IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 237 of 2020 (ASCJ)

IN THE MATTER OF SECTION 104 OF THE TRUSTS ACT (2021 REVISION)

Between

CIBC Bank and Trust Company (Cayman) Limited

Plaintiff

And

(1) T
(2) S

Defendants

BEFORE: Hon. Chief Justice Anthony Smellie

HEARD: In Chambers

APPEARANCES: Shân Warnock Smith QC, instructed by Rachael Reynolds and Anthony Partridge of Ogier, for the Plaintiff.
Bernadette Carey and Christopher Duncan of Carey Olsen for the First Defendant.

DRAFT RULING CIRCULATED: 12 July 2021

RULING DELIVERED: 16 July 2021

Headnote

Trusts established pursuant to the Special Trusts- Alternative Regime of Part VIII of the Trusts Act –application to reform the Trusts cy-prés on the ground of obsolescence of the manner of their execution – applicable principles.

REASONS FOR DECISION

1. On 29 October 2020, I granted certain orders which had the effect of reforming two trusts which are established in the Cayman Islands, in keeping with section 104 of the Trusts Act. A confidentiality order had earlier been granted on 19 October 2020 for the anonymization of the proceedings, the Court having been satisfied that the preservation of confidentiality, about the identity of beneficiaries and the affairs of the trusts, was necessary to ensure the proper administration of justice in the proceedings[1]. Upon granting the orders on 29 October, I promised to provide written reasons as soon as time allowed. I now do so, notwithstanding the regrettable but unavoidable delay.

2. The orders were granted upon the Plaintiff's application, brought by Originating Summons pursuant to section 104 of the Trusts Act in its capacity as trustee of two Cayman Islands STAR trusts, which I will refer to as the "A. R. Trust" and the "Ta trust" (together "the Trusts"). As their titles suggest, the Trusts are both governed by the provisions of Part VIII of the Trusts Act (2021 Revision), STAR being an acronym for "Special Trusts – Alternative Regime", the heading of Part VIII. Such "special trusts" differ from ordinary trusts in various ways as will become apparent below. Of particular significance, is the disapplication by section 104 (2) of the jurisdiction vested in the Court under section 72 of the Trusts Act which, in the case of ordinary trusts permits the Court, in certain circumstances described in section 72, to consent to variations of trust.[2]. Instead, in the case of a STAR trust, as will become apparent below, the relevant power to effect changes in circumstances such as those which arose here, is vested directly in the Court, as set out in section 104 itself.

3. The reason for the Plaintiff's application to the Court, and the grounds on which it is made, are the same for both trusts. In summary it is that, as a result of the decision of the primary beneficiary the First Defendant, T (the "First Defendant" or "T"), to relocate to the United States, in the words of section 104 (1) (c):

> *"... the execution of the [Trusts] in accordance with [their] terms," has become "(c) obsolete in that, by reason of changed circumstances, it fails to achieve the general intent of the [Trusts]".*

[1] And in keeping with well settled principles of case law. See, for instance: ***Barclays Bank and Trust (Cayman) Limited v C,K, and the A.G.*** 2014 CILR (1) 144; ***In Re Sphinx Group (in off. Liq.)*** 2017 (1) CILR 176; ***Re BCD Trust (Confidentiality Order)*** [2015] Bda LR 108; ***In Re G Trusts*** [2017] SC Bda 15 November 2017; ***Re Delphi Trust Ltd*** (2014) 16 ITELR 885 and ***Evening Post Ltd v Al-Thani*** [2002] JLR 542.

[2] Such applications have been brought before and granted by this Court. See, as a longstanding example: ***In Re T Trust*** 1999 CILR Note 10b, judgment delivered 2 November 1999.

4. In such circumstances section 104 (1) goes on to provide that:

> "*the trustee shall, unless the trust is reformed pursuant to its own terms, apply to the court to reform the trust cy-près* ...."

5. No attempt has been made by the Plaintiff to reform the Trusts pursuant to their own terms because, for the reasons examined below, it is not considered that the Trustee has such a power. The Enforcers have a power given under the Trust to reform "the Purposes" of the Trusts but, for the reasons also examined below, it was thought probable that the power could not be exercised to achieve the desired result. In any event, because T is himself an Enforcer, the exercise of such power would, in the present case, defeat the very object that the reformation is intended to achieve, namely the mitigation of United States tax which, on the advice of reputable United States tax lawyers, would otherwise likely accrue upon T's relocation to the United States. Accordingly, the Plaintiff, as sole trustee of the Trusts, applied to the court to reform the Trusts *cy près*.

