



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

CAUSE NO: FSD 12 OF 2024 (IKJ)

IN THE MATTER OF the A Trust (the "Trust")

AND IN THE MATTER OF Section 48 of the Trusts Act (2021 Revision) and Order 85, Rule 2 of the Grand Court Rules

BETWEEN:

AA

Plaintiff

-and-

JTC (CAYMAN) LIMITED

Defendant

IN CHAMBERS

Before: The Hon. Justice Kawaley

Appearances: Mr Richard Wilson KC of Counsel with Ms Bernadette Carey and Dr Graham Stoute of Carey Olsen on behalf of the Plaintiff (the "Enforcer")

Mr Carlos de Serpa Pimentel and Mr Esmond Brown of Appleby for the Trustee

Heard: 12 February 2024

Date of Decision: 12 February 2024

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Draft Reasons circulated: 22 April 2024

Reasons delivered: 26 April 2024

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Purpose trust-application for blessing of proposed exercise of Enforcer's fiduciary powers under trust deed-governing principles-Trusts Act (2021 Revision), sections 48, 98, 101 (2), 102 (b)-Grand Court Rules Order 85 rule 2

REASONS FOR DECISION

Introductory

1. The A Trust is a purpose trust established in the Cayman Islands under the Special Trusts Alternative Regime ("STAR") in Part VIII of the Trusts Act (2021 Revision) (the "Act"). By an Originating Summons dated 29 January 2024, the Enforcer sought this Court's approval in relation to a 'momentous' decision in relation to the proposed exercise of one of his fiduciary powers. At the conclusion of the 12 February 2024 hearing, I granted the directions the Enforcer sought.
2. Leading Counsel for the Plaintiff indicated that there were no published judgments on the principles applicable to such an application by an enforcer under the STAR trust regime. I accordingly now give reasons for the legal basis of my decision.

Statutory provisions

3. Section 48 of the Act provides as follows:

"Application to the Court for advice and directions

48. Any trustee or personal representative shall be at liberty, without the institution of suit, to apply to the Court for an opinion, advice or direction on any question respecting the management or administration of the trust money or the assets of any testator or intestate, such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application, or such of them as the Court shall think expedient; and the trustee or personal representative acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards that person's own responsibility, to have

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discharged that person's duty as such trustee or personal representative in the subject matter of the said application:

Provided, that this shall not indemnify any trustee or personal representative in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if such trustee or personal representative shall have been found to have committed any fraud, wilful concealment or misrepresentation in obtaining such opinion, advice or direction, and the costs of such application as aforesaid shall be in the discretion of the Court."

4. This provision, read according to its own terms, only confers a supervisory jurisdiction over trusts on the application of a "trustee or personal representative". However, Mr Wilson KC submitted that section 48 in the present case should be read with section 102 of the Act which provides:

"102. Subject to the terms of that person's appointment —

(a) an enforcer has the same rights as a beneficiary of an ordinary trust —

(i) to bring administrative and other actions, and make applications to the court, concerning the trust; and

(ii) to be informed of the terms of the trust, to receive information concerning the trust and its administration from the trustee, and to inspect and take copies of trust documents;

(b) in the performance of that person's duties, if any, an enforcer has the rights of a trustee of an ordinary trust to protection and indemnity and to make applications to the court for an opinion, advice or direction or for relief from personal liability; and

(c) in the event of a breach of trust an enforcer has, on behalf of the trust, the same personal and proprietary remedies against the trustee and against third parties as a beneficiary of an ordinary trust." [Emphasis added]

5. This is consistent with the fundamental character of the STAR trust regime. It seeks to modify the general law relating to trusts in the way explicitly stated in the Act, rather than to create an entirely parallel legal regime. Section 98 further provides:

"98. The law relating to special trusts and powers is the same in every respect as the law relating to ordinary trusts and powers, save as provided in this Part."

6. Section 101 also provides:

"(2) Subject to evidence of a contrary intention, an enforcer is deemed to have a fiduciary duty to act responsibly with a view to the proper execution of the trust."

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7. I accordingly had little difficulty in concluding that the Enforcer had standing to apply under section 48 read with section 102(b) of the Act to seek the Court's blessing of a momentous decision on the same legal basis as a trustee could invoking section 48 of the Act alone.
8. This was further confirmed by the following provisions of Order 85 of the Grand Court Rules:

“7. (1) Unless made by written submission under rule 8, an application by an executor, administrator, trustee or enforcer under Section 48 of the Trusts Act (as revised and amended) for the opinion, advice or direction of the Court upon any question respecting the management or administration of the estate or trust fund shall be made in accordance with this rule.” [Emphasis added]

Legal principles applicable to the merits of the application

9. It followed from the conclusion that the Enforcer was invoking the same advisory jurisdiction that this Court exercises over trustees, that:
 - (a) the Court was required to apply the familiar principles established by *Public Trustee v-Cooper* [2001] WTLR 901; and
 - (b) the application was a Category 2 case “*where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers.*”
10. As was pointed out in argument, these principles have been applied by this Court in various cases including *HSBC Trustee Limited as Trustee of the H Settlement*, FSD 130 of 2021 (ASCJ), Judgment dated 15 October 2022 (unreported) at paragraph 22, *AA-v-BB*, FSD 137 of 219 (ASCJ), Judgment dated 14 February 2020 (unreported) at paragraph 4, *In the Matter of A Trust* [2019 (1) CILR 130] at paragraphs 5-7 and *Standard and Chartered Trust (Singapore) Limited as trustee of the Emerging Market Diversified Trust*, FSD 82 of 2022 (DDJ), Judgment dated 18 May 2022 (unreported) at paragraphs 11-21. In a Category 2 case, the Court considers the following questions:

- (1) does the trustee or enforcer have the power to enter into the proposed transaction?

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- (2) is the Court satisfied that the trustee (or enforcer) has genuinely concluded that the proposed transaction is in the interests of the trust and the beneficiaries and/or in furtherance of its purposes?
- (3) is the Court satisfied that a reasonable trustee (or enforcer) would arrive at the relevant conclusion?
- (4) does the trustee (or enforcer) have any conflict of interests which prevents the Court from granting the approval sought?

The merits of the Enforcer's application

11. The Originating Summons sought approval for the Enforcer's decision to instruct the Trustee to exercise certain rights attached to shares held by the Trustee for the benefit of the Trust. The exercise of these share rights was central to the purpose of the Trust. I found in relation to the four questions I was required to ask that:

- (a) the Enforcer clearly had the power to give the relevant instruction. The Trustee under the Trust Deed was obliged to "*exercise the rights attaching to...the shares...as instructed in writing by the Enforcer...*";
- (b) I was satisfied that the Enforcer had genuinely decided that the proposed instruction to the Trustee was in the best interests of the Trust and in furtherance of the purposes for which it was established;
- (c) I was satisfied that a reasonable enforcer could have reached the same decision, which had not been entered into precipitously, but following careful deliberation and the receipt of appropriate legal advice; and
- (d) I was satisfied that the Enforcer was not impeded by conflicts of interest from concluding that it was appropriate to give the relevant instruction. What might be considered as potential conflicts of interest were properly identified in discharge of the duty to give full and frank disclosure of such matters when making a *Public Trustee-v-Cooper* Category 2 application.

Conclusion

12. For the above reasons, I approved the Enforcer's decision to make a 'momentous' decision in the exercise of his fiduciary powers under the Trust.



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