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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN

CAUSE NO. FSD 186 of 2010

IN THE MATTER of a Deed of Trust, known as the "B Trust"

AND IN THE MATTER of the Trusts Law (2009 Revision) and GCR
Order 85, rule 7

BETWEEN:

RBS Coutts (Cayman) Limited

Plaintiff

AND:

W and others

Defendants

Appearances: Ms. Rachel Reynolds of Ogier for the
Plaintiff/Trustee

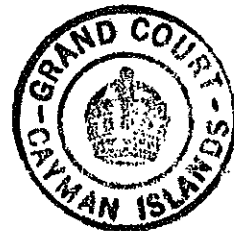
Mr. Bill Helfrecht of Bodden & Bodden
for the 1st Defendant

Mr. Colin McKie of Maples and Calder
for the 3rd Defendant

The 2nd Defendant did not appear

Before: Hon. Justice Henderson

Heard: November 26, 2010



JUDGMENT

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3 1. The Plaintiff RBS Coutts (Cayman) Limited (“the Trustee”) is
4 Trustee of the B Trust (the name of the Trust and the parties
5 other than the Trustee have been anonymised). The B Trust
6 was established in the Cayman Islands as a STAR trust, an
7 acronym for a trust established under Part XIII of the *Trusts*
8 *Law* (2009 Revision) which is entitled “Special Trusts –
9 Alternative Regime”. The Trustee asks for directions as to
10 whether, and to what extent, it should participate in matrimonial
11 and ancillary relief proceedings in Hong Kong between the two
12 settlors of the trust. They were formerly married. For
13 convenience I will refer to them, I hope without causing any
14 disrespect, as husband and wife.

15

16 2. The wife has now made an application under the relevant Hong
17 Kong matrimonial legislation seeking a variation of the trust,
18 which she characterizes as a nuptial settlement. She has
19 obtained an order in Hong Kong joining the Trustee as a party
20 on this variation application. The threshold question is whether
21 the Trustee should submit to the jurisdiction of the Hong Kong
22 Court and participate in the wife’s application. The Trustee is

1 already a party to that application but has made no voluntary
2 submission to the jurisdiction of the foreign court as yet. There
3 are collateral issues, including the question of disclosure by the
4 Trustee.

5

6 The B Trust

7

8 3. The B Trust was settled by the husband and by the wife by deed
9 in 2002. Clause 2(i) of the Trust Deed provides that the trust is
10 governed by the laws of the Cayman Islands and that the
11 settlors, the Trustee and the enforcers are required to submit to
12 the exclusive jurisdiction of the Cayman Court. The Trustee is
13 domiciled in the Cayman Islands and administers the trust here;
14 it has no presence in Hong Kong.

15

16 4. There are five beneficiaries of the trust: the husband, the wife,
17 and their three children aged 19, 17 and 12. Under clause 29 of
18 the Trust Deed, the husband, the wife and the oldest child are
19 those with standing to enforce the trust provisions. When the
20 other two children reach the age of 18 they too will become
21 enforcers.

22

1 5. Clause 5 of the Trust Deed makes provision for one of the
2 beneficiaries to be the “designated beneficiary”. The designated
3 beneficiary has the privilege of controlling the investment
4 business of “controlled companies”, which are companies
5 directly owned by the trust or owned by another controlled
6 company but not held within the “distribution fund” (see clause
7 1(vi)). The distribution fund consists of trust property which
8 has been transferred or credited to it but in relation to which the
9 privileges of the designated beneficiary do not extend (clause
10 7(i)). The Trustee is solely responsible for the management and
11 investment of the distribution fund (clause 7(ii)).

12
13 6. The objects of the trust are set out in clause 4 and are twofold:
14 (i) to give to the designated beneficiary the privilege of
15 controlling the investment business of all controlled companies;
16 and (ii) to apply the capital and income of the distribution fund
17 for the benefit of the beneficiaries.

