  
6 The B Trust  
7

8 3. The B Trust was settled by the husband and by the wife by deed  
9 in 2002. Clause 2(i) of the Trust Deed provides that the trust is  
10 governed by the laws of the Cayman Islands and that the  
11 settlors, the Trustee and the enforcers are required to submit to  
12 the exclusive jurisdiction of the Cayman Court. The Trustee is  
13 domiciled in the Cayman Islands and administers the trust here;  
14 it has no presence in Hong Kong.

15  
16 4. There are five beneficiaries of the trust: the husband, the wife,  
17 and their three children aged 19, 17 and 12. Under clause 29 of  
18 the Trust Deed, the husband, the wife and the oldest child are  
19 those with standing to enforce the trust provisions. When the  
20 other two children reach the age of 18 they too will become  
21 enforcers.

22

1 5. Clause 5 of the Trust Deed makes provision for one of the  
2 beneficiaries to be the “designated beneficiary”. The designated  
3 beneficiary has the privilege of controlling the investment  
4 business of “controlled companies”, which are companies  
5 directly owned by the trust or owned by another controlled  
6 company but not held within the “distribution fund” (see clause  
7 1(vi)). The distribution fund consists of trust property which  
8 has been transferred or credited to it but in relation to which the  
9 privileges of the designated beneficiary do not extend (clause  
10 7(i)). The Trustee is solely responsible for the management and  
11 investment of the distribution fund (clause 7(ii)).  
12

13 6. The objects of the trust are set out in clause 4 and are twofold:  
14 (i) to give to the designated beneficiary the privilege of  
15 controlling the investment business of all controlled companies;  
16 and (ii) to apply the capital and income of the distribution fund  
17 for the benefit of the beneficiaries.

18  
19 7. The two settlors have power under clause 5(i) of the Trust Deed  
20 to name a designated beneficiary or successor designated  
21 beneficiaries. At present, the wife is the designated beneficiary  
22 and the husband is the successor designated beneficiary. Any

1 settlor may revoke the designation of any designated  
2 beneficiary and the latter may also relinquish his or her status:  
3 clause 5(iii)(c). If at any point in time there is no designated  
4 beneficiary and none is appointed by the settlors within thirty  
5 days after being notified of the situation by the Trustee, the  
6 power of the settlors to make the designation lapses: clause  
7 5(iv).

8  
9 8. The B Trust owns all of the shares of a Cayman Islands  
10 company (“the parent company”) which in turn owns all of the  
11 shares of another Cayman Islands company (“the subsidiary”).  
12 Both the parent and the subsidiary have the status of controlled  
13 companies under the Trust Deed. The parent company owns an  
14 investment portfolio located at RBS Coutts Bank Ltd in  
15 Singapore. The subsidiary owns all but one of the outstanding  
16 shares in a Hong Kong company (“the Hong Kong company”) which  
17 in turn owns a residential property in Hong Kong. This  
18 is the principal residence of the wife and the three children.  
19 One share in the Hong Kong company is held by the Trustee in  
20 the distribution fund, a fact of some significance. The greater  
21 part of the value of the underlying trust assets is represented by  
22 the residential property in Hong Kong.

1  
2 9. At present, there are no assets in the distribution fund apart  
3 from the single share in the Hong Kong company. The fund has  
4 no cash. The Trustee's remuneration and expenses are being  
5 met by dividends declared by the parent company which are  
6 paid out of the Singapore investment portfolio, which is  
7 permitted by clause 6(xi)(e) of the Trust Deed. The proceeds of  
8 the investment portfolio are not available for distribution to  
9 beneficiaries under the terms of the trust.

10  
11 10. The trust is a discretionary trust only with respect to the  
12 distribution fund. The Trustee has no dispositive powers over  
13 controlled companies or assets owned by them save for a  
14 limited power exercisable only at the request of the designated  
15 beneficiary (clause 6(xv)(c)). The designated beneficiary has  
16 power to give investment directions in relation to controlled  
17 companies but has no dispositive power over such companies or  
18 the assets owned by them (*ibid*).

