IN THE GRAND COURT OF THE CAYMAN ISLANDS

IN THE FINANCIAL SERVICES DIVISION

FSD NO. 122 OF 2014 ASCJ

BETWEEN SCHRODER CAYMAN BANK AND TRUST COMPANY LIMITED PLAINTIFF

AND SCHRODER TRUST AG DEFENDANT

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 29TH JANUARY 2015 AND 9TH MARCH 2015

APPEARANCES: Mr. Richard Wilson instructed by Ms. Lucy Diggle of Mourant Ozannes, Attorneys-at-Law for the Plaintiff

Mr. Carlos Pimentel, Mr. Robert Lindley and Mrs. Selina Tibbetts of Appleby (Cayman) Ltd., Attorneys-at-Law for the Defendant

Employee benefit trust established in the Cayman Islands – appointment of capital from the Cayman Trust to trusts established in Jersey for the individual benefit of employees and other beneficiaries – whether appointments valid.

JUDGMENT

1. Fifteen years ago, on 28th January 2000, Boyer Allan Investment Management Limited[1] ("Boyer Allan"), a United Kingdom company, established, irrevocably, the Boyer Allan Investment Management Ltd. Employee Benefit Trust in this jurisdiction (the "Cayman Trust").

2. The Plaintiff and the Defendant (an affiliate of the Plaintiff's based in Switzerland) were appointed as the original trustees ("the Trustees" or "the Plaintiff" or "the

[1] In 2005 Boyer Allan Investment Management Limited changed its name to Boyer Allan Investment Services Limited.

Defendant", as the context might require). The Cayman Trust was established for the benefit of a class of beneficiaries defined in clause 2.1 of the trust deed as "*the Employees and the wives, husbands, widows, widowers and children or step-children and remoter issue, of the Employees*". Boyer Allan made an initial contribution to the Cayman Trust in the sum of £23,196,191 and subsequent much smaller cash contributions. These funds were loaned to an underlying trust investment company, B.A. Offshore Company Ltd., (a Cayman Islands Company) for investment purposes, the shares in which were held by the Cayman Trust.

3. Clause 2.4 of the Cayman Trust deed defined "*Employee*" as "*any person who is or has at any time after the making of [the Cayman Trust] been a bona fide employee (whether full-time or part-time) of [Boyer Allan]*".

4. Clause 4 conferred the following specific powers on the Trustees:

"4.1 Power of appointment

The Trustees may appoint that they hold the whole or any part or parts of the Trust Fund for the benefit of any of the Beneficiaries on such terms as the Trustees think fit.

4.2.1. The Trustees may by deed declare that they hold any Trust Property on trust to transfer it to trustees of a Qualifying Settlement; to hold on the terms of that settlement, freed and released from the terms of this Settlement".

5. Clause 4.2.1. contained an important limitation on the Trustees' power to transfer trust property to a new settlement described as a "Qualifying Settlement".

6. Clause 4.2.2. defined a "*Qualifying Settlement*" as *"any settlement, wherever established, under which every Person who may benefit is (or would if living be) a Beneficiary of this Settlement"*.

7. Thus, as appears from this wording, the Trustees can only exercise the Clause 4.2 power to transfer trust property to the trustee of a new settlement if the beneficial class of the new settlement consists entirely of those who are beneficiaries under the Cayman Trust.

8. Fundamental concerns have arisen about the purported exercise of this power and pursuant to section 48 of the Trusts Law (2011 Revision)[2], the Plaintiff makes this application for the following relief from this Court:

(a) a declaration that three appointments out of the Cayman Trust, each dated 5th April 2011 ("the Appointments") executed by the Plaintiff and Defendant as the Trustees of the Cayman Trust are void and of no effect; alternatively

(b) an order setting aside the Appointments (and each of them) on the grounds of mistake;

(c) such further relief or other relief as the court shall consider appropriate; and

(d) an order making provisions for the costs of this application.

[2] Section 48 reads:

"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 trusts 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 his own responsibility, to have discharged his duty as such trustee or personal representative in the subject matter of the said application." Provided that this should not indemnify any trustee or personal representation in respect of any act done in accordance with such opinion, advice or discretion as aforesaid, if such trustee or personal representation should have been guilty of any fraud, willful concealment or misrepresentation in obtaining such opinion, advice or direction and the costs of such application as aforesaid should be in the discretion of the Court.

9. In the exercise of any of their dispositive powers, the Trustees are bound to have regard primarily to what is described in the trust deed at Clause 6 as "*the contribution made or likely to be made by such Employee to the prosperity of the Company*" and in so doing, the Trustees are entitled to "*consult with, and to rely upon the representations made by the Board (of Boyer Allan) as to any Employee's contribution.*"

10. In considering whether or not to exercise these powers of appointment[3], the Plaintiff sought advice from the English firm of solicitors, Thomas Eggar, concerning the taxation of employee benefit trusts and pursuant to this advice, appointments out of the Cayman Trust were made.

