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A very warm welcome

Jonathan Dunlop introduces the supplement and contemplates Bermuda’s increasing prominence on the global economic stage

From the Editor

I feel privileged to have the opportunity to introduce this Bermuda supplement to the STEP Journal. It is the product of efforts from across Bermuda, and elsewhere, as you will see from our contributors. On behalf of our STEP branch, I would like to thank our writers and our sponsors. I would also like to thank the Bermuda Association of Licensed Trustees (BALT) and Bermuda’s Business Development Association (BDA) for co-sponsoring this publication, along with STEP Bermuda.

In recent years, members of the Bermudian trust and private client industry have started working together to develop, improve and market Bermuda. Their efforts have been decidedly successful. We have new legislation. We sponsored the STEP Private Client Awards 2013/14 in London, the Transcontinental Trusts 2014 conference in Geneva, and the STEP LATAM Conference 2014 in Mexico City this year, and we are in the process of developing plans to expand our reach further into Asia in 2015.

Changes in the world economy in recent years have led to an expansion in Bermuda’s global profile. While we continue to value established markets in the US, the UK and Europe, Bermuda is increasingly attracting business from Asia and Latin America. The quality and reliability of Bermuda’s regulatory structure, coupled with its proximity to the US, makes it a valuable international partner in the world economy. And Bermuda’s stable legal environment reflects the jurisdiction’s close relationships with the UK (the Privy Council in London being our final court of appeal) and thus offers familiarity and predictability to the international business community.

The trust industry has worked closely with government over the past year on a range of legislative reforms. New legislation on settlor reserved powers and a statutory Hastings-Bass rule has recently come into force, and it will allow us to better serve families in regions beyond our traditional markets, as discussed in this supplement. I had hoped for an opinion piece from one of Bermuda’s famous resident Michaels – Douglas or Bloomberg – on the joys of Bermuda’s beaches and rum swizzles. This did not prove possible but we did manage to get an article from another famous Michael, the Hon Michael Dunkley JP, our Premier, and a strong supporter of our industry. Premier Dunkley opened our local STEP conference two years ago and we hope to welcome him back in future.

Bermuda is lucky to have many supporters around the world. Our hope is that, with this publication, those STEP members who are not already aware of Bermuda’s charms and sophistication will become interested in how we are adapting to a new business environment, and how we can do business together.

I have worked in the trust industry since 1994. The changes since then are too many to list here. Many, but not all, have strengthened our industry. For smaller international centres, the future is about quality and reputation. We have a long, proud history of providing sophisticated and innovative financial and professional services to international businesses and families, and we hope and expect that to continue long into the future.

Jonathan Dunlop
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Contents

04 Open for business
Michael Dunkley, Premier of Bermuda, on reforms that will keep the jurisdiction at the head of the pack

06 Hastings-Bass rule reborn
Alec Anderson and Andrew Holden welcome new legislation

10 Super-powered settlers
Alec Anderson examines Bermuda’s innovative legislation on reserved powers

12 Advantage Bermuda
Bermuda’s variation of trusts legislation gives it the edge over England and Wales, write Keith Robinson and Anthony Poulton

14 Asian aspirations
Joe Field explains Bermuda’s appeal for Asian clients

17 Why Asia trusts in Bermuda
Nicholas Jacob on why Asian families are looking offshore

19 Sun, sand and succession planning
Edmund W Graniski, Jr on Bermuda’s offering for Latin American families

21 A cut above
Ross Webber investigates the ingredients that make Bermuda a top trust jurisdiction

22 Islands of opportunity
Penny MacIntyre and Fozeia Rana-Fahy note rising interest in Bermudian commercial property
Open for business

MICHAEL DUNKLEY, PREMIER OF BERMUDA,Explains reforms aimed at keeping
the jurisdiction at the forefront of the offshore world

When we took government on 17 December 2012, our vision was to move
Bermuda forward socially, economically and legislatively, and we have worked extremely
hard towards achieving those goals. Since becoming Premier, I have shared the
message with all of Bermuda that it is my personal goal to do all I can to work towards
laying the foundation for a future that benefits everyone who calls our island
home. Our vision as a government is of a
country working shoulder to shoulder with
our local and global industry partners to
ensure that Bermuda continues to thrive.
While there will always be challenges to
face, we are optimistic about the exciting
signs of recovery that we see in our economy,
including an expanding international
tourism industry.
We understand that, in this competitive,
global environment, the countries that are
aggressive, bold and innovative are the
ones that will succeed. So, for Bermuda to
maintain its success as a premier offshore
jurisdiction, we must be aggressive in
our perpetual quest to entice business
to our shores.
Attracting foreign, direct investment is
essential for our economy, and we have
taken the necessary steps to facilitate such
investment, in part by establishing an
Economic Development Committee
(EDC). The EDC is comprised of myself
and other key government ministers.
Our mandate is to encourage foreign direct
investment in the island to stimulate our
economy, and to be efficient in processing
the necessary approvals for those
businesses that wish to invest here.

We are encouraged by our success thus
far and view an increase in company
registrations as an offshoot of the efforts of
the EDC. In fact, Bermuda closed 2013 with
a significant number of new insurance
company registrations, ending the year on
a particularly high note. Impressively, the
increase in the number of new company
registrations in 2013 continued into the
first quarter of 2014, with both local and
international new company incorporations
rising 17 per cent compared to the first
quarter of 2013.