19  
20 11. The Hong Kong company is not a controlled company because  
21 not all of its shares are owned by the trust or by another  
22 controlled company. Since one of its shares is held in the

1 distribution fund, it falls outside the definition of a controlled  
2 company. The Hong Kong company is, of course, under the  
3 effective control of the subsidiary and ultimately of the parent  
4 company. The Trustee has no present ability to deal with or  
5 dispose of the assets of the Hong Kong property. Its powers are  
6 limited effectively to the single share in the Hong Kong  
7 company which is in the distribution fund.

8

9 12. The Trustee does not have control over transfers from the  
10 controlled companies to the distribution fund unless these are to  
11 meet the Trustee's charges and expenses. Transfers for other  
12 purposes depend upon either an agreement between the Trustee  
13 and the designated beneficiary (see clause 7(i)(a)) or upon the  
14 termination of the power of the settlors to designate a  
15 designated beneficiary (see clause 7(i)(c)); or upon a direction  
16 by the settlors under clause 7(iii). However, if the settlors  
17 revoke the designations of the designated beneficiaries, the  
18 entire trust property falls into the distribution fund: clause  
19 7(i)(c). Thus, the settlors themselves – the husband and the  
20 wife – have it within their own power to give up their rights to  
21 name designated beneficiaries and thus enable the Trustee to  
22 make discretionary distributions.

1  
2 13. In conclusion, the husband and the wife can themselves  
3 determine whether or not the Trustee is to be given dispositive  
4 powers (which it does not have at present) over the underlying  
5 trust assets. As things stand, this is not a discretionary trust; if  
6 the husband and the wife were to decide to make it one, either  
7 voluntarily or in compliance with orders from the Hong Kong  
8 Court, the B Trust could become a discretionary trust with the  
9 Trustee empowered to make substantive decisions.

10  
11 The Hong Kong Proceedings

12  
13 14. The wife's variation application in Hong Kong seeks an order in  
14 the nature of ancillary relief that the trust be varied so that 40%  
15 of the shares in the Hong Kong company and 40% of the shares  
16 in the parent company are transferred out of the trust to be  
17 distributed between husband and wife. She asks that the  
18 remaining 60% of the shares remain in the trust for the benefit  
19 of the three child beneficiaries.

20  
21 15. The Hong Kong Court has ordered that the Trustee be joined as  
22 a party on this application but has acknowledged that there has



1        been no submission by the Trustee to the Court's jurisdiction.  
2        The proceedings in Hong Kong have been adjourned to  
3        accommodate the present application by the Trustee for  
4        directions.

5  
6        Views of the Parties

7  
8        16.        The husband takes the view that the Trustee should not submit  
9        to the jurisdiction of the Hong Kong Court.

10  
11        17.        The wife has not appeared in this proceeding and her position is  
12        more difficult to discern. She has made the variation  
13        application in Hong Kong and has sought and obtained an order  
14        there joining the Trustee as a party. However, in a letter from  
15        her Hong Kong solicitors of November 22<sup>nd</sup>, 2010 the Court is  
16        advised that the wife does not intend that the Trustee will  
17        participate actively in the dispute between husband and wife.  
18        The Trustee has been joined so that it may make representations  
19        if it wishes. It seems that the wife would like the Trustee to  
20        submit to the jurisdiction but to take no active role in the  
21        dispute with her husband.

22

1 The oldest child has said that he has no objection to the Trustee  
2 refraining from submitting to the jurisdiction of the Hong Kong  
3 Court.

4  
5 Hong Kong Law

6  
7 18. The Trustee has obtained legal advice from its Hong Kong  
8 solicitors concerning the position there. They advise that the  
9 Hong Kong Court does have jurisdiction to vary a nuptial  
10 settlement and that the B Trust falls within that description.

11  
12 19. In considering any suggested variation, the Court will be  
13 governed by the need to be fair to both sides and to avoid  
14 diminishing the rights of innocent third parties under the  
15 settlement. The solicitors say that the Court will resolve to  
16 interfere with the settlement only to the extent that is necessary  
17 to do justice between the husband and the wife.

18  
19 20. The Hong Kong Court has the power to add all three children as  
20 parties to the litigation there and to hear submissions on their  
21 behalf; the fact that they may lack standing to enforce the B  
22 Trust under Cayman law does not preclude their addition as

1 parties in Hong Kong. Whether or not the children are  
2 represented, the Hong Kong Court will take into consideration  
3 their interests as well as the interests of the adult parties. The  
4 Court may order that the children be represented separately on  
5 the application if it is concerned that a proposed variation will  
6 adversely affect their interests. The welfare of the children is  
7 likely to be a prime concern in the variation application.

8

9 21. The Hong Kong solicitors are of the opinion that even if the  
10 Trustee does submit to the jurisdiction of the Court there it is  
11 unlikely that it would be required to indicate how it would  
12 exercise its discretion. The Hong Kong Court may, however,  
13 provide judicious encouragement to the Trustee on the subject  
14 of how its discretion might be exercised.

15

16 22. If the Trustee submits to the jurisdiction in Hong Kong it would  
17 become susceptible to orders for discovery. In ordering  
18 discovery, the Court will balance the relevance and importance  
19 of the requested documents against the prejudice which might  
20 be caused to third parties.

21

1 23. The Hong Kong Court has jurisdiction within the matrimonial  
2 proceeding which extends to all the property comprised within  
3 the settlement, whether or not it is within that Court's  
4 jurisdiction, whether it is owned directly or indirectly by the  
5 trust, and whether or not the Trustee submits to the jurisdiction.  
6 The Court may also make ancillary relief orders in the nature of  
7 judicious encouragement to the Trustee.  
8

9 Position of the Trustee  
10

11 24. In light of the advice received from its Hong Kong solicitors,  
12 the Trustee is of the view that there is no present need for it to  
13 submit to the jurisdiction of the Hong Kong Court to protect the  
14 interests of the beneficiaries as a whole. It is also of the view  
15 that there is no need to submit to the jurisdiction in order to  
16 inform the Hong Kong Court about the terms or assets of the  
17 trust. It can be expected that the other parties will do that. As  
18 for the legal position of the trust under Cayman law, it is hoped  
19 that this judgment will be of some assistance to the Court in  
20 Hong Kong.

21

1 25. It appears that the interests of the children (who are also  
2 beneficiaries) will be fully protected in the Hong Kong  
3 proceeding. The Trustee's participation there is unnecessary to  
4 protect their interests.

5  
6 Cayman Law

7  
8 26. An order of the Hong Kong Court purporting to effect a  
9 variation of the trust, whether in a matrimonial proceeding or  
10 otherwise, cannot be recognized by the Trustee. That is so even  
11 if the Trustee were to attorn to the jurisdiction of the Hong  
12 Kong Court. A trust in the Cayman Islands can only be varied  
13 in accordance with the *Law* of the Cayman Islands and only by  
14 a court of the Cayman Islands. These overarching rules are  
15 provided for expressly in the *Trusts Law* (2009 Revision), in  
16 sections 90, 91 and 93 as follows:

17 “90. All questions arising in regard to a trust which is for  
18 the time being governed by the laws of the Islands or in  
19 regard to any disposition of property upon the trusts thereof  
20 including questions as to –  
21 (a) the capacity of any settlor;  
22 (b) any aspect of the validity of the trust or disposition or  
23 the interpretation or effect thereof;  
24 (c) the administration of the trust, whether the  
25 administration be conducted in the Islands or  
26 elsewhere, including questions as to the powers,

1 obligations, liabilities and rights of trustees and their  
2 appointment and removal; or  
3 (d) the existence and extent of powers, conferred or  
4 retained, including powers of variation or revocation  
5 of the trust and powers of appointment, and the  
6 validity of any exercise thereof,  
7

8 are to be determined according to the laws of the Islands,  
9 without reference to the laws of any other jurisdictions with  
10 which the trust or disposition may be connected:  
11