11. The background is explained by Mr. Gordon Findlay Matthew, Chairman of the Plaintiff and Chief Executive Officer of the Defendant.

12. Mr. Matthew explains that in or about late 2010 or early 2011, it came to his attention that a draft Finance Bill 2011 had been published by which Her Majesty's Revenue and Customs ("HMRC") in England, were planning new rules in relation to the taxation of employee benefit trusts ("EBT"), like the Cayman Trust. It was proposed that these rules would come into full effect from 5th April 2011.

13. He therefore approached a Mr. Quarmby at Thomas Eggar for his advice on what this might mean for the EBTs of which the Plaintiff and Defendant were trustees; one of which was the Cayman Trust.

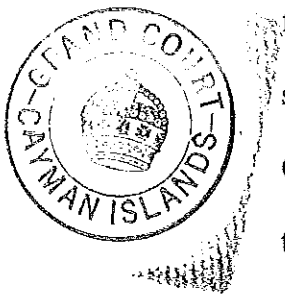
[3] As distinct from the power of advancement given by Clause 4.3; i.e: "The Trustees may pay or apply any Trust Property for the advancement or benefit of any Beneficiary as the Trustees think fit. In particular, the Trustees may grant Beneficiaries option over Shares at the expense of the Trust Fund".

14. By an email dated 11 February 2011, Mr. Quarmby advised Mr. Matthew that given that the changes were to come into effect in less than two (2) months' time, steps needed to be taken immediately to mitigate the effects of the proposed changes.

15. He advised that from 5 April 2011, all distributions from an EBT to employee beneficiaries, regardless of the residence or domicile of the employee, would be taxed in full as an employment tax charge and would be subject to National Insurance Contributions.

16. Mr. Quarmby advised that there were two ways in which distributions could be made in a tax efficient manner from an EBT prior to 5th April 2011, the second of which was by way of transfer out of an EBT to an employee financed retirement benefit scheme (an "EFRBS").

17. After considering this advice, Mr. Matthew sent Mr. Quarmby a copy of the Cayman Trust deed and asked for his advice especially in relation to it. Mr. Quarmby replied by email on 16th February 2011 expanding on the suggestion of a transfer of assets from the Cayman Trust to an EFRBS. Mr. Quarmby had himself sought advice from specialist tax counsel Mr. Barrie Akin of Gray's Inn Tax Chambers about the Cayman Trust and a note of advice from Mr. Akin dated 28 March 2011, confirmed that "*the Trustee has power to transfer EBT funds to a suitable EFRBS. Clause 4 of the EBT deed contains the relevant power*".



18. Mr. Akin agreed with the Thomas Eggar analysis that a transfer or appointment from the Cayman Trust to an EFRBS would achieve the required result and repeated the advice earlier given, that no documents be executed until after the final form of legislation was released on 31 March 2011.

19. Boyer Allan itself had been earlier assessed by HMRC as liable to a charge to tax arising from its original contribution of capital to the Cayman Trust[4].

20. As to Boyer Allan and that charge to tax, Counsel advised that an indemnity could be given from the Cayman Trust to Boyer Allan in respect of any payment eventually found due by Boyer Allan to HMRC in relation to the initial contribution.

21. Once the legislation was published in its final form on 31 March 2011, Thomas Eggar provided the Trustees with a full report of their advice dated 3 April 2011. The advice outlined the various options available to the Trustees and confirmed the initial advice that a transfer from the Cayman Trust to an EFRBS would mitigate the effects of the new legislation. Thomas Eggar also confirmed that "*the Trustees of the Boyer Allan EBT do have power to transfer to an EFRBS*".

22. Thomas Eggar highlighted, at paragraphs 38 to 43 of their advice, what they regarded as the principal risks in the transfer into an EFRBS, among them being the risk that HMRC would regard the EFRBS as a "family trust" rather than a retirement benefit scheme. The main disadvantage in this approach by HMRC would be that the EFRBS would be subject to U.K. Inheritance Tax ("IHT"). However, advised by Thomas Eggar, this risk would be mitigated by the Cayman Trust continuing to exist in tandem with each EFRBS.

23. At paragraph 44, Thomas Eggar emphasized that "*it is essential that a physical transfer of the assets as well as execution of the relevant documents occurs on or before 5 April 2011.*" They also reiterated the risk that there might be further changes to the legislation before Royal Assent in July/August 2011 and which could result in

[4] An assessment was issued by HMRC against Boyer Allan in July 2005, seeking to recover a total £10,862,776. Farrer & Co. (Boyer Allan's London Solicitors) have estimated that with interest, the potential liability could possibly be significantly higher. Boyer Allan has raised the matter on appeal to the Tax Tribunal.

the transfer of assets not achieving the expected benefits. However, in the end, no such changes were in fact made.

24. The beneficiaries of the Cayman Trust were each informed of the Thomas Eggar advice and encouraged to seek their own advice, which they did.

25. Some beneficiary employees – Messrs. Richard Whittall, Guy Commaille, Alexander Griffin and Roger Dunby-Jones – elected to have their prospective entitlements paid to them in cash either before 5th April 2011 or over the three years following.

26. However, other employees – Messrs. Jonathan Boyer, Nicholas Allan and Andrew Tay – elected to have their prospective shares appointed out to single member EFRBS. In keeping with the advice received by the Trustees from Thomas Eggar, the appointments were made of shares in the underlying company, B.A. Offshore Ltd., rather than in cash. The Cayman Trust continued to hold cash[5] and was to remain in existence for as long as the EFRBSs were in place.

27. On the basis of the Thomas Eggar advice, the documents were prepared and executed on 5 April 2011, effecting the transfer of assets from the Cayman Trust to the three separate EFRBSs. Copies of the revocable deeds of appointment and indemnity and the Trustees' resolutions as drafted by Thomas Eggar and signed and executed by the parties in relation to the transfers to each single member EFRBS, are exhibited to Mr. Matthew's first affidavit, as are copies of the declarations of trust dated 5 April 2011 in relation to each EFRBS, each of which is declared to be governed by the laws of Jersey, with the Plaintiff and Defendant as co-trustees.

28. The exercise of the powers of transfer and appointment in the deeds was expressed to be revocable so as to allow for the possibility that funds would have to return to the

[5] At present, approximately £365,000.

Cayman Trust to meet any tax payment by Boyer Allan to HMRC, in the event that Boyer Allan ultimately lost its case then before the Tribunal (now on appeal from the Tribunal's decision).

29. Each EFRBS was intended to benefit one employee of Boyer Allan ("the member") and his respective family. Each was established on 5 April 2011, and contained inter alia, a class of beneficiaries defined in the following terms in clause 1.1.4.:

> "*(a) the Member*
>
> *(b) the Member's widow or widower;*
>
> *(c) any child of the Member living at the date of the Member's death*
>
> *(d) Any other person who in the opinion of the Trustees (which opinion may be exercised with our without requiring proof) is dependant upon the Member for the ordinary necessities of life at the date of the Member's death".* (Emphasis added.)

30. The material terms of the Appointments were as follows:

(a) recitals J and L referred to the powers under clauses 4.1.1. and 4.2.1. of the Cayman Trust respectively; [(see paragraph 4 above)]

(b) recital M referred to the definition of "*Qualifying Settlement*" under clause 4.2.2 of the Cayman Trust;

(c) recital N recorded that "*the Trustees of the Cayman Trust and the Trustee of the EFRBS hereby note that all beneficiaries of the EFRBS are also beneficiaries of the [Cayman Trust]....*";

(d) recital O defines the powers under clauses 4.1.1. and 4.2.1. of the Cayman Trust together (erroneously as will be seen) as "the Power of Appointment".;

(e) by clause 2.1 the Trustees purported to exercise their powers in the following terms:

> *"The [Trustees] of the Cayman Trust] in exercise of their Power of Appointment and every other power enabling them, hereby revocably appoint and declare that with effect from the date of this Deed they hold the Transfer Fund (sic) to the [Trustees of the EFRBS]– described as "the Recipient Trustee"] to hold the same upon the trusts of and with and subject to the powers and provisions contained in [the EFRBSs] as an addition to, and as one fund for all purposes with, any assets already held by them as trustees of the EFRBSs] upon the trusts and with and subject to the powers and provisions contained in the [EFRBS] Deed; and that the Transfer Fund shall be transferred into the names of the [Trustees of the EFRBS], or under their control, subject always to the lien of the Trustees of the [Cayman Trust] for any tax and other liabilities and freed and released from the terms of the [Cayman Trust] ("the Transfer")."*

31. Despite these seemingly well-laid plans, in the course of negotiations between Boyer Allan and HMRC, it became clear that HMRC determined – having been notified by Thomas Eggar in keeping with the law of England & Wales in relation to the establishment of the EFRBS and of the transfer of assets to them from the Cayman Trust – that the appointments of property to the EFRBS triggered a charge to UK IHT. HMRC also took the view that if there were to be a partial revocation of the Appointments to the EFRBSs to allow for assets to return to the Cayman Trust for the purposes of funding a settlement between Boyer Allan and HMRC, a further potential charge to IHT would be triggered. A copy of HMRC's letter of 25 November 2013 to Robert Field of Farrer & Co. (Boyer Allan's London solicitors) setting out their position, is exhibited to Mr. Matthew's first affidavit.

