

## Reforming a STAR trust

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*CIBC Bank and Trust Company (Cayman) Limited v T & S* (unreported 16 July 2021) (**CIBC v T & S**)<sup>[1]</sup>, is the first decision of the Grand Court of the Cayman Islands dealing with the variation of trusts established under the Special Trusts (Alternative) Regime (**STAR**).

A STAR trust is a form of statutory trust which was introduced into Cayman Islands law to overcome some of the difficulties arising with the use of more conventional offshore trusts. For example, unlike conventional trusts, STAR trusts can be established without a perpetuity period, and for the benefit of persons, purposes or both. The purposes can be of any kind or number and do not have to be charitable (provided that they are not contrary to public policy, or illegal). It is the enforcers of a STAR trust (or the Court), not the beneficiaries (if any), who have the power or duty to enforce the STAR trust, thereby bringing about a separation between enjoying the benefit of the Trust assets and enforcement of the trust.

### Reformation of a STAR trust

A significant way in which STAR trusts differ from ordinary trusts, and of particular significance in *CIBC v T & S*, is the disapplication of the jurisdiction of the court under section 72 of the Trusts Act (as revised) which, in the case of ordinary trusts, permits the court to consent to variations of trust on behalf of certain categories of beneficiaries. Instead, in the context of STAR trusts, the relevant power to effect changes is contained in section 104 of the Trusts Act (**Section 104**).

Where the execution of a STAR trust in accordance with its terms becomes over time "impossible or impractical, unlawful or contrary to public policy or obsolete, in that by reason of changed circumstances, it fails to achieve the general intent of the special trust," the trustee must, unless the trust is reformed pursuant to its own terms apply to the Cayman court to reform the trust *cy-près*. If the trust is not able to be reformed consistently with the general intent of the trust, the trustee must dispose of the trust property as though the trust has failed.

In *CIBC v T & S*, the trustee of the STAR trusts in question (the **Trustee** and **Trusts** respectively), applied to the court to reform the trusts *cy-près*, pursuant to Section 104, on the basis that

execution of the Trusts had become obsolete<sup>[2]</sup> as a result of the primary beneficiary's decision to relocate to a different tax jurisdiction. There was evidence that this change of residence was unforeseen by the settlor at the time the Trusts were settled and would have resulted in punitive tax consequences, wholly contrary to the intentions of the settlor.

## "Obsolete"

The term "obsolete" is not defined in the Act and has not been considered in previous reported case law in the Cayman Islands. Having considered the context of the word in this particular legislation, and other contexts, the court provided the following guidance as to the meaning of the concept in the context of reformation under Section 104:

- obsolescence has to be **by reason** of changed circumstances;
- it is the **execution** of the trust which must have become obsolete rather than the trust itself;
- the language "fails to achieve the general intent of the special trust" means that the execution of the trust in accordance with its terms is no longer able to achieve the settlor's original intention in the present changed circumstances, rather than needing to show that the execution of the trust has become impossible or redundant;
- Section 104 requires, by the expression "is or becomes" obsolete, that the change of circumstances affecting the execution of the trust has already come into existence, prior to the application being made, and does not extend to a possible future change of circumstances which has not yet occurred.

## "General intent"

The court found that Section 104 does not require the Court to identify a **specific** intent, which can no longer be achieved. Rather, the question is whether the execution of a STAR trust fails to achieve the "general intent" of the trust; and that even where the "Purposes" of the STAR trust can still be achieved, that does not necessarily mean that the "general intent" can be achieved.<sup>[3]</sup>

In this case, the court accepted that the "general intent" of the Trusts in question included an intent to "provide for the beneficiaries in a tax efficient way in a politically stable environment that adhered to the rule of law" and whilst this general intent had been achieved while the Trusts were located in the Cayman Islands, and whilst the primary beneficiary resided where he did, this would not be achieved upon the primary beneficiary's relocation unless the Trust Deeds were reformed.

Whilst the beneficiary's relocation had not yet happened at the date of the application, the fact that the beneficiary had already resolved to move and had communicated this intention to the Trustee was itself the change of circumstances which triggered the ability to apply to Court for

the reformation.

## Cy-près

Having decided that the Star trusts could be "reformed consistently with the general intent of the trust", the STAR trust regime dictated that such reform should be made cy-près. The term cy-près is from Norman French, and is conventionally understood, in the context of the reform of gifts for charitable purposes, to mean that the purposes of trust must be followed "as near as possible to" the original intention of the settlor. The court found that the term cy-près must have been intended to bear a similar meaning in the context of the reform of STAR Trusts.

## Did the court have discretion to refuse to reform cy-près?

In circumstances where, (i) the court is satisfied that the execution of the trust has become, for example, obsolete and (ii) that it can be reformed consistently with the general intent of the trust, it should reform it cy-près. Smellie CJ found the court does not have a discretion to refuse to exercise the power of reformation, absent express wording to that effect in the relevant section of the legislation.

The court accordingly exercised the power of reformation in the manner it was invited to by the Trustee, namely by the insertion into the deeds of the Trusts of a short provision which gave the Trustees the powers necessary to fulfil the original intentions of providing for the beneficiaries in a tax efficient way.

## Conclusion

STAR trusts are used increasingly for holding operating companies, as effective dynastic family trusts for multiple generations, as private trust companies which act as trustees of family trusts, and as special purpose vehicles in a commercial context to hold assets off balance sheet. So this judgment gives welcome guidance and clarification of the principles to be applied when changes need to be made. As families grow and become more globally mobile, and multi-national in character, it is imperative that trusts are able to adapt sensibly to accommodate new circumstances, and are able to be used as a flexible tool by trustees in the interests of ensuring the original intentions of the trust are fulfilled. The decision of the Grand Court shows the willingness of the Court to assist in the reformation of STAR trusts when circumstances require and the provisions of the legislation allow.

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[1] The applicant trustee was represented by Shân Warnock Smith QC and Ogier

[2] It was not suggested that the execution of either trust is or had become impossible or impracticable, unlawful or contrary to public policy.

[3] The court opined that, in respect to the special regime for non-charitable purpose trusts, it was inconceivable that the drafters would have used the term “general intent” if they meant “purposes.” [38]

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