

## Privy Council rules on Bermuda's 60/40 rule. What are the implications for the Cayman Islands?

Insights - 16/07/2019

Each of the Cayman Islands and Bermuda has legislation and regulation designed to promote and preserve local control over the jurisdiction's economic life. This is unsurprising given in each case the high proportion of expatriates to persons with Caymanian or Bermudian status, as the case may be.

To achieve this goal, each jurisdiction has a 60/40 rule that regulates when a company can carry on a local business.

### Cayman's 60/40 rule

The key provisions of Cayman's 60/40 rule are sections 4(1)(a) and 5(1) of the Local Companies (Control) Law (2019 Revision) (the LCC Law).

Under section 4(1)(a), “[s]ubject to subsection (3), no company shall carry on business in the Islands unless it is so empowered by its Memorandum of Association and –

*which, at the relevant time, is complying with section 5 or is a wholly owned subsidiary of such a company”.*

Section 5(1) is the key provision for present purposes. It provides that, for the purpose of section 4(1)(a), “a local company or an exempted company that is carrying on business in the Islands is complying with this section if –

(The underlining has been added.)

Put simply, with certain exceptions, a local company or a qualifying exempted company may only carry on business in the Cayman Islands if it is Caymanian controlled, at least 60% of its shares are beneficially owned by Caymanians, and at least 60% of its directors are Caymanians. The most significant exception (see section 4(1)(b) of the LCC Law) is where a company is licensed by the Trade and Business Licensing Board (the **T & B Licensing Board**) to carry on business in the Islands under the LCC Law and under the Trade and Business Licensing Law (2019 Revision) (the **T & B Licensing Law**), having regard to the factors in section 11(4) of the LCC Law. (One of those factors is the desirability of retaining in the control of Caymanians the economic resources of the Islands.)

### **Bermuda's 60/40 rule**

Bermuda's 60/40 rule is primarily found in section 114(1)(a) of its Companies Act 1981 (the **1981 Act**) and in Part 1 of the Third Schedule to that Act. The 1981 Act draws a distinction between local companies incorporated in Bermuda and controlled by Bermudians, which may carry on business in Bermuda, and other companies, which, unless exempted, must be licensed by the Minister of Finance to carry on such business.

Section 114 of the 1981 Act sets out the circumstances in which a local company may carry on business in Bermuda and, so far as relevant, provides:

*“(1) No local company shall carry on business of any sort in Bermuda unless -*

And, relevantly, Part 1 of the Third Schedule provides:

*“THIRD SCHEDULE*

*(Section 114)*

*PART I*

*PROVISIONS TO BE COMPLIED WITH BY A LOCAL COMPANY CARRYING ON BUSINESS IN BERMUDA*

*1(1) The company shall be controlled by Bermudians.*

*(2) Without prejudice to the generality of sub-paragraph (1), at least 60 per centum of the total voting rights in the company shall be exercisable by Bermudians.*

2(1) *The percentage of Bermudian directors, and the percentage of shares beneficially owned by Bermudians, in the company shall not be less than 60 per centum in each case:*

*Provided that the company shall not be deemed to be in breach of this paragraph in so far as, and so long as, it is acting in accordance with sub-paragraph (2) ...”*

(The underlining has been added.)

### **What did the Privy Council decide?**

Bermuda’s 60/40 rule came under scrutiny by the Privy Council in *Bermuda Bar Council v Walkers (Bermuda) Ltd* (Bermuda) [2019] UKPC 25 (10 June 2019) in which the main question was the nature of foreign control over a local company which would prevent it from being “*controlled by Bermudians*” and thus require it to be licensed by the Minister of Finance.

### Facts

The case arose out of an arrangement between Walkers (Bermuda) Ltd (WBL) and a Bermudan barrister, Kevin Taylor.

- 

- 

- 

-

On the applicant's originating motion challenging the refusal to issue a certificate, Kawaley CJ in the Supreme Court of Bermuda, having read the relevant provisions as prohibiting a local company from carrying on business in Bermuda unless it was in substance as well as in form at least 60% owned and controlled by Bermudans, held that since the applicant's shareholders had undoubted ownership and control of it, the proposed business model giving the Walkers Global effective control over commercial matters was not contrary to section 114 and Part 1 of the Third Schedule.

On the Council's appeal, the Court of Appeal for Bermuda, in purported reliance on previous authority of the Privy Council, interpreted the relevant provisions as extending beyond control over the voting power of shareholders and directors so as to include the substance and reality of commercial control, and on that basis restored the Council's decision.

#### Held

The Privy Council restored Kawaley CJ's decision. The principal judgement was given by Lord Hodge (with whom Lords Reed, Kerr and Briggs agreed); and Lady Arden gave a separate judgment in which she concurred in the result but for different reasons. The Board approved the reasoning of Kawaley CJ (save in one minor respect) that "*controlled by Bermudians*" in para 1(1) of the Third Schedule to 1981 Act refers to *corporate* rather than *commercial* control. In particular, it held that de facto control by commercial arrangements which might influence the policy of the decision-making organs of a relevant company but not impose a legal obligation on the decision-makers to vote in a particular manner is not the target of the 1981 Act.

#### **Does Bermuda Bar Council v Walkers (Bermuda) Ltd apply to Cayman's 60/40 rule?**

Would the "*Caymanian controlled*" requirement be interpreted in the same way as the "*controlled by Bermudians*" requirement? Or, could *Bermuda Bar Council v Walkers (Bermuda) Ltd* be distinguished because (for instance) section 3(2) of the LCC Law provides that "[f]or the purposes of [the LCC Law], a company shall be deemed to be Caymanian controlled if the [T & B Licensing Board] is satisfied that effective control is not, either directly or indirectly, or by reason of any arrangement, artifice or device vested in, or permitted to pass to, persons who are not Caymanians". (The underlining has been added.)

Lady Arden explained, citing the Privy Council's earlier decision in *Bermuda Cablevision Ltd v Colica Trust Co Ltd* [1998] AC 198 (*Bermuda Cablevision*), that the meaning of "control" is

contextual, and that it is not a term of art with a fixed meaning. Despite this, it is submitted that the “*Caymanian controlled*” requirement under Cayman’s 60/40 rule and “*controlled by Bermudians*” requirement under Bermuda’s 60/40 rule are so contextually similar as to make *Bermuda Bar Council v Walkers (Bermuda) Ltd* indistinguishable for Cayman purposes. Without seeking to be exhaustive, this article notes the following points of similarity.

In short, what the Privy Council held as to the meaning of “*controlled by Bermudians*” for the purpose of Bermuda’s 60/40 rule applies with equal force to interpretation of “*Caymanian controlled*” under Cayman’s 60/40 rule.

**What are the practical implications of *Bermuda Bar Council v Walkers (Bermuda) Ltd* for the application of Cayman’s 60/40 rule?**

First, it is clear that the “*Caymanian controlled*” requirement is directed to control of a company’s decision-making organs, whether in general meetings or board meetings; it does not extend to control over day-to-day matters. As Lord Hodge said, “[t]he Board interprets paragraph 1(1) of Part I of the Third Schedule as preventing agreements or arrangements which confer voting control or constrain the effectiveness of majority votes in the board of directors or in general meetings”.

The reason why Lady Arden concurred with the decision of the other members of the Privy Council is that, in her view, the Court of Appeal for Bermuda had failed to have regard to the statutory context when it concluded that control was general and without restriction, because it had failed to analyse control in terms of the effect on WBL’s corporate decision-making process.

Secondly, commercial influence is not irrelevant, but only when it is taken into account in combination with corporate control. For instance, Lord Hodge said of the Privy Council’s earlier decision in *Bermuda Cablevision* that it is not authority for the proposition that commercial influence by a non-Bermudian entity over the decision-making of a local company is sufficient by itself to prevent that company from carrying on business of any sort in Bermuda without a licence from the Minister. According to his Lordship, it was the combination of contractual and constitutional controls that led to a finding in that case of control in the requisite sense.

Thirdly, the 60/40 rule does not mean that a minimum percentage of profits must be attributed to Caymanians or Bermudians, as the case may be. Whilst the Board generally endorsed Kawaley CJ’s judgment, it did not endorse that part of the Chief Justice’s judgment where he said that the requirement that the company be controlled by Bermudians “speaks to the ability to ... receive the sort of economic benefits equivalent to holding more than 40% of a local company’s shares”. Lord Hodge, in giving the opinion of the Board, noted that “[t]here is no requirement in the 1981 Act, either expressly stated or arising by necessary implication, that a local company must pay or attribute a minimum percentage of its profits to Bermudians in order for it to be controlled by Bermudians.” Lady Arden, however, who was in the minority on this point, agreed with Kawaley CJ. Her Ladyship took the view that, once it is established that putative control is sought to be exerted at the *level* of the decision-making process, it is appropriate to take a wide view of the *means* of such control to determine if it offends the “*controlled by Bermudians*” requirement.

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

## Disclaimer

This client briefing has been prepared for clients and professional associates of Ogier. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Regulatory information can be found under [Legal Notice](#)

## Meet the Author



James Bergstrom

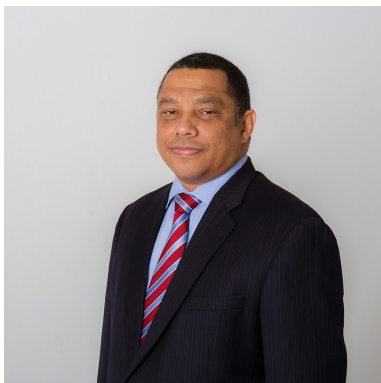
Partner

Cayman Islands

E: [james.bergstrom@ogier.com](mailto:james.bergstrom@ogier.com)

T: [+1 345 815 1855](tel:+13458151855)

## Key Contacts



Cline Glidden

Counsel

Cayman Islands

E: [cline.glidden@ogier.com](mailto:cline.glidden@ogier.com)

T: +1 345 815 1785