12 Provided that this section -

- 13 (i) does not validate any disposition of property  
14 which is neither owned by the settlor nor the  
15 subject of a power in that behalf vested in the  
16 settlor, nor does this section affect the  
17 recognition of foreign laws in determining  
18 whether the settlor is the owner of such  
19 property or the holder of such a power;  
20 (ii) takes effect subject to any express contrary term  
21 of the trust or disposition;  
22 (iii) does not, as regards the capacity of a  
23 corporation, affect the recognition of the laws  
24 of its place of incorporation;  
25 (iv) does not affect the recognition of foreign laws  
26 prescribing generally (without reference to the  
27 existence or terms of the trust) the formalities  
28 for the disposition of property;  
29 (v) does not validate any trust or disposition of  
30 immovable property situate in a jurisdiction  
31 other than the Islands which is invalid  
32 according to the laws of such jurisdiction; and  
33 (vi) does not validate any testamentary trust or  
34 disposition which is invalid according to the  
35 laws of the testator's domicile.  
36

37 91. Subject to the same provisos as are set out in  
38 paragraphs (i) to (vi) of section 90, it is expressly declared  
39 that no trust governed by the laws of the Islands and no  
40 disposition of property to be held upon the trusts thereof is  
41 void, voidable, liable to be set aside or defective in any  
42 fashion, nor is the capacity of any settlor to be questioned,

1 nor is the trustee, any beneficiary or any other person to be  
2 subjected to any liability or deprived of any right, by reason  
3 that -

4  
5 (a) the laws of any foreign jurisdiction prohibit or do  
6 not recognise the concept of a trust; or

7 (b) the trust or disposition avoids or defeats rights,  
8 claims or interests conferred by foreign law upon  
9 any person by reason of a personal relationship to  
10 the settlor or by way or heirship rights, or  
11 contravenes any rule of foreign law or any foreign  
12 judicial or administrative order or action intended  
13 to recognise, protect, enforce or give effect to any  
14 such rights, claims or interests.  
15

16 ...

17  
18 93. A foreign judgment shall not be recognised, enforced  
19 or give rise to any estoppel insofar as it is inconsistent with  
20 section 91 or 92.”  
21

22 27. There are a limited number of ways in which STAR trusts may  
23 be varied under the law of the Cayman Islands. Such a trust  
24 may be varied in accordance with the express terms of the Trust  
25 Deed; or, as to the administrative and management powers of  
26 the trustees, in accordance with section 63 of the *Trusts Law*; or  
27 under the common law jurisdiction to approved compromises  
28 and confer emergency administrative powers upon trustees in  
29 certain limited circumstances; or on the cy-pres basis in  
30 accordance with section 104(i) of the *Law*; or under section  
31 21(c) or (d) of our *Matrimonial Causes Law* (2005 Revision).  
32 None of these provisions are capable of being of any assistance

1 to the Hong Kong Court in its adjudication upon a fair division  
2 of property between husband and wife. In particular, the  
3 referenced section of our *Matrimonial Causes Law* can apply  
4 only to such causes initiated in this jurisdiction.

5  
6 28. The Trustee's duty is, of course, to carry out the trust according  
7 to its terms unless some deviation from that has been sanctioned  
8 by this Court: *Underhill and Hayton, Law of Trusts and*  
9 *Trustees* (17<sup>th</sup> edition) paragraph 47.1. It would be unwise and  
10 inappropriate for a trustee to allow itself to be placed in a  
11 situation where its trust obligation comes into conflict or may  
12 come into conflict with an obligation to obey the order of a  
13 foreign court.

14  
15 29. At present, the Trustee has virtually no scope for the exercise of  
16 any discretion at all. If it had the opportunity to exercise its  
17 discretion in a manner which would assist in the resolution of  
18 the matrimonial dispute while maintaining an even-handed  
19 approach to all beneficiaries, it would no doubt give respectful  
20 consideration to the views of the Hong Kong Court. The parties  
21 before me are agreed that consideration of such "judicious  
22 encouragement" by the Hong Kong Court would and should be



1 taken into account in any possible exercise of the Trustee's  
2 discretion together with all of the other circumstances which are  
3 relevant. However, since the distribution fund contains only a  
4 single share, there is no exercise of discretion at present which  
5 can contribute in any meaningful way to a division of assets  
6 ordered by the Hong Kong Court. The task must therefore be  
7 approached in a different way.

8

9 30. Both the husband and the wife can be required by the Hong  
10 Kong Court to exercise their powers as settlors in a particular  
11 way. The parties before me are agreed that the element of  
12 compulsion supplied by the Hong Kong order cannot affect the  
13 Trustee's obligation to give effect to such instructions from the  
14 settlors. The wife and the husband could each be ordered to  
15 resign as the designated beneficiary and as the successor  
16 designated beneficiary respectively. That would bring about a  
17 situation where no designated beneficiary exists. They could be  
18 further ordered to refrain from appointing any replacement.  
19 After the lapse of thirty days with no designated beneficiary, the  
20 power of the husband and wife terminates and the entire trust  
21 property becomes a part of the distribution fund. This much can  
22 be accomplished by the Hong Kong Court directly.

1

2 31. Once the trust property has been transferred to the distribution  
3 fund, the discretionary trusts applicable to that fund and  
4 described in Schedule 4 of the Trust Deed become operative  
5 without the need for any consent from the settlors. Schedule 4  
6 provides that

7 (i) Until the Termination Date the Trustees may pay or apply all or  
8 any part of the income or capital of the Distribution Fund to or  
9 for the benefit of the Settlers, or any of them, or any one or  
10 more of the Beneficiaries, at such times, in such amounts, and  
11 in such manner as the Trustees think fit ...  
12

13 Should the Trustee submit to the Jurisdiction of the Foreign  
14 Court?  
15

16 32. Clause 2(i) of the Trust Deed – the jurisdiction clause – is  
17 expressed in these wide and emphatic terms:

18 “...the Settlers, the Trustees and the Enforcers hereby  
19 submit, or are required to submit, to the exclusive  
20 jurisdiction of the Courts of the Cayman Islands;”  
21

22 33. It has been held in relation to a jurisdiction clause in a Jersey  
23 trust in similar terms that the wording does not prevent the  
24 application of the English matrimonial jurisdiction to vary a  
25 nuptial settlement: *Charlambous v. Charlambous* [2004]  
26 EWCA Civ 1030 (Court of Appeal). This result was not

1 reached by placing a particular construction upon the clause, but  
2 resulted from a conclusion that it is impermissible to contract  
3 out of the matrimonial legislation.

4

5 34. There is no local authority on the question of a trustee's  
6 submission to the jurisdiction of a foreign court during the  
7 course of foreign matrimonial proceedings. The question has  
8 attracted some judicial attention on the island of Jersey and is  
9 the subject of some helpful decisions there.

10

11 35. In *Re H. Trust* [2006] JLR 280 (Royal Court of Jersey), a wife  
12 in matrimonial proceedings in the family division of the English  
13 High Court had obtained a freezing order which included assets  
14 in a Jersey trust. The Trustee resolved not to submit to the  
15 jurisdiction of the English Court and applied for court approval  
16 of its decision. The Court held:

17 “12 Significant consequences may flow from a  
18 decision by a trustee of a Jersey trust to submit  
19 to the jurisdiction of the Family Division of the  
20 High Court or indeed any other court  
21 considering the matrimonial affairs of  
22 beneficiaries of a trust. Any order subsequently  
23 made by the Family Division would be made in  
24 proceedings to which the trustee had voluntarily  
25 submitted and in which therefore it had full  
26 opportunity to put forward submissions on the  
27 order which the court should make. It follows

1 that the trustee would be in some difficulty in  
2 arguing subsequently before this court against  
3 the proposition that any order of the Family  
4 Division relating to the trust should be enforced  
5 without reconsideration of the merits of such  
6 order.  
7

8 13 Conversely, if the trustee has not submitted to  
9 the jurisdiction of the Family Division, any  
10 order of that court will not be enforceable in  
11 Jersey under the rules of private international  
12 law. On any subsequent application to this  
13 court to vary the trust so as to achieve the effect  
14 of any variation or other order made by the  
15 Family Division, this court would have  
16 complete discretion as to the course it should  
17 take.”  
18

...

19 15 It follows that, in most circumstances, it is  
20 unlikely to be in the interest of the Jersey trust  
21 for the trustee to submit to the jurisdiction of an  
22 overseas court which is hearing divorce  
23 proceedings between a husband and wife, one  
24 or both of whom may be beneficiaries under the  
25 trust. To do so would be to confer an  
26 enforceable power upon the overseas court to  
27 act to the detriment to the beneficiaries of a  
28 trust when the primary focus of that court is the  
29 interests of the two spouses before it. It is more  
30 likely to be in the interests of a Jersey trust and  
31 the beneficiaries thereunder to preserve the  
32 freedom of action of both the trustee and this  
33 court to act as appropriate following and taking  
34 full account of the decision of the overseas  
35 court. We have said that this is likely to be the  
36 case in most circumstances. In some cases, e.g.,  
37 where all the trust assets are in England, it may  
38 well be in the interests of a trustee to appear  
39 before the English court in order to put forward  
40 its point of view because, by reason of the  
41 location of the assets, that court will be able to

1 enforce its order without regard to the trustee or  
2 this court.  
3

4 16 The observations which we have made do not  
5 lead to the conclusion that this court will ignore  
6 a decision of the Family Division or other  
7 overseas Court. Far from it. That court will  
8 have investigated the matter very fully and will  
9 have made a decision intended to achieve a fair  
10 allocation as between the spouses. In such  
11 cases, the interests of comity as well as the  
12 interests of the beneficiaries will often point  
13 strongly in favour of this court making an order  
14 which achieves the result contemplated by the  
15 order of the Family Division. Indeed, this court  
16 has made such orders in the past and will no  
17 doubt do so again in the future. But the  
18 significant factor, from the point of view of  
19 whether the trustee should submit to the  
20 jurisdiction of the overseas court, is that it will  
21 remain a matter of discretion for this court as to  
22 the course it should take in the light of the  
23 overseas order if the trustee has not submitted,  
24 whereas if the trustee has submitted, the  
25 overseas order is likely to be enforced without  
26 reconsideration of the merits. For these  
27 reasons, we approve of the trustee's decision  
28 not to submit to the jurisdiction of the Family  
29 Division in this case."  
30

31 36. In *Re B Trust* 2006 JLR 562, the Royal Court of Jersey had

32 before it a case in which the trustee of a Jersey trust had already

33 submitted to the jurisdiction of the High Court in England.

34 There were matrimonial proceedings in England and the High

35 Court sought to make financial provision for the wife by

36 varying the Jersey trust of which the husband and his family

1 were beneficiaries. The Court found the trust to be a post-  
2 nuptial settlement and ordered that a portion of it be transferred  
3 to a sub-trust in which the wife would have a life interest. The  
4 Royal Court determined to recognize and give effect to the  
5 English order, with some qualifications, so as to vary the trust  
6 and create the sub-trust. It noted that the English order was not  
7 inconsistent with Jersey law and invoked judicial comity as a  
8 significant reason for giving effect to the English order. In a  
9 postscript, the Court noted at paragraph 30:

10 “Much time and expense has been consumed in  
11 considering the interrelationship between the  
12 purported variation of the B Trust pursuant to English  
13 statutory powers on the one hand, and the recently  
14 enacted provisions of the Trusts (Amendment No. 4)  
15 (Jersey) Law 2006 on the other. In the event, we have  
16 found ourselves able to deal with the matter on the  
17 basis of judicial comity. With some diffidence, we  
18 express the hope, however, that English courts might  
19 in future exercise judicial restraint before asserting a  
20 jurisdiction pursuant to s.24 of the Matrimonial  
21 Causes Act 1973 to vary a Jersey trust. This court has  
22 shown itself sensitive (long before the enactment of  
23 the Trusts Law amendment) to perceived interference  
24 with its jurisdiction to supervise Jersey trusts.”  
25