32. It was during the course of dealing with this dispute with HMRC, that it became apparent that the Appointments were flawed in two important respects:

(1) They purported to benefit a class wider than that permissible under the Cayman Trust ("the excessive execution issue"); and

(2) They were executed in the mistaken belief that (a) the classes of beneficiaries under the EFRBSs and the Cayman Trust were identical; and (b) that no tax charge would arise ("the Mistake Issue").

33. Having been thus confronted with the severe tax consequences of what they understood to be wrong advice from Thomas Eggar (and from Counsel instructed by them); the Trustees saw the need for different lawyers to be instructed and Mr. Matthew approached Lenz & Staehelin; attorneys in Geneva, Switzerland, for advice.

34. Enquiries that followed uncovered the fact that HMRC, in a "Revenue and Customs Brief" dated 4 April 2011 – the day before the transfers of the assets to the EFRBSs took place – had set out their guidelines on, among other things, the IHT issues associated with EBTs. Part 1 of the guidelines makes it clear that HMRC's position is that a charge to tax arises under section 72 of the UK Inheritance Tax Act 1984 where property leaves an EBT, the extent of the charge depending on the length of time the property was held subject to the trust of the EBT. A copy of the HMRC guidelines is exhibited to Mr. Matthew's first affidavit.

The basis of the present application

35. The Trustees having realised that they were provided with erroneous advice by Thomas Eggar; on 6 May 2014 Farrer & Co. wrote on behalf of the Trustees to Thomas Eggar setting out the basis of the Trustees' claim against them for negligent advice and seeking an assurance from them that they would pay the costs of this application to this Court for remedial relief. Thomas Eggar have however, denied liability and the result was that the Trustees were advised that they should nonetheless seek relief from this Court, as the Court of the domicile of the Cayman Trust on two separate and alternative bases, both related to the validity of the Appointments.

Proper law and forum

36. Before turning to the substantive legal principles governing the relief sought as to the validity of the Appointments, there is a question of the proper law and forum to be addressed. The question is whether the law of the Cayman Islands (as the proper law of the Cayman Trust) or the law of Jersey (as the proper law of the EFRBSs) applies.

37. The question arises because of the introduction of so-called "firewall" legislation in both jurisdictions.

38. Part VII of the Trusts Law (2011 Revision) sets out Cayman's "Trusts – Foreign Element" provisions.

39. In summary, by section 89, when determining the governing law of a trust, regard must be had to the terms of the trust and the intentions of the parties as evidenced by the terms of the trust. Section 89(2) declares that a term of a trust which expressly selects the laws of the Cayman Islands as the governing laws is *"valid, effective and conclusive regardless of any other circumstances."*

40. By section 90 (subject to certain exceptions which are not relevant for present purposes), all questions regarding a trust governed by Cayman Islands law or any disposition of property held upon the trusts of such a trust, are to be determined in accordance with Cayman Islands law *"without reference to the laws of any other jurisdictions with which the trust or disposition may be connected."* Such questions include:

> *"...any aspect of the validity of the trust or disposition or the interpretation or effect thereof" (section 90(b) and "the existence and extent of powers, conferred or retained,...and the validity of any exercise thereof"* (section 90(d)).

41. Article 9 of the Trusts (Jersey) Law 1984 (Revised as at January 2014) sets out the seemingly conflicting Jersey "firewall" provisions as they would apply to the EFRBS as Jersey settlements.

42. Subject to certain exceptions which are not relevant for present purposes, Article 9(1) confirms that any questions concerning "*the validity or effect of any transfer or other disposition of property to a trust*" and the "*existence and extent of powers conferred or retained... and the validity of any exercise of such powers*" shall be determined in accordance with Jersey law "*and no rule of foreign law shall affect such question.*"

43. Further, Article 9(4) provides that no judgment of a foreign court or decision of any other foreign tribunal "*with respect to a trust shall be enforceable, or given effect, to the extent that it is inconsistent with [Article 9], irrespective of any applicable law relating to conflict of laws*".

44. Thus there appears to be a conflict between the Cayman "firewall" (where it provides that any challenge to the validity of an exercise of discretion by trustees of a Cayman law trust is to be governed by Cayman law alone) and its Jersey counterpart (which provides that the validity of a transfer into a Jersey law trust (here the EFRBS) is governed solely by reference to the laws of Jersey).