18
19 7. The two settlors have power under clause 5(i) of the Trust Deed
20 to name a designated beneficiary or successor designated
21 beneficiaries. At present, the wife is the designated beneficiary
22 and the husband is the successor designated beneficiary. Any

1 settlor may revoke the designation of any designated
2 beneficiary and the latter may also relinquish his or her status:
3 clause 5(iii)(c). If at any point in time there is no designated
4 beneficiary and none is appointed by the settlors within thirty
5 days after being notified of the situation by the Trustee, the
6 power of the settlors to make the designation lapses: clause
7 5(iv).

8
9 8. The B Trust owns all of the shares of a Cayman Islands
10 company ("the parent company") which in turn owns all of the
11 shares of another Cayman Islands company ("the subsidiary").
12 Both the parent and the subsidiary have the status of controlled
13 companies under the Trust Deed. The parent company owns an
14 investment portfolio located at RBS Coutts Bank Ltd in
15 Singapore. The subsidiary owns all but one of the outstanding
16 shares in a Hong Kong company ("the Hong Kong company")
17 which in turn owns a residential property in Hong Kong. This
18 is the principal residence of the wife and the three children.
19 One share in the Hong Kong company is held by the Trustee in
20 the distribution fund, a fact of some significance. The greater
21 part of the value of the underlying trust assets is represented by
22 the residential property in Hong Kong.

1

2 9. At present, there are no assets in the distribution fund apart
3 from the single share in the Hong Kong company. The fund has
4 no cash. The Trustee's remuneration and expenses are being
5 met by dividends declared by the parent company which are
6 paid out of the Singapore investment portfolio, which is
7 permitted by clause 6(xi)(e) of the Trust Deed. The proceeds of
8 the investment portfolio are not available for distribution to
9 beneficiaries under the terms of the trust.

10

11 10. The trust is a discretionary trust only with respect to the
12 distribution fund. The Trustee has no dispositive powers over
13 controlled companies or assets owned by them save for a
14 limited power exercisable only at the request of the designated
15 beneficiary (clause 6(xv)(c)). The designated beneficiary has
16 power to give investment directions in relation to controlled
17 companies but has no dispositive power over such companies or
18 the assets owned by them (*ibid*).

19

20 11. The Hong Kong company is not a controlled company because
21 not all of its shares are owned by the trust or by another
22 controlled company. Since one of its shares is held in the

1 distribution fund, it falls outside the definition of a controlled
2 company. The Hong Kong company is, of course, under the
3 effective control of the subsidiary and ultimately of the parent
4 company. The Trustee has no present ability to deal with or
5 dispose of the assets of the Hong Kong property. Its powers are
6 limited effectively to the single share in the Hong Kong
7 company which is in the distribution fund.

8
9 12. The Trustee does not have control over transfers from the
10 controlled companies to the distribution fund unless these are to
11 meet the Trustee's charges and expenses. Transfers for other
12 purposes depend upon either an agreement between the Trustee
13 and the designated beneficiary (see clause 7(i)(a)) or upon the
14 termination of the power of the settlors to designate a
15 designated beneficiary (see clause 7(i)(c)); or upon a direction
16 by the settlors under clause 7(iii). However, if the settlors
17 revoke the designations of the designated beneficiaries, the
18 entire trust property falls into the distribution fund: clause
19 7(i)(c). Thus, the settlors themselves – the husband and the
20 wife – have it within their own power to give up their rights to
21 name designated beneficiaries and thus enable the Trustee to
22 make discretionary distributions.

1

2 13. In conclusion, the husband and the wife can themselves
3 determine whether or not the Trustee is to be given dispositive
4 powers (which it does not have at present) over the underlying
5 trust assets. As things stand, this is not a discretionary trust; if
6 the husband and the wife were to decide to make it one, either
7 voluntarily or in compliance with orders from the Hong Kong
8 Court, the B Trust could become a discretionary trust with the
9 Trustee empowered to make substantive decisions.

