



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

FSD 270 OF 2023 (IKJ)

**IN THE MATTER OF THE G TRUST
AND IN THE MATTER OF SECTION 48 OF THE TRUSTS ACT (2021 REVISION)
AND
ORDER 85 OF THE GRAND COURT RULES (2023 REVISION)**

Before: The Hon. Justice Kawaley

Appearances:

Ms Rachael Reynolds KC and Ms Deborah Barker Roye of
Ogier for the Trustee and ICTI (the “Applicants”)

Mr Robert Lindley and Mr Wesley O’Brien of Conyers, for the
Enforcer

Ms Bernadette Carey and Ms Katie Turney of Carey Olsen for
the A Beneficiaries

Mr John Machell KC of counsel and Mr Andrew Peedom of
Collas Crill for the B Beneficiaries¹

Heard: On the papers

¹ By the time the present Ruling was delivered, the B Beneficiaries were represented by Mourant Ozannes (Cayman) LLP.

Date of submissions:	15 December 2023
Draft Ruling Circulated:	19 January 2024
Ruling Delivered:	1 February 2024

HEADNOTE

Beddoe application- directions in relation to participation in possible rectification application- need for adversarial argument- identity of party to be assigned role of advancing any contrary arguments- relevance of STAR trust regime-Trusts Act (2021 Revision), Part VIII-Grand Court Rules Order 85 rules 2, 3 (3)

RULING

Background

1. On 11 December 2023, I gave directions in relation to the Trustee’s 27 October 2023 Summons (the “Beddoe Rectification Summons”). The main direction given was that the Applicants were at liberty to issue an Originating Summons seeking declaratory relief in relation to a Deed of Addition and, potentially at least, rectification (“Rectification Summons”). After indicating that I would hear counsel if required, I concluded that Ruling as follows:

“22...My provisional view is that directions should be included in the Order for the B Beneficiaries to be nominated to oppose the application for declaratory relief and rectification, if required, with the protection of a pre-emptive costs order.”

2. The parties agreed to file supplementary submissions by 15 December 2023. Submissions were filed by the Applicants, the Enforcer, the A Beneficiaries and B Beneficiaries on 15 December 2023. The central purpose of the submissions was to displace my provisional views as to:
 - (a) the need for adversarial argument;

- (b) the identity of the party(ies) permitted to advance any counter-arguments; and
- (c) the appropriateness of a pre-emptive costs order.

3. My provisional views were very provisional indeed, because they were based on counsel foreshadowing issues which would have to be addressed at some future point rather than by way of formal submission in relation to relief positively sought from the Court. I was, in effect, seeking to save costs by avoiding future argument on an issue which might not have been controversial. As I observed concerning the first issue in my 11 December 2023 Ruling on the Beddoe Rectification Summons:

“13. Ms Reynolds KC submitted, without reference to authority, that only the parties to the instrument sought to be rectified had the right to be party to the proceedings where those with the relevant intentions were all before the Court. Mr Machell KC submitted, without reference to authority, that there should be a party nominated to argue against the rectification proposed by the Applicants; he argued his clients were the appropriate parties.”

4. Based on my own limited researches after the 28 November 2023 hearing, I formed the preliminary view that the English approach to rectification applications reflected the Cayman Islands position. Accordingly:

“15...For the purposes of the present application, I will assume (without formally deciding the matter), that even if the Settlor and the Trustee agree, the Court would want to have adversarial argument if the Rectification Summons were to be issued.”

The contending positions

The Applicants

5. The Applicants submitted that:

- (a) under Cayman Islands law the need for adversarial argument in relation to a rectification application did not arise. This was a fiscal policy issue in England and Wales which did not apply under local law: *Re Golden Trust* [2012 (2) CILR 355];
- (b) the “Rectification Court” is the most appropriate forum to decide whether or not a counter position needed to be advanced and whether there should be a pre-emptive costs order;
- (c) having regard to the STAR Trust regime, the Enforcer was the appropriate party to advance any opposing arguments which needed to be advanced in any event.

The Enforcer

6. The Enforcer submitted that:

- (a) the key features of the STAR trust regime were those provisions which conferred on the enforcer the right to enforce a trust which a beneficiary would otherwise have (Trust Act (2021 Revision), sections 100-102).
- (b) it was premature to consider the need for pre-emptive costs orders and inappropriate for the B Beneficiaries to be the parties charged with advancing any counter arguments even if they chose to participate in the Rectification proceeding of their own volition.

