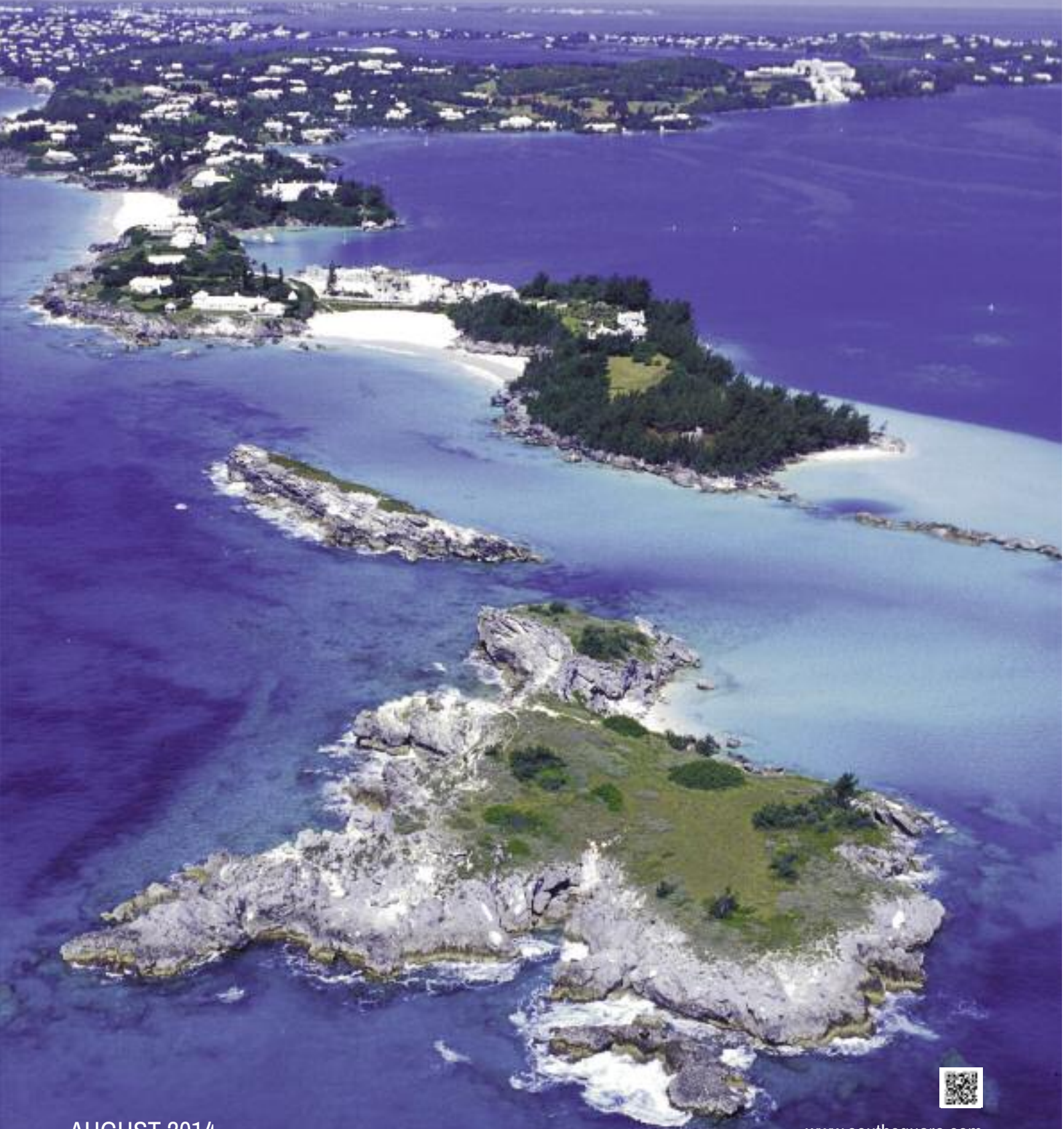


SOUTH SQUARE DIGEST

A REGULAR REVIEW OF NEWS, CASES AND ARTICLES FROM **SOUTH SQUARE BARRISTERS**



AUGUST 2014

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AUGUST 2014



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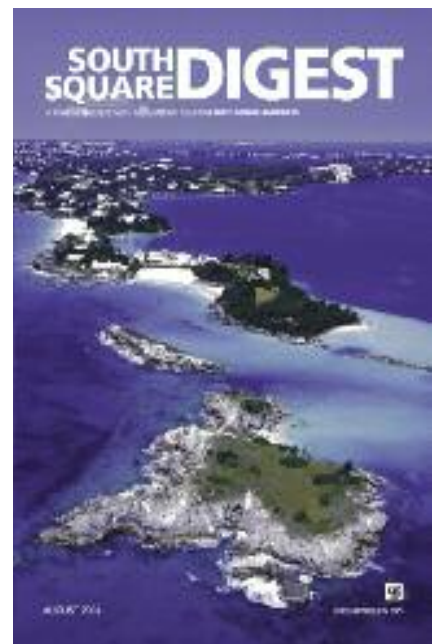
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The Islands that could - and do