45. Mr. Wilson on behalf of the Plaintiff argues that as neither the Cayman nor the Jersey law appears to provide an answer to this conundrum, the Plaintiff has been forced to choose one forum over the other. And that the Plaintiff has chosen to bring these proceedings in Cayman rather than Jersey, principally for the following reasons:

(a) given the conflict between the rival firewall provisions, the correct approach must be to fall back onto ordinary private international law principles;

(b) these principles require the identification of the system of law most closely connected with the transactions under challenge, which is clearly Cayman

law; the dispositive transactions involve the exercise of discretionary powers by a Cayman resident trustee of a trust governed by Cayman law;

(c) it would be absurd for the validity of such an exercise of powers to be determined by Jersey law simply because the recipient of the assets appointed out from the Cayman trust happened to be a trustee of a trust governed by the laws of Jersey.

46. These are self-evidently correct arguments which I accept in holding that this Court is the proper forum for the determination of the present issues of the validity of the Appointments. Indeed, on one view of the matter, the question of the validity of the Appointments does not give rise to a conflict of laws issue in the first place; for if the Appointments were never validly made – as I have determined to be the case for the reasons which follow below – the assets appointed never made their way to the EFRBSs, and so no question of the validity of the EFRBSs themselves or of any "appointment" into them necessarily arises for my determination. See *Re Cohen* (below). The assets purportedly appointed out of the Cayman Trust are choses in action or "movables" (shares in B.A. Offshore Company Ltd and the right to repayment of loans made to B.A. Offshore Company Ltd) and so under the applicable common law principles, the law of the domicile governs the transaction, which in this case is therefore Cayman law. See Dicey, Morris and Collins: The Conflicts of Laws 15th Ed. Rule 112(1): *"choses in action generally are situate in the country where they are properly recoverable or can be enforced";* citing *Kwok Chi Leung Karl v Commissioner of Estate Duty* [1988] 1 W.L. 1035 (P.C), where Rule 112(1) was expressly approved.

47. It has however, been brought to my attention by Mr. Wilson and Mr. Pimentel that there may be a need to seek an order of the Jersey Royal Court confirming an order of this Court by which I would declare the Appointments void or voidable and if the latter, a further order setting them aside either *ab initio* or *pro tanto.*

48. From that point of view, I am asked to say whether, on the basis of my understanding of Jersey law, I would be satisfied that I would have arrived at the same conclusion by the application of Jersey law.

49. In this regard, the Plaintiff adduces the evidence of Jersey law from Mr. Edward Devenport, an ecrivain (solicitor) of the Royal Court of Jersey, practicing since 1993 in Jersey in the areas of trusts and investment funds, including, says Mr. Devenport, advising on a number of complex trusts (including pensions and employee benefit trusts) and commercial matters.

50. As Mr. Devenport opines and as I accept, whilst Jersey has legislated to make the setting aside of the erroneous or invalid exercises of discretion a matter of black letter law (and arguably more readily understood and attainable) the underlying common law principles upon which that legislation[6] is based, are the same as those which are applied by the Courts of the Cayman Islands.

51. Accordingly, I can be satisfied that in granting declaratory relief upon this application, I would reach the same conclusion by applying the law of Jersey. I agree with and accept this argument.

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[6] In particular the Trust (Amendment No. 6) (Jersey) Law 2013 which introduced statutory powers of the Royal Court to set aside decisions in relation to Jersey Trusts in cases of "mistake" or by the application of principles similar to the rule in Re Hastings-Bass [1995] 1 Ch. 25 and as explained in *Sieff v Fox* [2005] 1 WLR 3811. The principles of mistake adopted are said to be those as clarified and enunciated by the U.K. Supreme Court in *Pitt v Holt* and *Futter v Futter[2013] 2 AC 108,* principles which I am asked to follow and apply here by way of setting aside the Appointment as an alternative form of relief, due not only to an excessive use of the powers vested in the Trustees but also because of far-reaching and vitiating misunderstandings on their part.

The reasons for seeking declaratory relief

52. I set out following the summary of the advice that the Trustees have now received, taken from Mr. Matthew's first affidavit (at paragraph 46) as it identifies the legal hypotheses for the relief which the Trustees seek:

> *"The Trustees purportedly exercised their powers on 5 April 2011 to transfer the assets from the Cayman Trust to the EFRBSs on the basis of two fundamental mistakes. First, they mistakenly believed (based on the advice of Thomas Eggar) that the transfers would not attract any IHT charge. Secondly, they also mistakenly believed that they were exercising their powers in a way which meant that the transfers would benefit a class of beneficiaries identical to that under the Cayman Trust. In fact, the class of beneficiaries under the EFRBSs is wider than that under the Cayman Trust, as clause 1.1.4. (d) provides [as shown in emphasis above at paragraph 29) for the inclusion of "any other person who is in the opinion of the Trustees [(of the EFRBS)] a dependant of the Member at the date of the Member's death" Such persons are not included as beneficiaries under the Cayman Trust [as is evident from Clause 4.2.2 above at paragraph 2]. Evidence of the Trustees' mistaken understanding as to the extent of the beneficial class of each of the EFRBSs is contained at recital N of each [EFRBS] deed of appointment and indemnity where it states [also as extracted above at paragraph 30] that the Transferor Trustee*

and the Recipient Trustee hereby note for the record that "all beneficiaries of the EFRBS are also Beneficiaries of the EBT...."