The A Beneficiaries (the Settlor and family)

7. The A Beneficiaries submitted:

- (a) there was no general requirement for contrary argument in the rectification context under Cayman Islands law;
- (b) assigning the role of advancing counter arguments to the B Beneficiaries rather than the Enforcer would be inconsistent with the STAR Trust regime (Trusts Act Part VIII and GCR Order 85 rule 3 (3));

- (c) making a pre-emptive costs order in relation to the Rectification Summons would be inconsistent with the usual principle that the costs in the main action should not be dealt with by the *Beddoe* Judge: '*Lewin on Trusts*', 20th edition, paragraphs 48-135-48-137.

The B Beneficiaries

8. The B Beneficiaries submitted:

- (a) the Court generally wished to receive the benefit of contrary argument in rectification cases and otherwise where controversial issues arose relating to a trust: *Lewin on Trusts*, 20th ed. (at 5-091 and 5-092);
- (b) the natural parties to advance such arguments were the B Beneficiaries taking into account the wider context including the Hong Kong Proceedings;
- (c) there was a need to ensure that the party advancing contrary argument was best equipped to do so and had all relevant information. The Enforcer, who had indicated support for the Trustee and who was not a party to the Hong Kong Proceedings, was not appropriate;
- (d) a prospective costs order could properly be made in relation to proceedings for the benefit of the Trust (*In re Buckton; Buckton v Buckton* [1907] 2 Ch 406 (at p.414))

Findings: governing legal principles

The need for a counter position to be advanced in rectification proceedings

9. Ms Reynolds KC was clearly right to submit during the hearing of the Rectification Beddoe Application that there is no general requirement for contrary argument when seeking rectification under Cayman Islands law. This is because rectification can be granted even if there is no issue in dispute between the parties interested in the matter under Cayman Islands law. However, the fact that this English law policy requirement does not invariably exist does not mean that in certain

factual circumstances, a dispute may not exist between those persons interested in the determination of a rectification application.

10. This finds support in the insightful observations of As Smellie CJ (as he then was) in *In re Golden Trust* [2012 (2) CILR 355]:

“37 True it is that there could be an ‘issue’ or ‘issues’ joined, for instance, between the settlor, his trustee, and the beneficiaries of his settlement, depending on whether or not rectification is granted. This is for the reason that the outcome could well determine whether the loans (or now their proceeds) fall within or without the settlement and the respective rights could be altered or confirmed accordingly. And so, even if the approach taken in Chisholm v. Chisholm (5) (earlier adopted in Allnutt v. Wilding (1), Racal Group Servs. Ltd. v. Ashmore (9) and Wills v. Gibbs (14)) requiring of a ‘non-fiscal issue’ were adopted and followed by this court, rectification could nonetheless be an available remedy in this case.

38 But I am obliged to note that I do not consider that the requirement of the identification of a non-fiscal issue operating as a fetter upon the court’s jurisdiction or discretion to grant rectification forms any part of Cayman law. From the cases discussed above, this appears to be a fetter adopted by the United Kingdom courts in deference to the imperative of domestic fiscal policy as articulated by HMRC. It is aimed at discouraging the rectification of settlements where there is no “issue” between parties and so solely for the sake of vesting a retroactive fiscal benefit which was not genuinely contemplated and intended at the time of settlement: see, for instance, Racal Group Servs. Ltd. v. Ashmore, Allnutt v. Wilding and later Chisholm v. Chisholm ([2011] WTLR 187, at paras. 9 and 15). In the latter passage, the learned Deputy Judge confirms “for the benefit of HMRC” her consideration of those two earlier cases which address the policy concerns and to which the HMRC has come routinely to invite the English court’s attention upon applications of this kind.

39 Such imperatives of fiscal policy do not arise in this jurisdiction to justify the fetter upon the exercise of the equitable remedial jurisdiction that is rectification. In my judgment, it is a jurisdiction to be exercised by this court, as a matter of discretion, as the justice of the case deserves, including in cases where there may be no identifiable issue joined between parties.

40 The classic exposition of Cayman law on the subject is that which is stated in the Cayman cases cited above, following *Joscelyne v. Nissen* (7) and *In re Butlin's Settlement Trusts* (4). It is that this court will rectify a document, 'putting the record straight' (adopting also those words of Mummery, L.J. from the case of *Allnutt v. Wilding* (1) ([2007] EWCA Civ 412, at para. 11)), where it is satisfied that the document did not carry out the common intention of the parties, or, in the case of a voluntary settlement, the intention of the settlor. Rectification is available not merely in respect of words wrongly added, omitted or wrongly written, but also used in the mistaken belief that they bear a meaning different from their correct meaning as a matter of true construction." [Emphasis added]

The appropriate party to advance a counter position in relation to a STAR Trust

11. Section 100 of the Trusts Act pivotally provides:

"(1) A beneficiary of a special trust does not, as such, have standing to enforce the trust, or an enforceable right against a trustee or an enforcer, or an enforceable right to the trust property.