Recent developments in Bermuda by **Robin Mayor**, of Conyers, **Kiernan Bell** of Appleby and **Andrew Martin** of MJM

Bermuda has long punched above her weight – home of the third largest reinsurance market in the world, the country has a global reach, providing a home to considerable intellectual capital and established expertise in providing first-class financial services. While Bermuda, like all financial centres, has suffered in the global financial crisis, Bermuda has not rested on her laurels, but instead is leveraging off her well-earned reputation for stability and strong regulation to create a compelling case for new markets looking for a home. This summary highlights what's new in Bermuda, in business, law reform and in the courts, with commentary from across industry sectors.

Highlights

Significant developments in the past twelve months in Bermuda have included:

■ An increase by over 17% in new incorporations in 2014 over 2013, the largest increase since 2008. Reporting to the Bermuda Legislature in March 2014, Minister of Education and Economic Development Dr Grant Gibbons stated “The figures speak for themselves. They show quantitative evidence that there is growth and renewed confidence in Bermuda as a

place to do business”.

■ Bermuda has successfully leveraged its regulatory environment and infrastructure to dominate the insurance and capital markets sector, developing insurance linked securities (ILS) and related bond products. Now known as the “the World’s Convergence Capital” Bermuda is the market leader with the number of ILS listings on the Bermuda Stock Exchange reaching US\$10.09 billion at the end of the first quarter in 2014, “which represents almost half the outstanding market for catastrophe reinsurance bonds,” according to Greg Wojciechowski, Chairman of the Bermuda Stock Exchange. The number of ILS listings has grown to 83, as at the end of March 2014.

■ Merger and acquisition activity in 2014 increased by 51% compared to 2013, involving 96 transactions, with an average transaction size of US\$111 million. “Bermuda companies acted as acquirers in 50 transactions worth US\$22.22 billion, which marked the highest acquirer average deal value across jurisdictions, of over just US\$400 million” according to Tim Faries, group head of Corporate Commercial at Appleby. There were

34 IPOs in the first quarter, worth a total of \$11.7 billion, and the average of this quarter’s IPO values has only been greater once before in the last decade.

■ Endurance Specialty Holdings Ltd is currently mounting a well-publicised hostile bid for the shares of Aspen Holdings Ltd for an acquisition price of US\$3.2 Billion in cash and share equivalents.

■ In March 2014 Bermuda became home to the first African catastrophe insurance pool, a mutual established by several African nations to provide drought coverage for Kenya, Mauretania, Mozambique, Niger and Senegal. Henry Rotich, Kenya’s Cabinet Secretary for the National Treasury said: *“Droughts undermine our hard-won development gains, just as Africa is beginning to realise its vast potential. ARC will help build resilience among vulnerable populations, protect our agricultural investments, thereby increasing productivity, as well as promoting fiscal stability by preventing budget dislocation in a crisis.”* Nigeria’s Finance Minister OkojoIweala, Chairman of the ARC Agency Board, said *“It is an unprecedented way of organising ourselves with our partners, with Africa taking the lead—taking our collective destiny into our own hands, rather than relying on the international community for bailouts.”* The insurance policies issued by ARC will

provide approximately US\$135 million in drought direct insurance coverage, and US\$55 million in reinsurance cover. The structure is believed to be the first of many potential structures of a similar type which will be capable of bringing relief to populations in areas of the world which are prone to suffer from weather related disasters.

■ In April 2014 the US investment and advisory company FRMO Corporation acquired a 37.5% stake in the Bermuda Stock Exchange (“BSX”). *“Bermuda’s honoured legal and regulatory environment is time tested, making it a very attractive country for offshore investors”*, according to Murray Stahl, Chairman of The Elmsford, a New York based investment company, now the biggest shareholder in the BSX. The BSX is the leading electronic offshore securities market. The BSX is a full member of the World Federation of Exchanges, affiliate member of IOSCO and is recognised by the SEC as a Designated Offshore Securities Market; the UK

Bermuda has successfully leveraged its regulatory environment and infrastructure to dominate the insurance and capital markets sector

FCA as a Designated Investment Exchange, the HK HM Revenue and Customs as a Recognised Stock Exchange. In addition it has approved Stock Exchange status under Australia’s Foreign Investment Fund (FIF) taxation rules; and a Designated Exchange status by the Canadian Ministry of Finance.