10

11 The Hong Kong Proceedings

12

13 14. The wife's variation application in Hong Kong seeks an order in
14 the nature of ancillary relief that the trust be varied so that 40%
15 of the shares in the Hong Kong company and 40% of the shares
16 in the parent company are transferred out of the trust to be
17 distributed between husband and wife. She asks that the
18 remaining 60% of the shares remain in the trust for the benefit
19 of the three child beneficiaries.

20

21 15. The Hong Kong Court has ordered that the Trustee be joined as
22 a party on this application but has acknowledged that there has

1 been no submission by the Trustee to the Court's jurisdiction.
2 The proceedings in Hong Kong have been adjourned to
3 accommodate the present application by the Trustee for
4 directions.

5

6 Views of the Parties

7

8 16. The husband takes the view that the Trustee should not submit
9 to the jurisdiction of the Hong Kong Court.

10

11 17. The wife has not appeared in this proceeding and her position is
12 more difficult to discern. She has made the variation
13 application in Hong Kong and has sought and obtained an order
14 there joining the Trustee as a party. However, in a letter from
15 her Hong Kong solicitors of November 22nd, 2010 the Court is
16 advised that the wife does not intend that the Trustee will
17 participate actively in the dispute between husband and wife.
18 The Trustee has been joined so that it may make representations
19 if it wishes. It seems that the wife would like the Trustee to
20 submit to the jurisdiction but to take no active role in the
21 dispute with her husband.

22

1 The oldest child has said that he has no objection to the Trustee
2 refraining from submitting to the jurisdiction of the Hong Kong
3 Court.

4
5 Hong Kong Law

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7 18. The Trustee has obtained legal advice from its Hong Kong
8 solicitors concerning the position there. They advise that the
9 Hong Kong Court does have jurisdiction to vary a nuptial
10 settlement and that the B Trust falls within that description.

11
12 19. In considering any suggested variation, the Court will be
13 governed by the need to be fair to both sides and to avoid
14 diminishing the rights of innocent third parties under the
15 settlement. The solicitors say that the Court will resolve to
16 interfere with the settlement only to the extent that is necessary
17 to do justice between the husband and the wife.

18
19 20. The Hong Kong Court has the power to add all three children as
20 parties to the litigation there and to hear submissions on their
21 behalf; the fact that they may lack standing to enforce the B
22 Trust under Cayman law does not preclude their addition as

1 parties in Hong Kong. Whether or not the children are
2 represented, the Hong Kong Court will take into consideration
3 their interests as well as the interests of the adult parties. The
4 Court may order that the children be represented separately on
5 the application if it is concerned that a proposed variation will
6 adversely affect their interests. The welfare of the children is
7 likely to be a prime concern in the variation application.

8
9 21. The Hong Kong solicitors are of the opinion that even if the
10 Trustee does submit to the jurisdiction of the Court there it is
11 unlikely that it would be required to indicate how it would
12 exercise its discretion. The Hong Kong Court may, however,
13 provide judicious encouragement to the Trustee on the subject
14 of how its discretion might be exercised.

15
16 22. If the Trustee submits to the jurisdiction in Hong Kong it would
17 become susceptible to orders for discovery. In ordering
18 discovery, the Court will balance the relevance and importance
19 of the requested documents against the prejudice which might
20 be caused to third parties.

21

1 23. The Hong Kong Court has jurisdiction within the matrimonial
2 proceeding which extends to all the property comprised within
3 the settlement, whether or not it is within that Court's
4 jurisdiction, whether it is owned directly or indirectly by the
5 trust, and whether or not the Trustee submits to the jurisdiction.
6 The Court may also make ancillary relief orders in the nature of
7 judicious encouragement to the Trustee.