26 37. This decision was explained and distinguished in a subsequent  
27 decision of the Royal Court of Jersey in *Re IMK Family Trust*  
28 2008 JLR 250. Again, a wife in a matrimonial proceeding in the  
29 Family Division of the High Court in England obtained an order

1 altering (or purporting to alter) a Jersey trust. On this occasion  
2 the trustee had not submitted to the jurisdiction of the English  
3 Court. The wife argued that the English order should be  
4 enforced on the grounds of comity. Article 9(1) of the *Trusts*  
5 (*Jersey*) Law of 1984 provided that questions concerning the  
6 variation of a Jersey trust must be determined solely in  
7 accordance with Jersey law. The English order was not  
8 compatible with article 9(1) and for that reason was  
9 unenforceable in Jersey. Having decided that, the Court said at  
10 paragraphs 72-74:

11 “Does this mean that there are no circumstances in  
12 which the objectives of an order of the Family  
13 Division varying or altering a Jersey trust can be given  
14 effect under the law of Jersey? In our judgment, it  
15 does not. We agree with Bailhache, Bailiff in *In re B*  
16 *Trust* (3) and Clyde-Smith, Commr. in *In re H Trust*  
17 (8) that the giving of directions under art. 51 does not  
18 amount to enforcement of the overseas judgment in  
19 question for the purposes of art. 9(4). Why do we say  
20 that?”

21  
22  
23 Let us take a simple example. Suppose that, in the  
24 case of a conventional discretionary Jersey trust where  
25 the beneficiaries include the husband, the wife and  
26 their children, the English court varies the Jersey trust  
27 under the 1973 Act by ordering that the sum of £1m.  
28 be paid to the wife out of the trust. This is something  
29 which the trustee could do under the powers conferred  
30 upon it under the trust deed. The trustee would not  
31 necessarily have to seek directions from the Jersey  
32 court. It would be open to the trustee to take note of  
33 the English judgment, to consider the desirability of

1 bringing to an end any financial dispute between the  
2 husband and wife and to reach the view that it was in  
3 the best interests of all the beneficiaries (including the  
4 children) for a capital distribution of £1m. to be paid  
5 to the wife so that everyone could get on with his or  
6 her life. This would not amount to “enforcement” of  
7 the English judgment. It would be a conventional case  
8 of a trustee taking account of all the relevant  
9 circumstances (including, in this case, the existence of  
10 an English judgment) and deciding how to exercise its  
11 dispositive powers under the trust deed in the best  
12 interests of the beneficiaries.

13  
14 Although a Jersey trustee might in such circumstances  
15 be content to exercise its powers without recourse to  
16 this court, it might wish to seek the approval of this  
17 court to its decision. In those circumstances, this  
18 court would no more be enforcing the English  
19 judgment than the trustee itself. The court would  
20 simply be fulfilling its usual function of considering  
21 the exercise by a trustee of its discretionary powers  
22 and deciding whether those powers were being  
23 exercised reasonably. Alternatively, the trustee might  
24 surrender its discretion to the court. In that event, the  
25 court would stand in place of the trustee and consider  
26 how the powers under the trust deed should be  
27 exercised in the interests of the beneficiaries, taking  
28 account of all relevant circumstances, including the  
29 existence of the English judgment. Alternatively, the  
30 court might be asked to exercise its power to give  
31 directions under art. 51 on the basis that a decision of  
32 the trustee to exercise its power in such a way as to  
33 give effect or not to give effect (as the case may be) to  
34 the English judgment was unreasonable. In all of  
35 these cases, there would be no question of any  
36 “enforcement” of the English judgment for the  
37 purposes of art. 9(4). All that the court would be doing  
38 is exercising its supervisory jurisdiction on  
39 conventional grounds.”  
40



1 38. The Court also noted that the inability to enforce a foreign order  
2 varying a Jersey trust remains even if the trustee submits to the  
3 jurisdiction of the foreign court (see paragraph 76(i)). It also  
4 observed that where trust assets are in fact situate within the  
5 jurisdiction of the foreign court the trustee may have no option  
6 but to “bow to the inevitable.” (at para. 79).

7  
8 39. The Trustee cannot, of course, fetter its discretion now by  
9 suggesting how it may act in the future. In exercising its  
10 discretion, it must take into account all of the relevant  
11 circumstances existing at the time it is called upon to make a  
12 decision. One relevant circumstance, to which respectful and  
13 attentive consideration will be given, is any judicious  
14 encouragement received in the form of a judgment or ruling  
15 from the Court in Hong Kong. On the subject of judicious  
16 encouragement and the proper reaction of a trustee upon  
17 receiving it, *Lewin on Trusts, 18<sup>th</sup> edition, para. 29-157* says:

18 “Once it is made, it is plainly proper for the trustees to  
19 take it into account in exercising their powers and  
20 commonly it will be decisive; but there appears to be  
21 no jurisdiction to direct a particular exercise of a  
22 power and the order is not binding on them, so if their  
23 view is that the interests of other beneficiaries will be  
24 unduly prejudiced should they give full effect to the  
25 court’s expectations, they will be acting properly by  
26 declining to do so.”  
27

1 In *A. v. A.* [2007] EWHC 99 (FAM) at paragraph 97, a trustee

2 submitted that:

3 “[w]hilst the Court is of course free to give judicious  
4 encouragement to the Trustees if it concludes it is  
5 appropriate to do so on the facts of this case, the  
6 Trustees must (and do) jealously guard their  
7 independence in this respect. The Court should not  
8 assume that the Trustees will automatically or  
9 inevitably exercise their discretion in any particular  
10 way simply because they are encouraged to do so by  
11 the Court. By making this submission the Trustees are  
12 not indicating an intention to set their face against  
13 whatever the Court may consider is the right solution  
14 as between [the husband and the wife]: they simply  
15 make it clear that they have a number of beneficiaries  
16 to consider and they will do what they think is right  
17 for the class of beneficiaries as a whole.”  
18

19 The Trustee was praised by the Court for its “impeccable  
20 attitude” in adopting that approach.

21

22

23 40. The oldest child, who is a beneficiary and an enforcer of the

24

trust, has applied in Hong Kong to be joined as a party to the  
25 variation application. The Trustee has asked how it should

26

respond to this application. In light of what I have said earlier,

27

it is clear that the Trustee should take no part in it and offer no

28

response at all. The Trustee should not submit to the

29

jurisdiction of the Hong Kong Court.

30

1  
2                   Indication of Future Intention

3  
4   41.           The Trustee has asked whether it would be appropriate for it to  
5           give “some indication, without binding itself” as to how it may  
6           exercise its powers if and when available assets are transferred  
7           into the distribution fund.

8  
9   42.           Any such indication will necessarily establish in the minds of  
10           the parties an expectation that the Trustee’s discretion will  
11           thereafter be exercised in the way it has intimated. The Court  
12           itself may share that view. After all, there can be no purpose in  
13           the Trustee providing an “indication” as to how it may exercise  
14           its powers other than influencing the positions of the parties and  
15           shaping their expectations. There is a risk that the Trustee will  
16           find itself in a position where it feels obliged to exercise its  
17           discretion in a particular way because it accords with an  
18           indication given earlier. There is always the danger, however,  
19           that the circumstances may have changed somewhat in the  
20           interim. I consider the suggestion that the Trustee might give  
21           an indication now of how it might exercise its discretion in the  
22           future to be fraught with difficulty and therefore inappropriate.

1

2

Disclosure

3

4 43. The husband and wife and the oldest child all have rights to  
5 seek information about the B Trust as enforcers under section  
6 102 of the *Trusts Law*. They are also at liberty to place this  
7 judgment and the evidence provided to me on this application  
8 before the Court in Hong Kong. They may not, of course, use  
9 the evidence for any other purpose without leave of this Court.

10

11

Liberty to Apply

12

13

14 44. The situation is fluid and the Trustee may need further  
15 directions as the circumstances change. As usual, it is at liberty  
16 to apply, as are the other parties to these proceedings.

17

18 Dated this 9<sup>th</sup> day of December, 2010

19

*Henderson, J.*

20

21 Henderson, J.

Judge of the Grand Court

23