■ London-based investment managers Securis Investment Partners LLP, the fifth or sixth largest ILS firm in the world, and the largest in London, established a physical presence in Bermuda in April 2014 to take advantage of Bermuda’s dominant position in the ILS market and its ready access to North American

markets. *“There is still plenty of room for growth—70 percent of catastrophe losses are uninsured”*, says Mr Rob Procter CEO of Securis. *“We have a great business in London, but ultimately you have to be in Bermuda as well.”*

■ The Investment Funds Act 2006 (the “IFA”) was recently amended to give qualified new and existing investment funds the option to register with the Island’s integrated financial services regulator, the Bermuda Monetary Authority in one of two new exempted fund categories:

- (i) Class A Exempt Funds (“Class A Funds”); or
- (ii) Class B Exempt Funds (“Class



WATERLOO HOUSE: BERMUDA HAS NOT RESTED ON HER LAURELS, BUT INSTEAD IS LEVERAGING OFF HER WELL-EARNED REPUTATION FOR STABILITY AND STRONG REGULATION



ROBIN MAYOR OF CONYERS

B Funds”).

The new exempt fund classes enable same day incorporation and regulatory certainty. Class A Exempt Funds (funds that have an investment manager regulated by the BMA, or a recognised regulator (such as the SEC) or have at least \$100 million in assets under management) can launch the exemption notification with the BMA. A secondary option of Class B Funds similarly preserves flexibility and speed for fund managers that do not meet the Class A Funds requirements. The bottom line is that Bermuda provides fund and asset managers with the option to create an investment fund in a stable jurisdiction with a blue chip reputation quickly and cost effectively.

■ Bermuda has recently established the Bermuda Business Development Agency (‘BDA’) (www.bermudabda.com) a centralised non-profit corporation aimed at growing and developing Bermuda’s international business. The BDA supports and provides a framework for collaboration between industry and government to drive economic

growth and provides strategic direction to the jurisdiction’s efforts.

■ Bermuda’s Offshore financial services industry directly or indirectly supports over 100,000 jobs in the UK, and 355,000 jobs in the US.

Tax Information Exchange Agreements

To date, Bermuda has signed 41 Tax Information Exchange Agreements (TIEAs) with various countries globally, with more under negotiation, including every member of the EU that is a signatory to the Multilateral Convention on Mutual Assistance in Tax Matters, with the exception of Greece, Lithuania, Romania, Slovenia, and Spain. Bermuda most recently signed a TIEA with Poland in November 2013, and has concluded negotiations and is awaiting signature of TIEAs with Greece and Spain.

The legislation underlying the enforcement of TIEAs in Bermuda was modified in 2013 to make court challenges to production orders simpler and speedier.

Bermuda’s business model values the benefits of compliance with international standards and international cooperation on crime, regulatory and tax matters.

“It is clear Bermuda is not a tax haven ... Bermuda’s main financial services are about the provision of high-quality, good value, well-regulated and well-regarded insurances and reinsurances to the wider world”

said Governor of Bermuda, George Fergusson, in an interview with Insurance Day in June 2013.

FATCA

Bermuda negotiated and entered a Model II IGA with the United States on FATCA (the Foreign Account Tax Compliance Act) determining that this best meets the interests of the financial services industry and the country. The Model II IGA with the US requires financial institutions in

Bermuda to identify and annually report information about US persons directly to the IRS. Bermuda is not the only international financial centre to adopt a Model II approach – Hong Kong recently followed Bermuda, Switzerland and Japan in negotiating an IGA Model II. The Bermuda Government also negotiated and entered a Model II IGA with the UK government. The advantage is that unlike a Model I IGA, the Bermuda Government will not be required to introduce extensive legislation or regulations. As such Bermuda-based FFIs currently have all that they need to take steps to comply with the requirements of FATCA. This should reduce costs and ensure that Bermuda based FFI’s have direct control over data and where and to whom it is reported.

Multilateral Convention on Mutual Administrative Assistance in Tax Matters

In addition, Bermuda became a signatory to the Multilateral Convention on Mutual Administrative Assistance in Tax Matters in March 2014, which has over 60 participating countries. This greatly expands Bermuda’s reach, and enables the authorities in Bermuda to co-operate with a much wider number of onshore jurisdictions. In an era of transparency in tax matters, multilateral participation in tax matters is seen as essential to develop trade and commercial links with all major onshore financial centres.