6. The way in which the Plaintiff asks the Court to reform the Trusts is referred to in more detail below. In summary, it is to insert a new power into each Trust to enable the Plaintiff to transfer, or "decant", the assets of the Trusts to new trusts or to T directly, thereby leading to a substantial mitigation of United States tax which would otherwise arise.

Background to the Application

7. The background comes from affidavit evidence filed by an officer of the Plaintiff in support of the Application and is in summary, as follows:

8. The Trusts were established by T's father, ("Dr T" or "the Settlor") on 30 July 2010. Dr T passed away in 2013. Dr T was also the husband of the Second Defendant, Madam S (the "Second Defendant" or "Madam S").

9. Dr T worked in the petroleum and minerals industries and had accumulated a great deal of wealth during his lifetime. Madam S was Dr T's second wife and T was the only child of their marriage. There are three children of Dr T's first marriage.

10. Dr T established the Trusts for the benefit of himself, Madam S and T and any children T might have ("remoter beneficiaries"). T is 33 years old, unmarried and as yet, has no children. Dr T's children from his first marriage already benefitted from another Cayman Islands trust (the "V Trust") managed by another reputable Cayman Islands corporate trustee.

11. Initially T was also a trustee of the Trusts but he resigned as trustee on 28 May 2013. Since then the Plaintiff has been the sole trustee. Dr T appointed the Plaintiff as trustee of the Trusts because he wished the Trusts and the V Trust to have different trustees.

12. T was aged 23 when the Trusts were established, and 26 when his father died. T left his country of birth to attend school and university in the United Kingdom and has not returned to reside there since. At the time the Trusts were established, it was not anticipated that he might wish to relocate to the United States but as already noted and of crucial importance now, this has since changed. The Trusts were established on the basis of his and Madam S's situation at the time and the Plaintiff's evidence is that Dr T chose to establish the Trusts in this jurisdiction because he was seeking *"political and economic stability, adherence to the rule of law and the fact that Cayman is a tax neutral jurisdiction"*. T was at that time (as he is now) living in the United Kingdom and he and Madam S have maintained residences in the United Kingdom, France, Switzerland and in the country of his birth.

13. T began to consider moving to the United States in mid-2018. He intends to relocate there partly for business reasons. He is highly educated with advanced degrees in the physical sciences. However, in order to be able to compete in the technology sector as he intends, or at least in the part of it that interests him, T believes that he needs to be in the United States, particularly in Silicon Valley.

14. In preparation for his move to the United States, T engaged his United States tax attorneys, McDermott, Will & Emery LLP ("MWE") to provide immigration advice to inform not only his decision but also that of the Plaintiff qua trustee, in response to T's intended relocation. MWE have advised the Plaintiff that T's relocation to the United States would have serious adverse tax consequences for him unless steps are taken to mitigate them. MWE have explained this in a memorandum of advice dated October 8, 2020 ("Tax Memorandum") which was presented to the Court. MWE have advised on, among other things, the United States income, estate, gift and generation-skipping transfer tax laws that will negatively affect T and his descendants if the Trusts are not reformed. MWE have also set out in the Tax Memorandum certain steps which could be taken in relation to the Trusts to achieve the desired mitigation. The Plaintiff is sympathetic to these aims and seeks orders under section 104 to assist T, while bearing in mind at the same time, the interests of the other beneficiaries.

15. In this regard it should be noted that upon an aspect of this application by the Plaintiff pursuant to Grand Court Rules Order 15 rule 13(1)(b), I made an order appointing T to represent the interests of the remoter beneficiaries. This was plainly justified on the basis that T and any children he might have, would share the same interests and so it would also be in their interests to reform the Trusts for the reasons given. The same reasoning would apply to the charitable organizations and any other beneficiaries, as all would remain objects of the purposes under the new trust structures suggested in the MWE Tax Memorandum and would obviously also benefit from a more tax efficient structure.

16. In anticipation of the present issues being resolved satisfactorily, including as a result of this application to the Court, T had applied under the United States Immigration Investor

Program for the issuance of the requisite visa and approval was expected imminently. This gave urgency to the completion of the application in anticipation of his relocation to the United States on 1 January 2021, in keeping with the related immigration deadlines and the need for the Plaintiff to reform the Trusts before his relocation.

17. The A. R. Trust is governed by a trust deed dated 30 July 2010 (the "A. R. Deed") and a number of supplemental documents. It was established by Dr T, as donor, with the Plaintiff and T as trustees, although, as mentioned above, the Plaintiff is now the sole trustee.

