



Fozeia is a director at Bermuda-based law firm MJM and has extensive experience acting for both international and offshore Bermuda clients in a wide range of complex disputes, including corporate, banking, insurance, insolvency and high-value trust litigation. Fozeia is an accredited mediator and has developed a successful mediation practice. She routinely advises and gives presentations on topical issues for the banking, insurance, trust, and private client sectors in Bermuda. She is regularly instructed by trustees, principal beneficiaries and court representatives of minor and unborn beneficiaries in complex trust cases and has been instructed in many prominent international family trust restructurings in the last several years.

### SIFTUNG SALLE MODULABLE & RUTLI V. BUTTERFIELD TRUST (BERMUDA) LIMITED (CIV JUR 2012 NO. 165)

In February 2014, the Chief Justice handed down his 121-page ruling following a six-week trial in this matter which has come to be known as the “Opera House” case.

This fact-specific and Swiss law-centric case essentially related to a project which was conceived in 2003 whereby a multipurpose cultural facility, (“the Opera House”), would be built and maintained in Lucerne, Switzerland providing a flexible space for different types of art productions. The Settlor in this case had sought the support of the beneficiaries for the funding of the Opera House from the trust after which the Bermuda-based defendant trustee (“the Trustee”) commenced correspondence and entered into an agreement with one of the plaintiff Swiss Foundations pertaining to the funding of the Opera House. Shortly after the Settlor’s death in 2010, and having discharged certain costs that had been incurred, the Trustee took the decision to “pull the plug” on the Opera House funding.

The plaintiff Swiss Foundations asserted claims in contract and in equity to support the broad allegation that the Trustee was obliged to provide funding in the amount of 120 million Swiss Francs to build the Opera House. They sought to argue the contract was governed by Swiss law as the forum with which the contract was most closely connected. The Trustee denied that the Settlor was the agent of the trust or the trust was bound by the Settlor’s wishes. The Trustee argued that the alleged contract failed for certainty. If the contract existed under Swiss law it was to be considered a “mandate” not a “donation” contract. Various breaches of duty were also alleged against the Trustee.

The Chief Justice held that Swiss law was the applicable law as place of payment was Lucerne and the only formal contractual documentation was loosely based on Swiss form. He found the parties had entered into a “donation” contract rather than “mandate” contract. Donation contracts are not a recognised legal concept in Bermuda. They permit the promise of a gift by the donor without the requirement of consideration as long as the parties are identified and the promise is made in writing. The Chief Justice held that the Trustee was not entitled to terminate the donation contract for breach of implied accounting/reporting duties and/or failure by the Swiss Foundations to comply with an implied requirement to establish feasibility within a reasonable time. He also held that the plaintiffs failed to prove that the Trustee acted in bad faith.

The overall result is that the Chief Justice effectively awarded specific performance. The Swiss Foundations are entitled to perform their rights under the contract and to compel the Trustee to perform its obligations.

In this case two specific points of interest arose for consideration by the Trust profession in Bermuda. The first relates to the Judge’s view with respect to Trustee’s regard to the Settlor’s wishes and the other in relation to costs.

In the context of considering whether the contract was validly terminated by the Trustee under Bermuda law, the Chief Justice noted the Trustee had no legal obligation to have regard to the Settlor’s wishes either generally or to the exclusion of the other beneficiaries. This is despite the fact that the Settlor’s letter of wishes expressly requested the Trustee to “consider the wishes of his children and remoter issue as they would his own.”

The other discrete element of this case but of wider interest to the Trust profession relates to litigation funding agreements. In this case the plaintiff Swiss Foundations had entered into a litigation funding agreement under which they had to pay over 40% of any damages recovered in return for litigation funding received.

The Trustees sought to argue this was void under public policy grounds in Bermuda. This was rejected outright by the Chief Justice who took the modern approach that funding agreements should be encouraged not condemned.

The Chief Justice was unwilling to make a first instance decision in Bermuda applying Swiss law, in effect making a ground-breaking determination as to whether litigation funding was recoverable as a matter of Swiss law.

The Swiss Foundations submitted in the alternative that such costs should be recoverable under Bermudian law, not as legal costs but under the general principles of contractual damages. The Chief Justice stated it was not reasonable for the losing party to assume not just its own costs but also the costs of whatever litigation funding the innocent pay might choose to negotiate (or practically, the difference between its recovered legal costs and the costs of its litigation funding agreement). However, he expressed no view on whether or not litigation funding costs are potentially recoverable as part of legal costs under the existing taxation of costs regime in Bermuda.

So although parties in trust litigation in Bermuda could obtain litigation funding, the ability to recover such costs under the existing regime of taxation of costs or as a separate head of damages has not yet been fully examined. The early indication is that funding costs are not recoverable as damages.