8

9 Position of the Trustee

10

11 24. In light of the advice received from its Hong Kong solicitors,
12 the Trustee is of the view that there is no present need for it to
13 submit to the jurisdiction of the Hong Kong Court to protect the
14 interests of the beneficiaries as a whole. It is also of the view
15 that there is no need to submit to the jurisdiction in order to
16 inform the Hong Kong Court about the terms or assets of the
17 trust. It can be expected that the other parties will do that. As
18 for the legal position of the trust under Cayman law, it is hoped
19 that this judgment will be of some assistance to the Court in
20 Hong Kong.

21

1 25. It appears that the interests of the children (who are also
2 beneficiaries) will be fully protected in the Hong Kong
3 proceeding. The Trustee's participation there is unnecessary to
4 protect their interests.

5

6 Cayman Law

7

8 26. An order of the Hong Kong Court purporting to effect a
9 variation of the trust, whether in a matrimonial proceeding or
10 otherwise, cannot be recognized by the Trustee. That is so even
11 if the Trustee were to attorn to the jurisdiction of the Hong
12 Kong Court. A trust in the Cayman Islands can only be varied
13 in accordance with the *Law* of the Cayman Islands and only by
14 a court of the Cayman Islands. These overarching rules are
15 provided for expressly in the *Trusts Law* (2009 Revision), in
16 sections 90, 91 and 93 as follows:

17 "90. All questions arising in regard to a trust which is for
18 the time being governed by the laws of the Islands or in
19 regard to any disposition of property upon the trusts thereof
20 including questions as to –
21 (a) the capacity of any settlor;
22 (b) any aspect of the validity of the trust or disposition or
23 the interpretation or effect thereof;
24 (c) the administration of the trust, whether the
25 administration be conducted in the Islands or
26 elsewhere, including questions as to the powers,

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- obligations, liabilities and rights of trustees and their appointment and removal; or
- (d) the existence and extent of powers, conferred or retained, including powers of variation or revocation of the trust and powers of appointment, and the validity of any exercise thereof,

are to be determined according to the laws of the Islands, without reference to the laws of any other jurisdictions with which the trust or disposition may be connected:

Provided that this section -

- (i) does not validate any disposition of property which is neither owned by the settlor nor the subject of a power in that behalf vested in the settlor, nor does this section affect the recognition of foreign laws in determining whether the settlor is the owner of such property or the holder of such a power;
- (ii) takes effect subject to any express contrary term of the trust or disposition;
- (iii) does not, as regards the capacity of a corporation, affect the recognition of the laws of its place of incorporation;
- (iv) does not affect the recognition of foreign laws prescribing generally (without reference to the existence or terms of the trust) the formalities for the disposition of property;
- (v) does not validate any trust or disposition of immovable property situate in a jurisdiction other than the Islands which is invalid according to the laws of such jurisdiction; and
- (vi) does not validate any testamentary trust or disposition which is invalid according to the laws of the testator's domicile.

91. Subject to the same provisos as are set out in paragraphs (i) to (vi) of section 90, it is expressly declared that no trust governed by the laws of the Islands and no disposition of property to be held upon the trusts thereof is void, voidable, liable to be set aside or defective in any fashion, nor is the capacity of any settlor to be questioned,

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nor is the trustee, any beneficiary or any other person to be subjected to any liability or deprived of any right, by reason that -

- (a) the laws of any foreign jurisdiction prohibit or do not recognise the concept of a trust; or
- (b) the trust or disposition avoids or defeats rights, claims or interests conferred by foreign law upon any person by reason of a personal relationship to the settlor or by way or heirship rights, or contravenes any rule of foreign law or any foreign judicial or administrative order or action intended to recognise, protect, enforce or give effect to any such rights, claims or interests.

...

93. A foreign judgment shall not be recognised, enforced or give rise to any estoppel insofar as it is inconsistent with section 91 or 92.”

27. There are a limited number of ways in which STAR trusts may be varied under the law of the Cayman Islands. Such a trust may be varied in accordance with the express terms of the Trust Deed; or, as to the administrative and management powers of the trustees, in accordance with section 63 of the *Trusts Law*; or under the common law jurisdiction to approved compromises and confer emergency administrative powers upon trustees in certain limited circumstances; or on the cy-pres basis in accordance with section 104(i) of the *Law*; or under section 21(c) or (d) of our *Matrimonial Causes Law* (2005 Revision).

None of these provisions are capable of being of any assistance

1 to the Hong Kong Court in its adjudication upon a fair division
2 of property between husband and wife. In particular, the
3 referenced section of our *Matrimonial Causes Law* can apply
4 only to such causes initiated in this jurisdiction.

5
6 28. The Trustee's duty is, of course, to carry out the trust according
7 to its terms unless some deviation from that has been sanctioned
8 by this Court: *Underhill and Hayton, Law of Trusts and*
9 *Trustees* (17th edition) paragraph 47.1. It would be unwise and
10 inappropriate for a trustee to allow itself to be placed in a
11 situation where its trust obligation comes into conflict or may
12 come into conflict with an obligation to obey the order of a
13 foreign court.

14
15 29. At present, the Trustee has virtually no scope for the exercise of
16 any discretion at all. If it had the opportunity to exercise its
17 discretion in a manner which would assist in the resolution of
18 the matrimonial dispute while maintaining an even-handed
19 approach to all beneficiaries, it would no doubt give respectful
20 consideration to the views of the Hong Kong Court. The parties
21 before me are agreed that consideration of such "judicious
22 encouragement" by the Hong Kong Court would and should be

1 taken into account in any possible exercise of the Trustee's
2 discretion together with all of the other circumstances which are
3 relevant. However, since the distribution fund contains only a
4 single share, there is no exercise of discretion at present which
5 can contribute in any meaningful way to a division of assets
6 ordered by the Hong Kong Court. The task must therefore be
7 approached in a different way.

8
9 30. Both the husband and the wife can be required by the Hong
10 Kong Court to exercise their powers as settlors in a particular
11 way. The parties before me are agreed that the element of
12 compulsion supplied by the Hong Kong order cannot affect the
13 Trustee's obligation to give effect to such instructions from the
14 settlors. The wife and the husband could each be ordered to
15 resign as the designated beneficiary and as the successor
16 designated beneficiary respectively. That would bring about a
17 situation where no designated beneficiary exists. They could be
18 further ordered to refrain from appointing any replacement.
19 After the lapse of thirty days with no designated beneficiary, the
20 power of the husband and wife terminates and the entire trust
21 property becomes a part of the distribution fund. This much can
22 be accomplished by the Hong Kong Court directly.

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31. Once the trust property has been transferred to the distribution fund, the discretionary trusts applicable to that fund and described in Schedule 4 of the Trust Deed become operative without the need for any consent from the settlors. Schedule 4 provides that

(i) Until the Termination Date the Trustees may pay or apply all or any part of the income or capital of the Distribution Fund to or for the benefit of the Settlers, or any of them, or any one or more of the Beneficiaries, at such times, in such amounts, and in such manner as the Trustees think fit ...

Should the Trustee submit to the Jurisdiction of the Foreign Court?

32. Clause 2(i) of the Trust Deed – the jurisdiction clause – is expressed in these wide and emphatic terms:

“...the Settlers, the Trustees and the Enforcers hereby submit, or are required to submit, to the exclusive jurisdiction of the Courts of the Cayman Islands;”

33. It has been held in relation to a jurisdiction clause in a Jersey trust in similar terms that the wording does not prevent the application of the English matrimonial jurisdiction to vary a nuptial settlement: *Charlambous v. Charlambous* [2004] EWCA Civ 1030 (Court of Appeal). This result was not

1 reached by placing a particular construction upon the clause, but
2 resulted from a conclusion that it is impermissible to contract
3 out of the matrimonial legislation.
4

5 34. There is no local authority on the question of a trustee's
6 submission to the jurisdiction of a foreign court during the
7 course of foreign matrimonial proceedings. The question has
8 attracted some judicial attention on the island of Jersey and is
9 the subject of some helpful decisions there.
10

11 35. In *Re H. Trust* [2006] JLR 280 (Royal Court of Jersey), a wife
12 in matrimonial proceedings in the family division of the English
13 High Court had obtained a freezing order which included assets
14 in a Jersey trust. The Trustee resolved not to submit to the
15 jurisdiction of the English Court and applied for court approval
16 of its decision. The Court held:

17 "12 Significant consequences may flow from a
18 decision by a trustee of a Jersey trust to submit
19 to the jurisdiction of the Family Division of the
20 High Court or indeed any other court
21 considering the matrimonial affairs of
22 beneficiaries of a trust. Any order subsequently
23 made by the Family Division would be made in
24 proceedings to which the trustee had voluntarily
25 submitted and in which therefore it had full
26 opportunity to put forward submissions on the
27 order which the court should make. It follows

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that the trustee would be in some difficulty in arguing subsequently before this court against the proposition that any order of the Family Division relating to the trust should be enforced without reconsideration of the merits of such order.

13 Conversely, if the trustee has not submitted to the jurisdiction of the Family Division, any order of that court will not be enforceable in Jersey under the rules of private international law. On any subsequent application to this court to vary the trust so as to achieve the effect of any variation or other order made by the Family Division, this court would have complete discretion as to the course it should take.”

...

15 It follows that, in most circumstances, it is unlikely to be in the interest of the Jersey trust for the trustee to submit to the jurisdiction of an overseas court which is hearing divorce proceedings between a husband and wife, one or both of whom may be beneficiaries under the trust. To do so would be to confer an enforceable power upon the overseas court to act to the detriment to the beneficiaries of a trust when the primary focus of that court is the interests of the two spouses before it. It is more likely to be in the interests of a Jersey trust and the beneficiaries thereunder to preserve the freedom of action of both the trustee and this court to act as appropriate following and taking full account of the decision of the overseas court. We have said that this is likely to be the case in most circumstances. In some cases, e.g., where all the trust assets are in England, it may well be in the interests of a trustee to appear before the English court in order to put forward its point of view because, by reason of the location of the assets, that court will be able to

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enforce its order without regard to the trustee or this court.

16 The observations which we have made do not lead to the conclusion that this court will ignore a decision of the Family Division or other overseas Court. Far from it. That court will have investigated the matter very fully and will have made a decision intended to achieve a fair allocation as between the spouses. In such cases, the interests of comity as well as the interests of the beneficiaries will often point strongly in favour of this court making an order which achieves the result contemplated by the order of the Family Division. Indeed, this court has made such orders in the past and will no doubt do so again in the future. But the significant factor, from the point of view of whether the trustee should submit to the jurisdiction of the overseas court, is that it will remain a matter of discretion for this court as to the course it should take in the light of the overseas order if the trustee has not submitted, whereas if the trustee has submitted, the overseas order is likely to be enforced without reconsideration of the merits. For these reasons, we approve of the trustee's decision not to submit to the jurisdiction of the Family Division in this case."

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36. In *Re B Trust* 2006 JLR 562, the Royal Court of Jersey had before it a case in which the trustee of a Jersey trust had already submitted to the jurisdiction of the High Court in England. There were matrimonial proceedings in England and the High Court sought to make financial provision for the wife by varying the Jersey trust of which the husband and his family

1 were beneficiaries. The Court found the trust to be a post-
2 nuptial settlement and ordered that a portion of it be transferred
3 to a sub-trust in which the wife would have a life interest. The
4 Royal Court determined to recognize and give effect to the
5 English order, with some qualifications, so as to vary the trust
6 and create the sub-trust. It noted that the English order was not
7 inconsistent with Jersey law and invoked judicial comity as a
8 significant reason for giving effect to the English order. In a
9 postscript, the Court noted at paragraph 30:

10 “Much time and expense has been consumed in
11 considering the interrelationship between the
12 purported variation of the B Trust pursuant to English
13 statutory powers on the one hand, and the recently
14 enacted provisions of the Trusts (Amendment No. 4)
15 (Jersey) Law 2006 on the other. In the event, we have
16 found ourselves able to deal with the matter on the
17 basis of judicial comity. With some diffidence, we
18 express the hope, however, that English courts might
19 in future exercise judicial restraint before asserting a
20 jurisdiction pursuant to s.24 of the Matrimonial
21 Causes Act 1973 to vary a Jersey trust. This court has
22 shown itself sensitive (long before the enactment of
23 the Trusts Law amendment) to perceived interference
24 with its jurisdiction to supervise Jersey trusts.”
25

26 37. This decision was explained and distinguished in a subsequent
27 decision of the Royal Court of Jersey in *Re IMK Family Trust*
28 2008 JLR 250. Again, a wife in a matrimonial proceeding in the
29 Family Division of the High Court in England obtained an order

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altering (or purporting to alter) a Jersey trust. On this occasion the trustee had not submitted to the jurisdiction of the English Court. The wife argued that the English order should be enforced on the grounds of comity. Article 9(1) of the *Trusts (Jersey) Law* of 1984 provided that questions concerning the variation of a Jersey trust must be determined solely in accordance with Jersey law. The English order was not compatible with article 9(1) and for that reason was unenforceable in Jersey. Having decided that, the Court said at paragraphs 72-74:

“Does this mean that there are no circumstances in which the objectives of an order of the Family Division varying or altering a Jersey trust can be given effect under the law of Jersey? In our judgment, it does not. We agree with Bailhache, Bailiff in *In re B Trust* (3) and Clyde-Smith, Commr. in *In re H Trust* (8) that the giving of directions under art. 51 does not amount to enforcement of the overseas judgment in question for the purposes of art. 9(4). Why do we say that?

Let us take a simple example. Suppose that, in the case of a conventional discretionary Jersey trust where the beneficiaries include the husband, the wife and their children, the English court varies the Jersey trust under the 1973 Act by ordering that the sum of £1m. be paid to the wife out of the trust. This is something which the trustee could do under the powers conferred upon it under the trust deed. The trustee would not necessarily have to seek directions from the Jersey court. It would be open to the trustee to take note of the English judgment, to consider the desirability of

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bringing to an end any financial dispute between the husband and wife and to reach the view that it was in the best interests of all the beneficiaries (including the children) for a capital distribution of £1m. to be paid to the wife so that everyone could get on with his or her life. This would not amount to “enforcement” of the English judgment. It would be a conventional case of a trustee taking account of all the relevant circumstances (including, in this case, the existence of an English judgment) and deciding how to exercise its dispositive powers under the trust deed in the best interests of the beneficiaries.

Although a Jersey trustee might in such circumstances be content to exercise its powers without recourse to this court, it might wish to seek the approval of this court to its decision. In those circumstances, this court would no more be enforcing the English judgment than the trustee itself. The court would simply be fulfilling its usual function of considering the exercise by a trustee of its discretionary powers and deciding whether those powers were being exercised reasonably. Alternatively, the trustee might surrender its discretion to the court. In that event, the court would stand in place of the trustee and consider how the powers under the trust deed should be exercised in the interests of the beneficiaries, taking account of all relevant circumstances, including the existence of the English judgment. Alternatively, the court might be asked to exercise its power to give directions under art. 51 on the basis that a decision of the trustee to exercise its power in such a way as to give effect or not to give effect (as the case may be) to the English judgment was unreasonable. In all of these cases, there would be no question of any “enforcement” of the English judgment for the purposes of art. 9(4). All that the court would be doing is exercising its supervisory jurisdiction on conventional grounds.”

1 38. The Court also noted that the inability to enforce a foreign order
2 varying a Jersey trust remains even if the trustee submits to the
3 jurisdiction of the foreign court (see paragraph 76(i)). It also
4 observed that where trust assets are in fact situate within the
5 jurisdiction of the foreign court the trustee may have no option
6 but to “bow to the inevitable.” (at para. 79).

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8 39. The Trustee cannot, of course, fetter its discretion now by
9 suggesting how it may act in the future. In exercising its
10 discretion, it must take into account all of the relevant
11 circumstances existing at the time it is called upon to make a
12 decision. One relevant circumstance, to which respectful and
13 attentive consideration will be given, is any judicious
14 encouragement received in the form of a judgment or ruling
15 from the Court in Hong Kong. On the subject of judicious
16 encouragement and the proper reaction of a trustee upon
17 receiving it, *Lewin on Trusts, 18th edition, para. 29-157* says:

18 “Once it is made, it is plainly proper for the trustees to
19 take it into account in exercising their powers and
20 commonly it will be decisive; but there appears to be
21 no jurisdiction to direct a particular exercise of a
22 power and the order is not binding on them, so if their
23 view is that the interests of other beneficiaries will be
24 unduly prejudiced should they give full effect to the
25 court’s expectations, they will be acting properly by
26 declining to do so.”
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1 In *A. v. A.* [2007] EWHC 99 (FAM) at paragraph 97, a trustee
2 submitted that:

3 “[w]ilst the Court is of course free to give judicious
4 encouragement to the Trustees if it concludes it is
5 appropriate to do so on the facts of this case, the
6 Trustees must (and do) jealously guard their
7 independence in this respect. The Court should not
8 assume that the Trustees will automatically or
9 inevitably exercise their discretion in any particular
10 way simply because they are encouraged to do so by
11 the Court. By making this submission the Trustees are
12 not indicating an intention to set their face against
13 whatever the Court may consider is the right solution
14 as between [the husband and the wife]: they simply
15 make it clear that they have a number of beneficiaries
16 to consider and they will do what they think is right
17 for the class of beneficiaries as a whole.”
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19 The Trustee was praised by the Court for its “impeccable
20 attitude” in adopting that approach.

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23 40. The oldest child, who is a beneficiary and an enforcer of the
24 trust, has applied in Hong Kong to be joined as a party to the
25 variation application. The Trustee has asked how it should
26 respond to this application. In light of what I have said earlier,
27 it is clear that the Trustee should take no part in it and offer no
28 response at all. The Trustee should not submit to the
29 jurisdiction of the Hong Kong Court.
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Indication of Future Intention

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41. The Trustee has asked whether it would be appropriate for it to give “some indication, without binding itself” as to how it may exercise its powers if and when available assets are transferred into the distribution fund.

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42. Any such indication will necessarily establish in the minds of the parties an expectation that the Trustee’s discretion will thereafter be exercised in the way it has intimated. The Court itself may share that view. After all, there can be no purpose in the Trustee providing an “indication” as to how it may exercise its powers other than influencing the positions of the parties and shaping their expectations. There is a risk that the Trustee will find itself in a position where it feels obliged to exercise its discretion in a particular way because it accords with an indication given earlier. There is always the danger, however, that the circumstances may have changed somewhat in the interim. I consider the suggestion that the Trustee might give an indication now of how it might exercise its discretion in the future to be fraught with difficulty and therefore inappropriate.

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Disclosure

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43. The husband and wife and the oldest child all have rights to seek information about the B Trust as enforcers under section 102 of the *Trusts Law*. They are also at liberty to place this judgment and the evidence provided to me on this application before the Court in Hong Kong. They may not, of course, use the evidence for any other purpose without leave of this Court.

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Liberty to Apply

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44. The situation is fluid and the Trustee may need further directions as the circumstances change. As usual, it is at liberty to apply, as are the other parties to these proceedings.

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Dated this 9th day of December, 2010

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Henderson, J.

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Henderson, J.
Judge of the Grand Court

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