18. The Ta Trust is governed by a trust deed which is also dated 30 July 2010 (the "Ta Deed") as well as a number of supplemental documents. Like the A. R. Trust, the Ta Trust was established by Dr T as donor, with the Plaintiff and T as trustees, although the Plaintiff is now the sole trustee.

19. As at 31 August 2020, the assets of the A.R. Trust were more than US$1 billion and the assets of the Ta Trust more than US$135 million.

20. The purposes of the Trusts can be summarized as follows.

The A .R. Trust

i. The purposes of the A.R. Trust are described in Article 1.B. of the A.R. Deed as follows:

> *"The purposes of the trust (hereinafter referred to as the "Purposes") shall be to hold the trust income and principal for the benefit of the Donor, the Donor's wife, [Madam T], the Donor's son, [T], the individual issue of such son and charitable organizations and any other beneficiaries in accordance with the terms set forth in this Agreement".*

ii. The Trustee's evidence also explains that notwithstanding the broader terms of Article 1.B, the primary purpose of the A.R. Trust is to benefit T and his descendants to the maximum extent possible, regardless of their places of residence or domicile.

The Ta Trust

iii. The purposes of the Ta Trust are expressed in Article 1.B. of the Ta Trust Deed in exactly the same terms as the purposes of the A.R. Trust described above.

b. The Trustee has also confirmed that, like the A.R. Trust, the general intent of the

Ta Trust is to benefit the objects[3] of the Trusts, being the beneficiaries of the Ta Trust, in a tax-efficient way and otherwise in such a way so that as many of the Ta Trusts assets as possible would be used for the defined purposes.

The applicable law

21. Counsel for both the Plaintiff and T, provided helpful discussions of the applicable law, much of which I accept in the following analysis.

Section 104 of the Act

Section 104 provides as follows:

> "***Cy-près***
>
> *104. (1) If the execution of a special trust in accordance with its terms is or becomes in whole or in part —*
>
> (a) *impossible or impracticable;*
>
> (b) *unlawful or contrary to public policy; or*
>
> (c) *obsolete in that, by reason of changed circumstances, it fails to achieve the general intent of the special trust,*
>
> *the trustee shall, unless the trust is reformed pursuant to its own terms, apply to the court to reform the trust cy-près or, if or insofar as the court is of the opinion that it cannot be reformed consistently with the general intent of the trust, the trustees shall dispose of the trust property as though the trust or the relevant part of it has failed.*
>
> *(2) Section 72 does not apply to special trusts"*[4]. [emphasis added].

Section 104 has a number of aspects which are considered below.

Execution has become "obsolete"

[3] As defined in section 99 of the Act as follows: *"99 (1) The objects of a special trust or power may be persons or purposes or both. (2) The persons may be of any number. (3) The purposes may be of any number or kind, charitable or non-charitable, provided that they are lawful and not contrary to public policy."*

[4] As mentioned above, section 72 prescribes the general statutory jurisdiction of the courts to vary trusts in the interests of beneficiaries who are unascertained or under disability or whose interest is contingent upon a future event; its disapplication to STAR trusts being one of a number of the distinguishing features of the STAR regime.

22. It is not suggested by the Plaintiff that the execution of either of the Trusts is or has become, *"(a) impossible or impracticable,"* or, "*(b) unlawful or contrary to public policy*". Rather, the relevant basis for present purposes and upon which the application is made that, *"the execution of the special trust in accordance with its terms,"* has become, *"(c) obsolete in that, by reason of changed circumstances, it fails to achieve the general intent of the special trust"*.

23. It is submitted that circumstances have changed because, as mentioned above, T is relocating to the United States whereas previously he has lived outside the United States. Accordingly, the question is whether the execution of the Trusts is, or has become, obsolete by reason of those changed circumstances.

24. The term "*obsolete*" is not defined in the Act but some indication as to its meaning can be gleaned from the surrounding words.

   a. First, the obsolescence has to be by reason of changed circumstances, i.e.: the changed circumstances have to have caused it.

   b. Secondly, the execution of the trust must have become obsolete, "*in that ... it fails to achieve the general intent of the special trust*". The pronoun "*it*" is thus referring to the noun "*execution*" rather than the expression "*special trust*," so the section is concerned with the execution of the trust becoming obsolete, rather than the trust itself.

   c. Thirdly, the execution will become obsolete if, "*it fails to achieve the general intent of the special trust.*" It is not the case, therefore, that the execution of the special trust has to be obsolete in the sense of being impossible or redundant. Indeed the existence of subparagraph (a) shows that this cannot be its meaning. Rather, I accept as the Plaintiff submits, that the term obsolete in section 104 means, *no longer suitable for the present circumstances*, or *in the context of the present circumstances,* or some such cognitive meaning.