53. Mr. Matthew concludes on oath in this regard and pertinent to the relief sought from this Court: *"In view of the terms of Clause 1.1.4.(d) of the EFRBS, I now realize that this statement is obviously wrong".* (See again above in emphasis at paragraph 29.)

Analysis

54. There are at least two ways in which these mistakes operate to affect the validity of the transfers to the EFRBS.

55. The first and primary consequence upon which the Trustees rely is what is described as the "excessive execution" of the Clause 4.1 or 4.2 power of appointment[7]; as that expression is discussed in Thomas on Powers, 2nd Edition, Oxford University Press (see below).

56. As set out above, the Clause 4.1 power of appointment in the Cayman Trust is only to be exercised for the benefit of any of the Beneficiaries (as defined) which do not include the wider class of "dependents" included under Clause 1.1.4.(d) of the EFRBS.

57. Similarly, the clause 4.2 power to transfer trust property to another trust only enables the Trustees to transfer assets to a "Qualifying Settlement". A Qualifying Settlement

[7] The latter power being which I hold that they must have purported to exercise rather than the Clause 4.1 power which speaks differently to advancement of capital to the benefit of a beneficiary rather than, as was purportedly done, on appointment out by way of transfer to another settlement.

While the EFRBS deeds as drafted by Thomas Eggar actually cite the Clause 4.1 power, rather than the Clause 4.2 power, the consequence for present purposes would be the same, as the class of beneficiaries identified in clause 1.1.4(d) of each EFRBS deed, is in excess of that allowed whether under Clause 4.1 or 4.2 of the Cayman Trust.

is defined as a settlement under which every person who may benefit is a Beneficiary of the Cayman Trust.

58. As drafted the EFRBS and the Appointments did not ensure that this was the case, because they appointed assets onto the trusts of the EFRBS which included the additional, impermissible class of "dependent" beneficiaries within Clause 1.1.4.(d).

59. As Thomas on Powers states (above op. ci, para 8.16):

> *"It is of course, trite law that there is an excessive execution of a power of appointment if such execution is in favour of strangers (for example, where a power to appoint to children is exercised in favour of grandchildren)"* Citing inter alia; *Re Hepworth* [1936] Ch. 750.

60. Further, in *Harvey v Stacey* (1 Drewry, 73) (1852) 5.C. 22, L.J. Ch. 23:

> *"When an appointment is to a class, some of whom are within and others are not within the proper limits of the power, if the class of persons is ascertained, so that you can point to A, who is within the limits, and say, so much is to go to him, though the others are not within the limits, yet the appointment to A shall take effect; but if the appointment is to a class, some of whom may, and others may not, be objects of the power, and there is nothing to point out what portion is to go to those who are within the power, and what to those who are not, the whole fails."*

61. I regard the Appointments as falling within the latter impermissible category of this dictum.

62. The EFRBSs are meant to be fully discretionary trusts, like the Cayman Trust itself. There is therefore no basis for saying what would have been within the exact entitlement of any of the objects of any of the trusts of the EFRBSs.

63. The Appointments purport to benefit a class of beneficiaries who would include "*any other person who in the opinion of the Trustees ... is dependant upon the Member for the ordinary necessities of life at the date of the Member's death.*"

64. The Appointments thus purport to benefit a class of beneficiaries under the EFRBS that is wider than the class under the Cayman Trust. The appointments are void, rather than voidable. So also because the Appointments purport to benefit a wholly unidentified and as yet unidentifiable class of persons who, only as a matter of the subjective opinion of the Trustees, may come to be regarded as dependent upon a member. The Appointments therefore in my view constitute a wholly excessive execution of the power contained in Clause 4.2 of the Trust Deed.

65. The effect of an excessive execution of a power is that it does not amount to an execution at all where the boundaries between the excessive and the permissible execution are indistinguishable: *Alexander v Alexander 2. Vis. Sen. 641, July 17, 1755, 408 as discussed in Re Kerr's Trusts, 1877, 4 Ch. D. 600] at p. 610.* And if the impermissible cannot be fairly severed from the permissible execution of the power, the entire exercise will be deemed a fraud upon the power as having been made for an improper purpose and therefore void: *Re Cohen* [1911] 1 Ch 37.

66. I am satisfied and so declare that the purported exercise of powers by the Plaintiff as set out in Clause 2.1 of the Appointments (see above) is in its entirety impermissible

and I accordingly declare the exercise of the power to be *void ab initio*, and of no effect.

Contrary point of view

67. I recognise that it might be said that in accordance with the principles set out by the House of Lords in *Re Pilkington* [1964] AC 612, it is permissible to benefit non-objects of a trust in the manner reflected by the Appointments, on the basis that the application of capital is for the "*advance or benefit*" of a beneficiary.

68. However, even if what would otherwise be an excessive exercise of the power here were to be regarded as being capable of advancing or benefiting a beneficiary, the Appointment would still have to be in favour of a "Qualifying Settlement" only, and as discussed above, it clearly was not.

69. Further, while in certain circumstances it may be permissible to benefit non-objects (eg: re *Halstead's Will Trust* [1937] 2 All E.R. 570 - where the Court approved an advancement to a beneficiary so that he could make provision for his wife and child in future and *Re Clore* [1966] 1 WLR 955 - where the Court approved of an advancement to enable a contingently entitled beneficiary to allow the making of a donation to charity out of a moral sense of duty, held to be a benefit); such a decision on the part of a trustee must be a specific one, made on the basis of the relevant facts existing at the time of the exercise and not simply the inclusion of a wider class of beneficiaries who cannot at present be ascertained. Yet, such would be the consequences of the purported Appointments here.

70. I am also satisfied that declaring the Appointments to be void is consistent with the modern developments of the case law, as most recently and authoritatively declared in *Pitt and Futter* [2013] 2 A.C. 108.

71. There, the English Supreme Court approved of the distinction between an error by trustees in acting outside their powers ("excessive execution") and an error in failing to give proper consideration to relevant matters in making a decision which is within the scope of their powers ("inadequate deliberation").

72. Where trustees, acting within their powers, obtained and acted on apparently competent professional advice on relevant matters, including fiscal considerations; their Lordships concluded that a trustee's acts were not to be set aside by the Court on the basis of the trustee's breach of duty on grounds of inadequate deliberation merely because the advice turned out to be wrong[8].

73. Whether that approach is to be followed and applied in this jurisdiction, does not arise for decision here because here the Trustees' primary basis of application is excessive execution outside the scope of their powers and so (as per the Supreme Court in *Pitt and Futter*) in breach of their duty. I therefore regard the conclusions reached here – that the purported exercise of the power is void – to be in no way inconsistent with the principles declared in *Pitt and Futter* (above).

The alternative case: Mistake

74. On behalf of the Trustees, it is submitted in the alternative, that the Appointments are voidable and liable to be set aside, by reason of their having been executed as the result of mistakes as to three important matters, namely:

[8] Thus curtailing the application of the so-called Rule in Hastings-Bass (above).

(i) the extent of the class of beneficiaries – the excessive execution that took the EFRBSs outside of the scope of "Qualifying Settlements". It is clear from recital N of the Appointments that the Plaintiff believed that all of the beneficiaries under the Jersey Trust were within the class of Beneficiaries under the Cayman Trust (See para. 30(c) above);

(ii) the tax consequences of the exercise – the mistaken belief that there would be no adverse tax consequences. On the basis of the HMRC's determination, a significant charge to tax has arisen as a result of the Appointments;

(iii) the revocability of the Appointments. This mistake has only recently been identified. On the face of the Appointments, the exercise of the relevant power was clearly intended to be revocable. However, as explained above, Clause 4.2.1. does not permit the trustees to exercise it revocably and therefore if the exercise takes effect, it does so irrevocably; as the power purportedly exercised under Clause 4.2 of the Cayman Trust declared that the "*Transfer Fund should be transferred to the EFRBS freed and released from the terms of the EBT*" (see above at paragraph 30(e), in emphasis).

75. Mr. Matthew - in his second affidavit (at paragraphs 11 and 12) – explains that had the Trustees been aware of any of these three mistakes, and in particular had they appreciated that (i) the transfer of assets from the Cayman Trust to the EFRBSs would trigger a UK IHT charge; and ii) the Appoinments were irrevocable; they would not have exercised their power to transfer assets from the Cayman Trust to the EFRBSs, and would not have executed the Appointments.

76. I accept the Trustees' evidence in these regards. In particular, I accept that:

(i) it was the Trustees' intention to benefit only persons who were Beneficiaries under the Cayman Trust, not least because the terms of the Cayman Trust empowered them only to transfer assets to a "Qualifying Settlement";

(ii) the existence of a U.K. IHT charge and the quantum of such a charge are extremely undesirable and deleterious to the Fund and so not in the best interests of the beneficiaries of the Cayman Trust; and

(iii) it is clear that the Trustees wished to have revocable appointments to allow for the possibility that assets would have to be returned to meet any tax payment by Boyer Allan to HMRC for which a liability is ultimately established.

77. In *Pitt and Futter* (above), the Supreme Court confirmed that the proper approach to the application of the mistake doctrine is, in summary (as extracted by me from the headnote):

(i) that the equitable jurisdiction to set aside a voluntary disposition on the ground of mistake was exercisable wherever there was a causative mistake which was so grave that it would be unconscionable to refuse relief;

(ii) that a causative mistake differed from inadvertence, mis-prediction or mere ignorance, but forgetfulness, inadvertence or ignorance, although not such a mistake, could lead to a false belief or assumption which the law would recognise as a mistake;

(iii) that the gravity of the mistake had to be assessed by a close examination of the facts, including the circumstances of the mistake, its centrality to the

transaction in question and the seriousness of its consequences, including tax consequences, for the disponor; and

(iv) the court then had to make an objective evaluative judgment as to whether it would be unconscionable or unjust, to leave the mistake uncorrected.

78. With those guiding principles in mind, I am satisfied that the reliance by the Trustees on the erroneous advice and erroneous drafting from their lawyers, as to the effect of the Appointments, in terms of both the issues of revocability and tax planning, caused severe consequences to the Trusts which were never intended and that the Appointments would never have been made but for those mistakes. Thus, the mistakes are of sufficient gravity as to engage the Court's jurisdiction as described in *Pitt and Futter* (above) to set them aside on the basis of mistake. I would be prepared to so order, by way of alternative relief to the orders already made.

79. In my judgment, it would be unconscionable and unjust to leave the mistakes uncorrected. In this regard, I also note that I come to this conclusion irrespective of whether or not the Trustees (and/or other Beneficiaries) would have legal recourse against their lawyers; their access to this Court under section 48 for relief, not being contingent on whether or not such other recourse exists. I also note here – as I did in *Re Golden Trust Megerisi v Protec Trust Management* [2012] (2) CILR 355 (citing and applying *Walker v Medlicolt* [1999] 1 W.L.R. 727) – that as a general rule, a plaintiff should mitigate his loss by bringing proceedings for remedial relief before issuing proceedings for negligence against a solicitor whose negligence is said to have resulted in the true intentions of the donor not being expressed and which was

alleged to have given rise to the plaintiff's need for the remedial relief. This is how I regard the Trustees' application here.

Jersey Law (Mistake)

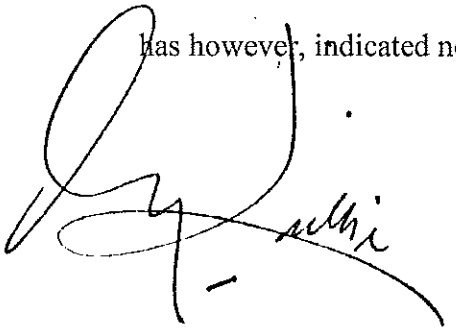
80. It is clear from the evidence of Mr. Devenport, that the position under Jersey law would be similar to that described above on the issue of mistake. Thus, if contrary to the Trustees' position and my finding above, that the matter falls to be determined in accordance with Cayman law; it were to be regarded elsewhere as to be decided in accordance with Jersey law, I am satisfied that the Appointments would be liable to be declared void, or alternatively, to be set aside under the law of Jersey in accordance with principles as to mistake, similar to those applicable in this jurisdiction.

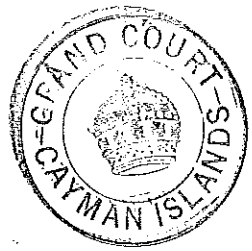
Representation orders

81. I note for the record that at the outset of these proceedings, I was asked to consider the need for representation for that class of unascertained beneficiaries whose interests would be impacted by orders of the kind I now make, setting aside the Appointments. These would be those persons coming or who might come within the description of the expanded meaning of clause 1.1.4 (d) of the EFRBSs, now deemed an excessive execution of the power of appointment. I note that having considered the matter and accepting that the interest of that class (however remote or unascertainable) should be represented, I directed that their interests would properly be represented by the Defendant, as trustee of the EFRBSs.

Notification to HMRC

82. Finally, I note for the record that it was brought to my attention that HMRC were made aware that the Plaintiff would be making an application to this Court for the relief set out in its Originating Summons. Further, that on 19 January 2015, Farrer & Co. wrote to HMRC enclosing copies of the Originating Summons of Mr. Matthew's first affidavit and the important exhibits to that affidavit (including copies of the deed of the Cayman Trust, of the Appointments and of the deeds of the EFRBSs). HMRC has however, indicated no intention to respond to these proceedings.





Hon. Anthony Smellie
Chief Justice

March 9 2015