## IN THE MATTER OF AN APPLICATION FOR INFORMATION ABOUT A TRUST [2013] CA (BDA) 8 CIV

In its 2014 decision, the Court of Appeal considered Chief Justice Kawaley's first instance 2013 decision to order the production of trust documents to a beneficiary notwithstanding that the trust deed contained an information-control mechanism designed to prevent disclosure of financial information unless the Protector (who was also the principal beneficiary) consented.

Although the Chief Justice Kawaley found the control mechanism clause to be valid (it did not violate the irreducible core requirements of a trust), he found it did not seek to oust the supervisory jurisdiction of the Court. He found the supervisory jurisdiction exists to enable the beneficiaries to hold trustees accountable to ensure the due administration of a trust.

Exercising its discretion, Justice Kawaley found in the circumstances of this anonymised case (which included for example, the conflict of interest created by the dual role of Protector and principal beneficiary, the acrimonious relationship between the beneficiaries and the refusal to supply any information) that the information-control mechanism was not being operated in a manner that was substantially consistent with the presumed intention of the Settlor. He thereafter ordered disclosure of certain financial documents subject to safeguards.

## RE HANNOVER TRUST, THE DRESSAGE TRUST AND THE VULCANO TRUST [2013] BDA LR 37

In this ex parte case, the Chief Justice confirmed that leave for service of an originating summons out of the jurisdiction on a foreign beneficiary is not required for non-contentious applications by Bermudian trustees for directions relating to the administration of a trust or for a Beddoe application. The application was prompted by the fact that relations between the Trustee and the Settlor had broken down and the trusts were illiquid.

The Chief Justice did acknowledge that leave may be required in the context where an adverse claim may be asserted against a substantive foreign defendant who is likely to contest jurisdiction. He specifically mentioned the scenario of service abroad on defendants to a breach of trust claim which he considered would require greater scrutiny.

## IN RE ABC TRUST [2012] SC (BDA) 65 CIV

The perpetuity period in Bermuda was abolished prospectively (save for the trusts of Bermuda land) by the Perpetuities and Accumulations Act 2009. The question arose whether trusts created before abolition could take advantage of the new law. In the ABC Trust case, the court was prepared to exercise its powers under section 47 of the Trustee Act to give a trustee the power to amend an existing trust which had the effect of extending the existing perpetuity period, thus taking advantage of the 2009 Act where this was expedient in the interests of the trust.

The protector appealed Justice Kawaley's decision, arguing that the supervisory jurisdiction of the Court should not be exercised where the Court ruled that the express disclosure mechanism was valid. Further disclosure should not have been ordered unless there was real concern the Trust was being mismanaged and that the Court did not give due weight to the evidence in the case.

The Court of Appeal supported the Chief Justice's conclusion that although the control mechanism was valid, it did not oust the jurisdiction of the Court. In its view, this could only be justified if it was consistent with the proper administration of a trust. The evidence did establish real cause for concern justifying the Court's interference. The control mechanism was to be exercised in the interests of the trust and its beneficiaries notwithstanding the Protector owed no fiduciary duties and notwithstanding the Protector was one of the beneficiaries.

## IN THE MATTER OF A TRUST [2012] SC (BDA) 72 CIV

This case is one of a small number of cases in common law jurisdictions which have considered jurisdiction clauses in trusts. The clause in question in this case was in terms which are very common in Bermuda trusts, namely that the "forum of administration shall be the courts of Bermuda." After a careful review of the case law from other jurisdictions, the Chief Justice held that this clause conferred exclusive jurisdiction on the Bermuda court in respect of the dispute in question which was an attempt by a beneficiary to launch proceedings in an onshore jurisdiction seeking information about the trust. It also appears from this judgment that such an exclusive jurisdiction clause is wide enough to encompass breach-of-trust actions. On the facts, the Bermuda court granted an anti-suit injunction against the beneficiary.

## GHIJ V. KL & OTHERS [2011] SC (BDA) 23

This case was the first reported decision on section 47 of the Trustee Act 1975. That section provides the court with jurisdiction to provide trustees with additional powers over and above those in the trust deed or otherwise provided by statute. This case clearly establishes that section 47 is wider in scope than the English equivalent jurisdiction contained in section 57 of the Trustee Act 1925 in that the Bermuda court has the power to provide a trustee with a power which has the effect of varying the beneficial interests. This can be achieved with representative beneficiaries before the court and without requiring the consent of the whole beneficial class.



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+1 441 292 0632



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Maxwell Roberts Building ■ 6<sup>th</sup> Floor ■ I Church Street ■ Hamilton HM 11 ■ Bermuda