25. I am informed that there is no case in which the meaning of the term "obsolete" in section 104 has been considered. Indeed, I am told that counsel have not been able to find any case in which section 104 has been considered in any depth[5]. Further, the word "obsolete" does

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[5] There is a passing reference to section 104 in the judgment in ***Re B Trust: RBS Coutts (Cayman) Limited v W and Others*** 2010 (2) CILR 348 at [24] but this confirmed, in a case dealing *inter alia* with the exclusive jurisdiction of the Cayman Court over a Cayman trust, simply that there is a limited number of ways in which a STAR trust may be varied, including *cy-pres* in accordance with section 104.

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not appear anywhere else in the Act. However, since the section invokes the cy-près doctrine, most often considered in the case law as applicable to charities, I recognize that the drafters are likely to have had in mind the way in which the doctrine has traditionally been applied in such cases even though STAR trusts are frequently not charitable trusts[6]. Indeed, it must be recognized that section 104, like much else about the STAR trusts regime, is innovative because at English common law, it is long settled that there is no question of a cy-prés application of property subject to trusts which are not strictly deemed charitable. See *Halsbury's Laws of England, Charities, Volume 8 (2019); paras 1- 657 and para 207: the cy-prés doctrine.*[7] The doctrine is there described as follows, in terms which I regard as applicable in this jurisdiction:

> *"207. The cy-près doctrine.*
>
> *Where a clear charitable intention is expressed, it will not be permitted to fail because the mode, if specified, cannot be executed, but the law will substitute another mode cy-près, that is, as near as possible to the mode specified by the donor.*
>
> *An application cy-près results from the exercise of the court's ordinary jurisdiction to administer a charitable trust of which the particular mode of application has not been defined by the donor. Where he has in fact prescribed a particular mode of application and that mode is incapable of being performed, but he had a charitable intention which transcended the particular mode of application prescribed, the court, in the exercise of this jurisdiction, can carry out the charitable intention as though the particular direction had not been expressed at all.*
>
> *However, where the particular mode of application prescribed by the donor was the essence of his intention, which may be shown by a condition or by particularity of language, and that mode is incapable of being performed, there is nothing left upon which the court can found*

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[6] Indeed, this is but one way in which STAR trusts are intended to be innovative in ways which would not be recognizable at common law. Already set out above are the distinguishing features of section 99 of the Act. Perhaps most distinguishing, in addition to the provisions of section 104 under consideration, are the provisions of section 100 which declare that beneficiaries have no rights as such to enforce a STAR trust but only enforcers (with fiduciary duties and obligations imposed by section 101 (2)) do; and those of section 103(1), that *"Subject to the court being able under subsection (4) to resolve any practical uncertainty, a special trust is not rendered void by uncertainty as to its objects or mode of execution"*.

[7] Citing ***A-G v Haberdashers' Co*** (1834) 1 My & K 420; ***Thomson v Shakespear*** (1860) 1 De GF & J 399; ***Game v Long*** (1860) 2 De GF & J 75; ***Re Clark's Trust*** (1875) 1 Ch D 497; and ***Pease v Pattinson*** (1886) 32 ChD 154.

its jurisdiction, so that in such circumstances the court has no power to direct any other charitable application in place of that which has failed".

26. Thus, the term '*cy-près*', from the Norman French, is a term of art conventionally rendered in the sense of "as near as possible to", in the context of the reform of gifts for charitable purposes. It must have been intended to bear a similar meaning in the context of the reform of STAR trusts, even those where the purposes of the STAR trust are not exclusively, or even mainly, charitable (as is provided for in section 99 of the Act as mentioned above).

Canadian influence on the STAR Law

27. Mr. Antony Duckworth, a leading local trust practitioner and policy advisor on the creation of the STAR regime, has commented[8] that the provisions now enshrined as section 104 of the Act were informed by the proposals of the Manitoba Law Reform Commission (the "**Commission**") in its Report #77 on Private Purpose Trusts (September 1992).

28. It is apparent that the proposals of the Commission in relation to the reform of trust purposes on grounds of obsolescence in that jurisdiction, were intended to go beyond the conventionally recognised basis of reform on grounds of impossibility or impracticability. According to the Commission, the mode of execution of a trust purpose may be obsolete notwithstanding that it is neither impossible nor impracticable in the technical common law sense (see Chapter4.B.2 of the Report). And it is notable that the Commission went on to state that the variation of mode must be within the context of the intended purpose, a proposition which I also accept as being applicable here.