Legislative Reform

The BDA through its Corporate & Commercial Legislative Change Committee, and the Trust Legislative Change Committee, has sponsored proposals for law reform intended to maintain Bermuda’s reputation as a modern, relevant, innovative and well-regulated jurisdiction. Amendments to the Investment Business Act 2006 establishing new solutions for same-



BERMUDA'S SESSIONS HOUSE

day investment fund formations, and removing regulatory uncertainty, have been implemented, making Bermuda more attractive as a domicile to investment managers and investment funds. A recent amendment to the Companies Act has added flexibility for companies wishing to alter their capital structure and an amendment to the Life Insurance Act makes it clear that the Act will apply to life policies expressed to be governed by Bermuda Law, even if made outside the jurisdiction. Future amendments to Partnership and Trustee legislation are in the pipeline to respond to the needs of international commerce.

Trusts (Special Provisions) Amendment Act 2014

A new Act has been passed to amend the existing law in Bermuda to clarify and expand the extent to which a settlor may reserve powers to himself. These powers now include the power to revoke the trust, amend or advance or distribute trust property (amongst others), and it is expressly provided that such powers shall not invalidate the trust or prevent it taking effect according to its terms or cause the

property to revert to the estate of the settlor. This is to make the use of Bermuda trusts more flexible and to correspond more closely with the wishes and expectations of certain prospective settlors to whom a greater say in the management and application of trust assets may be a determining factor in the decision to settle a trust.

The Regulator

In addition, Bermuda's regulator, the Bermuda Monetary Authority ("BMA"), continues to enjoy its well-deserved reputation as a blue chip regulator of a significant international financial centre. The BMA is a full member of the International Organization of Securities Commissions (IOSCO) and a founding member of the International Association of Insurance Supervisors (IAIS).

In more recent news, the BMA entered a Memorandum of Understanding with Germany's financial regulator, the Federal Financial Supervisory Authority (BaFin), in relation to the European Union's Alternative Investment Funds Manager's Directive (AIFMD). This is

the BMA's 27th accord under the AIFMD, which provides for mutual assistance between supervising managers of alternative investment funds who operate on a cross-border basis in their respective jurisdictions. The fact that the BMA has entered so many accords with other regulators is testament to the BMA's international reputation. MOUs such as this enable Bermuda-based fund managers to market their products in these jurisdictions. CEO of the BMA, Jeremy Cox said: *"Marking this milestone also serves to reinforce Bermuda's competitive position as a jurisdiction that can accommodate a full spectrum of fund-related activity within an internationally recognised regulatory framework"*.

Bermuda's Commercial Courts

Bermuda has a designated commercial court with experienced commercial judges who routinely consider cases of considerable complexity and significance. The commercial court judges (presided

Members of Chambers who have advised in relation to cases in Bermuda in the last 5 years

Michael Crystal QC
 Gabriel Moss QC
 Richard Sheldon QC
 Richard Hacker QC
 Robin Dicker QC
 William Trower QC
 David Alexander QC
 Barry Isaacs QC
 Felicity Toubé QC
 Mark Arnold QC
 David Allison QC
 Richard Fisher
 Stephen Robins
 Marcus Haywood
 Henry Phillips

Judges of the Court of Appeal

The Rt. Hon. Edward Zacca OJ, President
 The Rt. Hon. Sir Anthony Evans
 The Rt. Hon. Sir Robin Auld
 The Rt. Hon. Sir Scott Baker
 The Rt. Hon. Patricia Dangor
 The Rt. Hon. Sir Maurice Kay

Supreme Court Judges

Hon. Chief Justice Dr Ian Kawaley
 Hon. Mrs Justice Norma Wade-Miller
 Hon. Mrs Justice Charles-Etta Simmons
 Hon. Mr Justice Carlisle Greaves
 Hon. Mr Justice Stephen Hellman

Assistant Justices

Narinder K. Hargun
 John Riihiluoma

over by Bermuda’s well known Chief Justice Dr. Ian Kawaley) is known for robust but equitable case management for matters listed before the court, resulting in speedy hearings and promptly rendered decisions. Recently the Bermuda Courts at both the Supreme Court and the appellate level have issued a number of significant decisions at least two of which are subject to appeal to the Judicial Committee of the Privy Council, Bermuda’s highest appellate court which sits in London, England. Many of these cases are attracting international attention as the decisions involve matters of important legal principle which will create precedent in other offshore common law jurisdictions.

