Forum Inconvenient?
A case note on *Helmsman Limited and Hotham Trustee Company Company Limited v Bank of New York Trust Company (Cayman) Limited*

Abstract
In *Helmsman Limited and Hotham Trustee Company Limited v Bank of New York Trust Company (Cayman) Limited* [2009] CILR 490, the Grand Court of the Cayman Islands considered an application by the defendant to stay the proceedings on the basis that the more appropriate forum for the trial of the action was England. In considering the application, Mr Justice Henderson provided a helpful analysis of “forum for administration” clauses in trust deeds, and outlined the factors to be considered in deciding *forum conveniens* issues.

Case Note
It is increasingly common for modern trusts to have a global reach, with settlors, trustees, beneficiaries, and the trust assets, scattered all around the world. When disputes arise and the commencement of proceedings is anticipated, an initial matter for consideration is the *forum conveniens* for resolution of the dispute; that is, the most appropriate and convenient jurisdiction in which the litigation should be pursued. Most frequently, this is determined with reference to the provisions of the trust deed. But, as a recent decision of the Grand Court of the Cayman Islands highlights, the particular circumstances of each case will warrant careful consideration.

The facts
The Plaintiffs in this action were Helmsman Limited (“Helmsman”) and Hotham Trustee Company Limited (“Hotham”). Helmsman was the trustee of two trusts, known as the Beverley Settlement and the Howden Settlement, and Hotham was the
trustee of the London Settlement (collectively, “the Trusts”). The Settlor of the Trusts was an English resident, and the investment adviser appointed in respect of each of the Trusts was the Settlor’s longtime personal adviser, a Florida resident by the name of Mr Parker. The defendant in the action, Bank of New York Trust Co. (Cayman) Limited (“BNY Cayman”) was the former trustee of the each of the Trusts and had appointed Bank of New York in New York (“BNY New York”) to the role of investment manager.

In early 2009, Helmsman and Hotham filed proceedings against BNY Cayman in the Grand Court of the Cayman Islands, claiming breach of trust and seeking damages. In doing so, Helmsman and Hotham alleged that BNY Cayman had negligently failed to monitor the investment activities engaged in by BNY New York and Mr Parker, resulting in the Trusts suffering “heavy losses”. Those losses in fact exceeded US$68,000,000 across two of the Trusts and had been attributed to a decision to invest in “tech stocks” which subsequently suffered atrociously as a result of the burst of the “dot com bubble” in the early 2000s.

The Proceedings

On being served with the Writ, BNY Cayman applied to stay the proceedings on the ground that England was the more appropriate forum for the trial of the action. In doing so, BNY Cayman argued that two of the Trusts were governed by English law which would require the Cayman court to receive expert evidence in order properly to consider the matters in issue. Further, and in reliance on English legislation, BNY Cayman wished to claim a contribution from Mr Parker.

Two of the trust deeds contained a clause providing that the courts of England were the “forum for the administration” of the trust. The third trust deed, however, was governed by Cayman law. Importantly, the deeds provided Helmsman and Hotham with the power to change the forum of administration at any time, and they had exercised this power immediately prior to issuing their Writ so as to change the forum for the administration to the Cayman Islands.

Questions for the court

In considering BNY Cayman’s application to stay the proceedings, Mr Justice Henderson considered two questions: firstly, whether the “forum for administration” provisions in the Trusts conferred exclusive jurisdiction on the English courts and, secondly, whether an action for breach of trust of the kind in this case could in fact be accurately characterised as a matter concerning the administration of a trust.
In answer to the first question, the learned judge noted the well established principle that an agreement to submit to the jurisdiction of a foreign court must be express and cannot be implied. He confirmed that the “forum for the administration” clause in the trust deeds was not designed to, nor did it have the effect of, giving the English Courts exclusive jurisdiction over the Trusts. Further, there were no other provisions in the deeds which could be considered to amount to an express agreement to submit to the jurisdiction of the English court, or to any other jurisdiction. As the Trusts did not expressly confer exclusive jurisdiction over the dispute on any court, it was therefore necessary to consider the most appropriate forum based on the information available during the hearing.

As the trustees had exercised their power to change the forum of administration to the Cayman Islands prior to filing the Writ, the second question became academic. Accordingly, the learned judge held that it was unnecessary to decide this question finally for the purposes of the application before him. However, following a short analysis of authorities in the UK, he noted that it was “unlikely” that a clause referring to the “administration” of a trust was intended to include contentious breach of trust litigation and would instead be solely concerned with aspects of the administration of the trust which require the assistance of the court. He commented that an administration action is generally classified as procedural rather than substantive, and cannot be used to deal with breach of trust issues or other such hostile trust litigation.

**Forum conveniens?**

The learned judge then embarked on an exercise of assessing whether, based on the information available to him, it would be more appropriate and convenient for the proceedings to be pursued in England or in Cayman. In doing so, he confirmed that it was necessary to consider which of the two jurisdictions was “clearly or distinctly” the more appropriate forum for the resolution of the dispute. In considering BNY’s arguments that England was the most appropriate forum, he noted that BNY had no presence in England at all, and Helmsman and Hotham were located in Bermuda and London respectively. The judge also recorded his doubts that a trial judge in the Cayman Islands would view English law as “foreign law”. Rather, as the Cayman Islands is a British Overseas Territory and, given the similarities between Cayman and English law, it was unlikely that the Cayman court would have to hear expert evidence on English law. Most of the witnesses resided in the United States, and most of the relevant documents were located in the same country, so the convenience of the witnesses and access to documents was not a factor which argued strongly for conducting the proceedings in either jurisdiction.
Turning to Cayman, the court noted that BNY Cayman was licensed to conduct business in the Cayman Islands and regulated by the Cayman Islands Monetary Authority. Importantly, the learned judge noted that the one way in which the laws of the Cayman Islands and England do differ in deciding *forum conveniens* issues is in respect of public policy. The judge considered it a matter of significant public concern that a Cayman trust company had failed to carry out its fiduciary obligations, and the Cayman court would be the most natural forum for such a claim. In the light of this, the court held that there was “no evidence of any possible advantage” in conducting proceedings in England and BNY Cayman had been unable to prove on the balance of probabilities that the English court was the most appropriate forum. Its application to stay the proceedings was therefore dismissed.

**Summary**

While at its heart a gloomy tale of boom and bust harking back to the dot-com era, the case provides helpful guidance for potential plaintiffs considering the *forum conveniens* for resolution of a trust-related dispute involving parties strewn across the globe. It also contains a reminder for draftsmen wishing to confer exclusive jurisdiction in deeds of settlement, and perhaps a not-so-subtle aide memoire to Cayman trust companies that it is more likely than not that they will find themselves accountable before the Cayman courts for any neglect of their fiduciary duties.

Bernadette Carey participated in the drafting of this article.