29. The Commission in turn cites the legislative reforms of the *cy-près* doctrine in the United Kingdom in the Charities Act 1960 (now in the Charities Act 2011) by way of illustrating a jurisdiction which confers on the courts the power to apply the *cy-près* concept to obsolete modes which are not technically impossible or impracticable.

30. Accordingly, in construing section 104, reference might usefully be made to sections 61 and 62 of the Charities Act 2011 U.K. which embody the *cy-prés* concept in modern statutory form[9]. The sections reflect the doctrine which has for centuries allowed the

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[8] **STAR Trusts: The Special Trusts (Alternative Regime) Law 1997 Cayman Islands – 2nd generation of purpose trusts and more (1998)** by Antony Duckworth, Gostick Hall Publications (1998).

[9] Section 61 reads: "*It is hereby declared that a trust for charitable purposes places a trustee under a duty, where the case permits and requires the property or some part of it to be applied cy-pres, to secure its effective use for charity by taking steps to enable it to be so applied*".

Section 62(1) in part provides, illustratively for present purposes and in terms which, to my mind, admit of notions of obsolescence , as follows: "*Subject to subsection (3),[(which applies where the donor is unknown or disclaims return of the property)] the circumstances in which the original purposes of a charitable gift can be altered to allow the property given or part of it to be applied cy-pres are –*

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courts to save a charitable trust from failing by altering its objectives to be performed as closely as maybe as originally expressed, when a charitable objective becomes impossible or impracticable to fulfill by reference to an array of considerations which are prescribed. The doctrine and its modern statutory re-enactment, permit a *cy-près* scheme to be made, inter alia, where the original purposes cannot be carried out or have simply ceased to provide a suitable and effective method of using the property available having regard to the spirit of the gift and other circumstances. On the basis that the drafters of section 104 had the doctrine in mind, as indeed it appears from the afore-mentioned practitioners' textbook commentary they did[10], this comparable context lends support to the notion that obsolescence in section 104 is to be construed widely. It is unlikely to have been intended to restrict the ability of the court to assist where a practical way forward is needed to render the trust fit for changed circumstances.

31. From all the foregoing, I accept that it is clear that the inclusion of the ground of obsolescence in section 104(1)(c) was intended to confer a wider jurisdiction to reform the purposes of STAR trusts compared with the Court's inherent jurisdiction to reform trusts for charitable purposes at common law. At common law, even if there was a paramount charitable intent or if a charitable trust had once operated, the *cy- près* doctrine could only be applied if the object of the trust had become 'impossible" or "impracticable' or "practically impossible" in whole or in part: ***Re Weir Hospital*** [1910] 2 Ch 124 at 138 and 140 .

32. Moreover, section 104 also reflects another aspect of the *cy-prés* doctrine which is that

> *"... in no circumstances can trustees of a charity apply the trust funds cy-prés on their own initiative, without the direction of the court or the Charity Commission*" ***Halsbury's*** (above) para 210.

Thus, section 104 is clear in providing that a trustee has no power outside of an application to the Court under section 104 itself to apply the assets of a trust *cy-prés.*

Obsolescence

33. There are a number of reported cases in other common law jurisdictions in which the term "obsolete" has been considered in other contexts. These cases are mostly concerned with legislation under which restrictive covenants over land could be discharged or modified on

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(a) *Where the original purposes, in whole or in part- (i) have been as far as may be fulfilled, or (ii) cannot be carried out, or not according to the directions given and to the spirit of the gift,... (c) where the original purposes, in whole or in part, have, since they were laid down -...(iii) ceased in any way to provide a suitable and effective method of using the property available by virtue of the gift, regard being had to the appropriate considerations."*

[10] ***STAR Trusts – The Special Trusts (Alternative Regime) Law 1997 Cayman Islands – 2nd generation of purpose trusts and more,*** (above).- see commentary at pp. 37 to 41.

the ground that they were "obsolete", but they support the view that "obsolete" in section 104 has the meaning that both the Plaintiff and T submit should be ascribed to it.

34. Given that what is sought is simply the meaning of the word, these cases are however, to be treated as illustrative when taken in the contexts in which they were decided. I see the need therefore to refer to but one example. In the English case of ***Re Truman, Hanbury, Buxton & Co Ltd's Application*** [1955] 3 All ER 559 at 563–564 the question was whether a covenant was "obsolete" within the meaning of the Law of Property Act 1925, (the LPA) s 84(1)(a). Submissions were there made as to the meaning of "obsolete" in reliance on the New Oxford Dictionary, which provided definitions including "*fallen into disuse*" or "*out of date*", and also that the word means (in the context of covenants) that an "*original purpose can no longer be served*". These were accepted to be the proper interpretation to apply to "obsolete" in section 84 of the LPA, but the Court also noted that the meaning "*may very well vary according to the subject- matter to which it is applied*". Nonetheless, I accept it as being a proper interpretation for the present context.

35. In light of section 62(1)(a)(ii) of the Charities Act 2011 (above), regard may also be had to circumstances "*where the original purposes, in whole or in part, cannot be carried out, or [cannot be carried out] according to the directions given and to the spirit of the gift*" as the import of that phrase appears to be reflected in section 104(1) (c) of the Act, where the latter speaks of the execution of the special trust being "*obsolete in that, by reason of changed circumstances, it fails to achieve the general intent of the special trust.*" One sees the assimilation between the phrases "*the general intent of the special trust*"and "*the spirit of the gift*" and therefore it is helpful to note that the latter expression has been held to mean "*the basic intention underlying the gift or the substance of the gift rather than the form of the words used to express it or conditions imposed to effect it*". See ***Varsani and Others v Jesani and Others*** *[1999] Ch 219,* a decision of the English Court of Appeal. For these purposes, the basic intention underlying the gift or the spirit of the gift, is therefore to be ascertained from the relevant instruments used to effect the gift read in light of the admissible surrounding evidence. As further authority for this axiomatic proposition, see ***Re Lepton's Charity, Ambler v Thomas*** [1972] 1 Ch. 276, a decision of the English High Court decided under the Charities Act 1960. There Pennycuick V-C, held , among other things, in construing section 13 of the 1960 Act in relation to the occasions for applying property which was subject to a charitable gift *cy-prés*, that the words "*the original purposes of a charitable gift*" were applicable to the trusts of the disposition as a whole, and not severally in relation to its respective parts, and the phrase " *the spirit of the gift*" in paragraphs (a) (ii) and (e) (iii) was equivalent in meaning to the basic intention underlying the gift, as ascertainable from its terms in light of the admissible evidence. This was the approach I adopted in deciding that it was appropriate to grant the order for reform of the Trusts *cy-prés*, being satisfied that to do so would be in keeping with the general intention of the Trusts, as I turn to explain further below.

Reforming the Trust Deeds

36. It is the Plaintiff/Trustee who asks the Court to reform the Trusts, on the basis that neither the Trustee nor the Enforcers of the Trusts have the power to reform them. As already mentioned, while it could be said that the Enforcers have a power to decant assets from the Trusts to other trusts, the advice in the MWE Tax Memorandum is that if the First Defendant were to exercise that power, it would defeat the reformation required for tax avoidance purposes.

37. In general terms, and in reliance on the wording in section 104 to the effect that the Trustee "*shall*" make an application for reformation, the Plaintiff applies to the Court to reform the Trusts by inserting a power into each Trust to enable it to transfer the assets of the Trusts to new trusts or to T directly, such action to result in a substantial reduction in the US taxes that T will personally be required to pay. On T's behalf it is emphasized that the Trustee has accepted that the reformation is necessary because the execution of the purposes of the Trusts are in whole or in part obsolete by way of changed circumstances, and the general intention underlying the Settlor's gifts can no longer be met.

38. Accordingly, the Trustee's view is that the "*general intent*" of the Trusts was to benefit the objects of the "*Purposes*" as defined in the Trust Deeds, that is to say the beneficiaries, in a tax- efficient way in a politically stable environment so that as many of the Trusts' assets as possible may be used for the Purposes. This general intent has been achieved while the Trusts were located in the Cayman Islands and T was located outside the US, but this will not be achieved on his relocation to the US unless the Trust Deeds are reformed. The fact that the "*Purposes*" of the Trusts can still be achieved does not mean that the "*general intent*" can be. And if the drafters of section 104 had meant "*general intent*" to mean "*purposes*" one may expect that they would have said so. In the part of the Act that deals with the special regime for non-charitable purpose trusts, it is, I accept, inconceivable that the drafters would have used the term "*general intent*" if they meant "*purposes.*"

39. The issue I am concerned with therefore, is whether the general intent can still be achieved without reform of the manner of execution of the purposes.

40. Moreover, it was submitted and I accepted that section 104 does not require the Court to identify a specific intent, which can no longer be achieved. Rather, the question is whether the execution of a special trust fails to achieve the "*general intent*", which is understandable since it is likely that a special trust will have a number of general or interconnected intents. I also accepted the proposition that the "*general intent*" of the Trusts includes an intent to "*provide for the beneficiaries in a tax efficient way in a politically stable environment that adhered to the rule of law*", thus making it also appropriate for this application to the Court to be made. Also, the fact that section 104 is engaged if the execution of the special trust in accordance with its terms becomes "*in whole or in part*", obsolete, shows that the general intent is not necessarily referring to everything that the trust is intended to achieve. Furthermore, I note here again that "*general intent*" is not the same as "*purposes*". Being STAR trusts, as mentioned above, section 99 of the Act expressly permits the Trusts to have as their objects both persons and purposes, charitable or non-charitable.

41. The MWE Tax Memorandum concludes that the drafters of the Trust Deeds did not, when drafting the Trust Deeds in 2011, anticipate that any of the beneficiaries of the Trusts would become US tax residents or domiciliaries. If they had so anticipated, then the Trust Deeds would have included administrative, domestication and tax-limitation provisions (following common cross-border tax and estate planning structuring processes) which anticipate that a non-US trust may have a US beneficiary in due course:

   a. Including such clauses would have avoided the negative consequences that will be suffered by T and his descendants if the Trusts are not reformed as proposed in these proceedings and which are significant. By way of a very high level summary, and with reference to the A.R. Trust, T's potential US tax residency would subject him to:

      i. The general US federal income tax regime on his world-wide income (including distributions from any and all trusts established for his benefit);

      ii. A punitive US income tax regime commonly known as "Throwback Tax", which applies to specific types of distributions from non-US trusts to US persons and can result in effective income tax rates as high as 100% of a trust's distributions.[11]

      iii. If he becomes a US domiciliary, he will be subject to the US estate, gift, and generation-skipping tax regimes, which have top marginal rates of 40% that will apply to the assets of the A.R. Trust with respect to which T holds a power of withdrawal. Given the A.R. Trust's current asset levels, an imposition of U.S. estate tax on its corpus would result in an estate tax liability of more than US$370 million in the event of T's death (and his descendants would be subject to similar tax consequences if they become beneficiaries of the A.R. Trust and possess the same powers after his death).

      iv. These problems are compounded by the further tax consequences that are attributable to the Ta Trust. In addition to attracting the same Throwback Tax consequences described in respect of the A.R. Trust, the Ta Trust is exposed to an estate tax liability of more than $58 million. It will likely also attract the machinations of a separate punitive tax regime that applies to income earned by interests in Controlled Foreign Corporations.

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[11] As explained in the MWE Tax Memorandum at paragraph 3.1.2, the Distributable Net Income ("**DNI**") includes all of a trust's income and gains, and it becomes Undistributable Net Income ("**UNI**") if it is not distributed within 65 days of the end of a given year. UNI is subject to interest charges that compound daily and can result in an accumulation of UNI being subject to tax and interest as high as 100% of the distribution.

(**CFCs**). The MWE Tax Memorandum anticipates that by operation of the CFC regime, T would likely be deemed to own at least 87.5% of the Ta Trust's corporate holdings, rendering those trusts CFCs for US income tax purposes and accelerating when tax is due and at almost double the ordinary rate.

42. In terms of reformation to mitigate these unintended tax consequences, the MWE Tax Memorandum advises that the Trust Deeds should be reformed, as proposed by the Trustee set out above, by the insertion of a short provision into each of the Trust Deeds giving the Trustee power to transfer, or decant, the assets of each Trust to T directly or to new trusts.

43. The process by which the reformation is to be effected immediately prior and subsequent to the exercise of that power is set out in detail in the MWE Tax Memorandum. T is content to be guided by and adhere to the comprehensive tax advice given by MWE, and, I am informed, has no comment on that process.

44. To all of the foregoing, I add the following observations. While the proposed reforms are far-reaching and transformative, I accept that they remain within the basic intention underlying the spirit of the Settlor's gifts also because there is nothing to suggest that the Settlor would have wished to curtail T's choice of domicile as a condition of benefit. On the contrary, the peripatetic family history suggests that T's wish to relocate to the United States in order to fulfill his professional and entrepreneurial aspirations would be in keeping with what the Settlor would have expected. Indeed, this is as the Trustee is recorded as reporting at [20] above.

45. Finally, as to the meaning of section 104, at the hearing I raised with counsel the question whether the jurisdiction of the Court is engaged where, as it might have appeared from the circumstances presented, the proposed reformation arises by reason of a "prospective obsolescence", that is to say, a change of circumstances which has not yet occurred. This, at first blush, may appear to have been what was proposed because T had not yet relocated to the United States. But I was persuaded by further helpful submissions from counsel that the proper view to be taken is that, from the point of view of the Plaintiff's responsibilities as Trustee, the change of circumstances had already occurred and that, as discussed above, it is the *execution* of the Trusts which has become obsolete by reason of the changed circumstances.

46. Thus, as it was explained and I accepted, in the present case the Trustee is no longer administering the Trusts in circumstances where none of the beneficiaries have a connection with the United States or an intention to relocate to the United States. It has become the case that the Trustee is administering the Trusts for the benefit of a primary beneficiary T, who intended to relocate to the United States (with effect from 1 January

2021) and had initiated the process of doing so, with all the tax implications which flow from those circumstances.

47. In particular, T's intention to relocate has necessarily led to a complex and extensive restructuring plan drawn up by his advisors to deal with the relocation which he has provided to the Trustee; and the advisors have explained that the Trusts would need to be reformed in the way proposed by this application to the Court in order to permit the proposed restructuring, as set out in the MWE Tax Memorandum. The Trusts needed to be reformed before 1 January 2021 to address the punitive tax consequences that would otherwise be sustained by T upon his relocation.

48. I accepted that these are changed circumstances with which the Trustee has been presented and which impact on how the Trustee must administer the Trusts. It was no longer possible for the Trustee to ignore the potential US tax liability of the beneficiary. US tax issues were an irrelevant consideration in the exercise of the Trustee's administration of the Trust, whilst no beneficiary had any connection with the United States and had no intention to relocate there. But this had changed, and the US tax provisions must be taken into account by the Trustee in any exercise of its discretion, as they have now become highly relevant considerations. For instance, and as was posited on behalf of the Trustee (no doubt with well settled case law in mind), if the Trustee were to exercise its discretion without proper regard to the US tax position of the beneficiary, in light of the information provided to the Trustee by MWE, such an exercise would be liable to be set aside, or could expose the Trustee to a breach of trust claim, for failure to exercise its discretion having taken into account all relevant considerations.

49. Given that the circumstances in which the Trusts were being administered had clearly changed, the question became whether the execution of the Trusts had become obsolete by reason of those changed circumstances. I accepted that what section 104 appears to require by the expression "is or becomes" obsolete, is the presence of a relevant change of circumstances affecting the manner of execution of the Trust and with which the Trustee is already faced prior to applying to the Court. It was not contended nor did I find, that the jurisdiction extends to a possible future change of circumstances which has not occurred. However, if as here, a current change of circumstances is established, I accepted that it matters not whether future steps remain to be taken as a consequence of the change.

50. While the question whether the Court has a discretion whether or not to exercise the power to reform may be academic in light of the decision I reached in this case, as the question has been raised and in deference to the industry of counsel, I will express a view, albeit obiter, on the question.

51. I accepted that, (i) if the court is satisfied that the execution of the trust has become e.g. obsolete and (ii) that it can be reformed consistently with the general intent of the trust, it should reform it *cy-près*. Or, if the Court is of the opinion that the trust cannot be reformed consistently with the general intent of the trust, then it should so conclude, with the result that the trustee must dispose of the trust property as if the trust or the relevant part of the

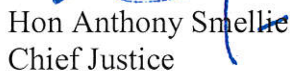
trust, had failed. In other words it would seem that the Court does not have a discretion in the matter simply to refuse to exercise the power: there is no indication that the Court retains a discretion; the familiar formula where the court is given a discretion ("the Court may") is noticeably absent. Having said that, however, it was submitted and I accepted that there is no reason why the Court should not exercise its power in the present case, even if it did have a discretion.

52. I note for the sake of completeness that evidence was provided to the Court demonstrating that Madam S (T's mother and also a beneficiary of the Trusts), supported the proposed course of action described above although she was not represented at the hearing.

Costs

53. The draft Order submitted to the Court by the Trustee provided for "*the costs of the parties of and arising out of these proceedings (to) be out of the assets of the said trusts, in such proportions between the trusts as the Court thinks fit, on the indemnity basis*."

54. In light of its non-contentious nature, the Application can be classified - using the classification identified in *Alsop Wilkinson (a firm) v Neary and others [1995] 1 All ER 431 at 434*[12] - as coming within the category of 'friendly' litigation on the basis that the Application is ultimately for the benefit of the trust fund. In those circumstances and where they have acted properly, the parties can usually be expected to be able to meet their legal costs from the trust fund and on an indemnity basis, see: *Al-Ibraheem v Bank of Butterfield International (Cayman) Ltd 2000 CILR 88.* It was therefore, so ordered.



Hon Anthony Smellie
Chief Justice

16 July 2021

[12] And as often applied by this Court. See for a recent instance: ***In re A Trust*** 2016 (2) CILR 416