(2) The only persons who have standing to enforce a special trust are such persons, whether or not beneficiaries, as are appointed to be enforcers —

(a) by or pursuant to the terms of the trust; or

(b) by order of the court...."

12. Section 101 provides that enforcers are deemed to have, *inter alia*, a fiduciary duty to act in the best interests of a special trust. Section 102 then provides:

"Rights and remedies of enforcers

102. Subject to the terms of that person's appointment —

(a) *an enforcer has the same rights as a beneficiary of an ordinary trust —*

(i) to bring administrative and other actions, and make applications to the court, concerning the trust; and

(ii) to be informed of the terms of the trust, to receive information concerning the trust and its administration from the trustee, and to inspect and take copies of trust documents;

(b) *in the performance of that person’s duties, if any, an enforcer has the rights of a trustee of an ordinary trust to protection and indemnity and to make applications to the court for an opinion, advice or direction or for relief from personal liability; and*

(c) *in the event of a breach of trust an enforcer has, on behalf of the trust, the same personal and proprietary remedies against the trustee and against third parties as a beneficiary of an ordinary trust.”*

13. GCR Order 85 deals with administration and similar actions. Order 85 rule 3 (2) provides that persons beneficially interested in an estate or trust need not be joined but may be joined as parties. The next paragraph provides:

“(3) For the purposes of this rule, a beneficiary of a special trust who is not also an enforcer, shall not be treated as having a beneficial interest under the trust.”

14. Although it is accepted that in the present case the beneficiaries should be permitted to participate in the hearing of the Rectification Summons, I accept the unanimous broad submission that the voice of a beneficiary in relation to a STAR Trust is far more muted compared with the standard position in relation to an ordinary trust. As the Enforcer’s counsel submitted, one well known rationale for establishing a STAR Trust is to “prevent hostile ‘beneficiary’ litigation”.

The appropriate forum for the determination of case management issues relating to the Rectification Summons

15. It is obvious that case management decisions in a proceeding which a *Beddoe* Judge authorises a trustee to participate in are matters falling within the purview of the judge presiding over the relevant substantive proceedings.
16. The usual practice clearly suggests that a separate Judge from the *Beddoe* Judge should deal with the costs of substantive proceedings in relation to which *Beddoe* directions have been given. The A Beneficiaries' counsel aptly relied upon '*Lewin on Trusts*' at paragraph 48-133 as to the separation of judicial roles. However, *Lewin* (at paragraph 48-137) does point out that prospective costs orders can be made in exceptional circumstances:

"...it is only where the judge hearing the application is satisfied that the judge at the trial could properly exercise his discretion only by making an order in accordance with the proposed prospective costs order that the order will be made."

17. The Applicants, on the other hand, seek cost protection orders in relation to the proposed Rectification Summons within the *Beddoe* process.

Findings

The need for a counter argument

18. There is no automatic need for a counter argument in relation to rectification applications under Cayman Islands law. My provisional assumption (set out in my 11 December 2023 Ruling) to contrary effect was not justified.

The appropriate party to advance any counter argument which might be required

19. The G Trust is a STAR Trust. The Enforcer is responsible for enforcing the Trust under the special statutory regime. In these circumstances, there is no proper basis for assuming that the B

Beneficiaries, by virtue of their status as beneficiaries, would be appropriate parties to advance counter arguments in the context of the Rectification Summons.

The appropriate forum for the determination of case management issues relating to the Rectification Summons

20. I was provisionally inclined to accept the invitation of counsel for the B Beneficiaries to prospectively assign the task of presenting counter arguments at the expense of the Trust on the assumption that it was clear that:
- (a) counter arguments would be required as a necessary part of the application; and
 - (b) the B Beneficiaries were appropriate parties to advance such arguments.
21. Each of these assumptions having been displaced, there is no discernible basis on which the *Beddoe* Court could properly usurp the jurisdiction of the Rectification Court to determine all case management issues arising in relation to the Rectification Summons. Such issues would include whether counter arguments are required at all, who should advance them and what costs order should be made.



**THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT**