

## The Paralysed Trustee: A Cayman Approach

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While it is a relatively rare occurrence, circumstances can arise in the life of a trust that lead a trustee to the view that its hands are effectively tied and which potentially put the proper administration of the trust, and the interests of its beneficiaries, in great peril. Such a set of circumstances were considered by the Grand Court of the Cayman Islands (the “Court”) earlier this year, and the resulting judgment offers guidance and comfort to both trustees and beneficiaries facing troubles of this nature.

In the judgment concerning *In the Matter of Various Trusts* (unreported, 22 February 2017), the Honourable Justice Mangatal considered an application (the “Application”) made jointly by the beneficiaries of various trusts governed by Cayman Islands (“Cayman”) law (collectively, the “Plaintiffs”) for orders substituting a new trustee in the place of the original, and apparently hamstrung, trustee of those trusts.

### Background

The Plaintiffs were all members of the same family, and beneficiaries of a number of trusts which were governed by Cayman law and contained clauses providing for the Court to have exclusive jurisdiction over any proceedings concerning the trusts. The original trustee of each of the trusts (the “Existing Trustee”) was a company incorporated outside Cayman. The trusts themselves were part of a complex trust and corporate structure and held, through various limited liability companies and other corporate intermediaries, assets worth hundreds of millions of dollars (the “Assets”). The Assets were located in a number of countries including the United States (“US”).

At the time the Application was made, the Existing Trustee was facing allegations by the US Government that some of the Assets were in fact traceable to a conspiracy, of which the settlor of the Trusts was allegedly a part, to launder money misappropriated from a company wholly owned by the government of another foreign country. Off the back of those allegations, the US Government had commenced proceedings in the US District Court for the Central District of California (“CDCA”), which took the form of forfeiture actions against the Assets pursuant to the laws of California (the “US Proceedings”). All of the allegations in the US Proceedings were strenuously contested by the Plaintiffs, who feared impairment to, or permanent loss of, the Assets if the Existing Trustee did not actively engage in the US Proceedings.

For its part, the Existing Trustee had informed the Plaintiffs that it considered itself to be effectively paralysed from performing its functions as trustee, or from resigning as trustee, due to the risk that if it were to take any such steps it would be accused by the US Government of being involved in money laundering or otherwise exposed to civil or criminal liability for any action it decided to take. Evidence was submitted to the effect that, in the course of the US Proceedings, the US Government had already made such accusations.

## The Application

Pursuant to the Application, which was listed urgently given the looming US Proceedings, the Plaintiffs sought orders that an alternative Cayman trustee (the “Substitute Trustee”) be installed as the replacement for the Existing Trustee. As part of the Application, the Substitute Trustee gave evidence confirming that it had the requisite experience and qualifications to act in the capacity proposed, and that it intended to intervene in the US Proceedings with a view to defeating the claims and protecting and preserving the Assets. The Existing Trustee did not oppose the Application, but indicated that it did not consider itself in a position, given the facts of the case and the allegations made in the US Proceedings, to agree to the appointment of the Substitute Trustee or to consent to the Application.

## The Judgment

In considering the Application, the Court was first concerned to ensure that the US Government had received sufficient notice of the hearing. The attorneys representing the US Government confirmed that they had been notified of the Application several weeks prior to the hearing, but did not regard the Application as appropriate or consistent with US law and took no further steps to intervene in the Application.

The Court noted that, for the purposes of the Application, the relevant sections of the *Trusts Law (2011)* (the “Law”) were as follows:

- Section 10 of the Law, which provides that the Court has power to appoint new trustees, including in substitution for existing trustees, whenever it is expedient to do so, or if it is otherwise found to be inexpedient, difficult or impracticable to do so without the assistance of the Court;
- Section 12 of the Law, which provides that every trustee appointed by the Court shall have the same powers, authorities and discretions, and may, in all respects, act as if he had been originally appointed a trustee by the trust instrument and
- Section 64 of the Law, which provides that an order for the appointment of a new trustee may be made on the application of any person beneficially interested in the property to which the trust relates.

The Court also noted that the general principle guiding it in the exercise of its inherent jurisdiction in circumstances where the removal of an existing trustee is being considered, is the welfare of the beneficiaries and the competent administration of the trust in their favour. In this case, and with reference to the Law, the Court was satisfied that:

- Cayman was the appropriate forum for the hearing and determination of the Application, given the terms of the relevant trust deeds.
- The Plaintiffs had standing to bring the Application, given they had a clear beneficial interest in the assets and property which were the subject of the Trusts.
- Other than to note that the allegations made in the US Proceedings were very serious, the Court need not be concerned with the merits of those allegations, or the likelihood of the success of the US Proceedings.
- Similarly, other than to note that there was no question at all of misconduct or breach of trust or unfitness on the part of the Existing Trustee, the Court need not be concerned about the appropriateness or merits of the position taken by the Existing Trustee in refusing to act in the US Proceedings.
- The Court’s sole focus was to consider whether, in light of the Existing Trustee refusing to authorise the taking of any steps or to resign, it was expedient to appoint a new trustee and whether it was inexpedient, difficult or impracticable

for this to be done without the assistance of the Court.

- In this case, there were substantial assets in the US worth hundreds of millions of dollars, which were likely to be forfeited to the US Government by default or uncontested process unless a party “properly authorised to do so and with standing and sufficient interest in the assets” took such steps as available to them under the relevant law to contest the making of such orders. The Court’s assistance was therefore required to protect the welfare of the beneficiaries and to prevent or circumvent omissions that would endanger the trust property. Given the position of the Existing Trustee, there was no practicable manner in which new trustees could be appointed without the assistance of the Court.
- The Substitute Trustee was fit to act and willing to take steps to protect the trust assets and to protect the interests of the beneficiaries, and had given undertakings that it would not take any action that would impair the *in rem* jurisdiction of the CDCA in the US Proceedings (save for the proper advancement of any claim in respect of the Assets) or cause there to be any change in the ownership of the Assets. Orders for substitution were therefore duly made, and the Existing Trustee was replaced by the Substitute Trustee in respect of all trusts of which the Plaintiffs were ultimate beneficiaries.

The Judgment is a helpful reminder that paralysis on the part of a trustee, whatever its cause, need not sound the death knell for the trust and its assets. This is particularly so in cases such as this, where real and credible threats against trust assets are on the brink of being realised. The Court, in reliance on the Law and its inherent jurisdiction, is empowered and ready to assist.

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