Trust Cases

***In the Matter of an Application for Information About a Trust* [2013]**

CA (Bda) 8

The case concerned disclosure of information in relation to a Bermudian trust and the court’s role

when the trust deed contained a disclosure mechanism. The trust deed contained a provision requiring the consent of the protector to disclosure. The protector, who was also one of the beneficiaries, had refused to provide her consent to disclosure sought from the trustee by another beneficiary. The Supreme Court of Bermuda and Bermuda Court of Appeal decided that the court retained the power, by virtue of its overriding supervisory jurisdiction, to order disclosure notwithstanding the disclosure mechanism. The case is subject to an appeal to the Privy Council.

***Stiftung Salle v Butterfield Trust* [2014] Bda LR 13**

This case concerned the giving of money to fund the construction of a new opera house for Lucerne, Switzerland. The court’s decision was that, as a matter of Swiss law, a valid and enforceable contract existed to provide money to fund the construction of the opera house, although various claims under Bermuda trust law were rejected. The case is important primarily for the (obiter) finding that litigation funding agreements are valid and enforceable



ANDREW MARTIN OF MJM

in Bermuda and the tentative (and again obiter) finding that funding costs are not recoverable from the defendant as damages.

***GHIJ v KL & Others* [2011] SC (Bda) 23**

This case was the first reported decision on s 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 s 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 ability 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.

***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.



KIERNAN BELL OF APPLEBY

In *Re ABC Trust* [2012] SC (Bda) 65 Civ,

The perpetuity period in Bermuda was abolished prospectively (save for 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. This decision shows the willingness of the Bermuda court to be flexible and ensure that trusts are administered on a modern and efficient basis.

Cross-border insolvency

PwC v Saad Investments Company Limited and Singularis Holdings Limited (2013) CA (Bda) 7 Civ International insolvency has also been at the forefront of litigation news with the *Saad Investments Company* and *Singularis Holdings* cases being heard by the Privy Council in May 2014. A judgment is expected shortly which will clarify Bermuda's insolvency laws, and determine the extent to which the Bermuda court has power to recognise foreign liquidators and allow them to exercise their powers within Bermuda.

The background to the case is the fact that Bermuda legislation does not contain provisions similar to those in section 426 of the English Insolvency Act 1986 expressly permitting assistance to be given to a foreign liquidator. Accordingly, the Bermuda courts have had to be creative in dealing with the effects of foreign liquidations in Bermuda and adapt the common law. A line of local case law in recent years following *Cambridge Gas* established that the Bermuda courts have jurisdiction at common law to assist foreign liquidators and to make production orders against people in Bermuda in aid of a foreign liquidation.

Saad Investments Company and *Singularis Holdings* were both Cayman companies that had been wound up in the Cayman Islands. In addition, an ancillary winding up order had been made in Bermuda against *Saad Investments Company* (on the basis that it was doing business in Bermuda). *Singularis Holdings* was not wound up in Bermuda. The liquidators, having obtained the books and records of the companies from the auditor in Cayman (where the statutory compulsive powers did not enable them to obtain the auditor's working papers), then sought production orders in Bermuda to obtain copies of the auditor's working papers. The auditor was a Bermuda exempted partnership, doing business in Dubai.

The Bermuda Court of Appeal held that there was no jurisdiction under the common law of Bermuda to make a production order in aid of a foreign liquidation against people in Bermuda.

By a majority, the Court of Appeal held that the defendant auditor was unable - in the case of *Saad Investments Company* - to challenge the making of the ancillary winding up order in Bermuda, on the ground that the challenge was out of time. Because the Bermuda court had made an ancillary winding-up order that could

Members of Chambers who have appeared in court in Bermuda or in appeals to the Privy Council from Bermuda in the last 5 years

Gabriel Moss QC
Richard Sheldon QC
Richard Hacker QC
Robin Dicker QC
David Alexander QC
Felicity Toube QC
Stephen Robins

Barry Isaacs QC has also appeared in an arbitration under the Bermuda Arbitration Act.

not be challenged, the court had statutory jurisdiction to make a production order against the auditor in Bermuda and accordingly ordered production of the auditor's working papers.

Auld LJ expressed the view that there was a pressing need for reform to give effect to a more comprehensive system of co-operation in cross-border insolvency cases.

The appeal was heard by the Privy Council in May 2014, and a decision is expected imminently.

Professional Associations

Bermuda's professional organisations are still growing to meet the demands of international business. The Bermuda Bar Association now has 458 members, the Bermuda Institute of Chartered Accountants has 726 members, the Bermuda Branch of the Society of Trusts and Estates Practitioners (STEP) has 238 members, and the local chapter of the Institute of Directors has 118 members, representing a tripling in growth in membership over the last 18 months. 🏢