

Flexibility in Bermuda trusts afforded by Section 47

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What is Section 47

Section 47 of Bermuda's Trustee Act 1975 provides trustees of Bermuda trusts with a very useful and flexible tool for varying trusts in the absence of the necessary power either in the trust instrument or otherwise under the relevant legislation. Trusts not governed by Bermuda law can be migrated to Bermuda to take advantage of section 47 and, in such cases, it may be desirable to appoint new trustees in Bermuda.

Bermuda's section 47 is a hybrid of two English provisions being section 57 of the Trustee Act 1925 and section 64 of the Settled Land Act 1926, but without the English limitation to administrative matters. As such, both beneficial and administrative provisions of a trust may be changed under this provision. While England and Wales also have the Variation of Trusts Act 1958, which contains no limitation as to what may be amended, any such amendment requires the consent of all capable beneficiaries, as well as benefit for other beneficiaries.

Section 47 confers on the court the power to grant trustees powers to enter into any transaction not authorised under the trust's terms without requiring the consent of all adult beneficiaries, provided that the court determines that it is expedient to do so. As in the English Trustee Act provisions, "expediency" is interpreted as that which is for the benefit of the beneficiaries of the trust and the trust as a whole and not simply just for one beneficiary.

1 [2022] Bda LR 10.

"Transaction" is defined in both section 64 of the English Settled Land Act and in Bermuda's section 47 to include not only a number of specific transactions but also to include any "arrangement" which has been given the widest possible meaning and unrestricted construction.

Benefits of Section 47

Section 47 can be utilised in many different circumstances to resolve trust issues; trustees will ask the court to confer on them the power to vary which they will use to effect a variety of changes including amending beneficial interests, transforming fixed trusts of income into discretionary trusts, varying investment and other administrative powers, adding powers to appoint trustees and protectors, modernising provisions deemed expedient for the trust such as trustee charging powers and adding a charity as a substantive beneficiary.

Recent cases

The jurisdiction of the Bermuda Supreme Court under section 47 of the Trustee Act 1975 continues to develop through recent cases.

The recent Bermuda case known as *Re the XYZ Trusts*¹ involved a number of family trusts and some disharmony. This case was a blessing application that followed two section 47 applications. The three applications took place over a period of seven years, all working towards and approving various stages of the restructuring of more than 20 offshore trusts and

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the allocation of the assets into several sub-funds for the three family branches. The case confirmed that such applications may be made in series in order to obtain the court's approval of various stages of a large transaction.

In another recent Bermuda case known as *Re the AB Settlement*², a declaration was sought from the court that granting a power to vary under section 47 and the subsequent exercise by the trustees of that power would not constitute a resettlement of the trust or otherwise have the effect of creating a new settlement. The relevant English case law was considered; both sides of the issue argued and in the end the court very helpfully found it appropriate to make the declaration requested. It is interesting to note that the court declared that a change of governing law to Bermuda and an extension of the trust period would also not have the effect of creating a new settlement.

The third recent Bermuda case, known as *Re the B Trusts*³, dealt with the question of whether the power to amend could be given to the trustees in circumstances where they wished to use it contrary to the explicit provisions of the trust. In this case, the trustees sought to exclude from further benefit one family branch of beneficiaries. However, one of the trust instruments involved contained a clause which provided that "notwithstanding anything herein contained the trustees shall not have the power to take any action which might in any way change the discretionary objects or beneficiaries."⁴ It was brought to the court's attention that section 47 may only be used because of an absence of power, but not in contradiction to an express prohibition. The court looked at the question of construction and whether the *herein* referred to that particular clause in the trust deed or to something wider. The court found that the reference to *herein* was only a reference to the clause itself and was not a general ban on taking any action to change the discretionary objects. Otherwise, it would contradict other provisions of the trust instrument like the power of appointment which expressly allowed the trustees to appoint other new trusts and to do so to the exclusion of members of the discretionary class. Accordingly, the court concluded that the provision in the trust instrument was not a general prohibition against the exclusion of members of the discretionary class of beneficiaries and was not a ban to the exercise of the court's jurisdiction under section 47.

A note on confidentiality

In all of these three cases, confidentiality orders were obtained demonstrating the Bermuda court's willingness to help protect the legitimate interests of families to maintain their privacy in cases involving the administration of private trusts.

2 [2022] Bda LR 115.

3 *Re the B Trusts; A Ltd and anor v C et al* [2022] Bda LR 117.

4 *Ibid* para. 26.



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