Progress on work permits
We have also had significant success in
accelerating the process for work-permit
approvals, planning approvals and
company formations, to name just a
few achievements.
It is noteworthy that, over the past
several months, the government has
worked diligently to introduce reforms to
the work-permit policy to assist in building
confidence in Bermuda. These work-
permit policy reforms are designed to
simplify and enhance the ability of
companies to attract and retain key
employees.
Some highlights of the reforms include
the development of ‘special category work
permits’, out of which have evolved the
‘global work permit’ and the ‘new business
work permit’. The global work permit is
designed to assist global companies to
move employees throughout their
organisation, including to Bermuda, with
ease. The new business work permit allows
international companies new to Bermuda
to receive, in a streamlined fashion, up to
five work permits for overseas recruits for
senior executive positions.

Feedback from the business community
has been positive, as the changes provide
greater clarity and certainty for businesses
operating in Bermuda. This is critical, as it
puts to rest any long-term human-resource
planning concerns and reinforces the
clear message that Bermuda is open for
business. The end result is not only to
increase Bermuda’s competitiveness
as an offshore jurisdiction, but also to
stimulate our economy, which in turn
facilitates job creation. Ultimately, these
elements ensure a successful Bermuda
for all.

Setting standards
Bermuda’s position at the forefront
of the offshore world is reinforced by
its involvement in the global standard-
setting process. For example, the island
is a vice-chair of the OECD Global Forum
on Transparency and Exchange of
Information for Tax Purposes; it wields
influence within the International
Organization of Securities Commissions;
and it also works closely with the
International Financial Centres Forum.
Offshore centres have had to work
hard to ensure that policy-makers onshore
truly understand their business model,
their role in the global financial system
and their adherence to international
standards. Now there are signs that
the message is starting to get through.
For example, Bermuda’s recent stellar
review by the OECD’s Peer Review
Group demonstrates the jurisdiction’s
progress and leadership in tax
transparency, something also illustrated
by its bilateral and multilateral tax
information exchange agreements
(TIEAs) with 80 countries.
Bermuda’s sophisticated and well-established infrastructure continues to make it one of the largest and most successful offshore jurisdictions in the world.

CONTINUED SUCCESS

Bermuda continues to maintain its position as an attractive, sophisticated and well-regulated jurisdiction for international high-net-worth private clients. With an independent, stable legal and judicial system, and regular and innovative reforms of its trust laws, Bermuda’s trust legislation is modern and facilitative of succession planning and asset protection.

Its sophisticated and well-established infrastructure continues to make it one of the largest and most successful offshore jurisdictions in the world.

From a global perspective, the jurisdiction continues to be actively engaged in the appropriate places, in the appropriate forums, and in the appropriate manner to share the Bermuda story. This is important both in terms of preserving existing jobs and developing the platform on which to build new jobs in the future.

Bermuda welcomes the contribution that STEP, as the leading worldwide professional body dealing with family inheritance and succession planning, makes to this island. Positive industry partnerships are, and will continue to be, critical to our overall success.

You can rest assured that this government recognises the importance of nurturing and protecting our business and professional relationships with our industry partners, and we will continue to partner and collaborate with you, and take the necessary actions to promote the fact that Bermuda is open for business, ensuring that everyone who calls Bermuda home benefits.
Court in Pitt v Holt; Futter v Futter, it followed the decision of the UK Supreme Court in Mettoy Pension Trustees Ltd v Evans. What the learned judge did in that case was to extract a principle that had not been drawn from the Hastings-Bass case at all. However, this new jurisdiction was taken up at first instance, not only in England and Wales but also in common-law jurisdictions worldwide. Over 20 years, the rule in Re Hastings-Bass was developed into a flexible jurisdiction permitting the court to undo the consequences of decisions made by trustees based on incomplete or flawed information.

At the same time as it was being deployed in common-law courts the world over, the rule in Re Hastings-Bass came in for trenchant criticism, most famously in an article by Lord Neuberger in which he compared an application of the rule to ‘Doctor Equity’ administering a ‘magical morning-after pill to trustees suffering from post-transaction remorse, but not to anyone else’.

Following criticisms of this nature, it is perhaps no surprise that, in the conjoined Pitt and Futter appeals, the UK Supreme Court decided to return to the orthodox principle that, while powers exercised in breach of fiduciary duty may be susceptible to challenge by beneficiaries, there is no wider common-law principle enabling the court to reverse the flawed exercise of a fiduciary power.

THE RULE RECALLED TO LIFE
The decision in Pitt v Holt may have been a triumph for legal orthodoxy, but, from a practical perspective, it was arguably a more unfortunate development. For over two decades following the decision in Mettoy, courts had been able to deploy the Hastings-Bass jurisdiction as a simple, cost-effective means of avoiding the damaging consequences of a defective exercise of power by trustees or other fiduciaries.

Put simply, the rule in Re Hastings-Bass was a superior method of undoing trustee errors based on defective decision-making. With the jurisdiction, a trustee could apply to court and, on satisfactory evidence that the exercise of a power had gone wrong and that, had the trustee been properly informed, the power would not have been exercised in that way, the court could step in to restore the status quo. Without the jurisdiction, the remedy for a flawed exercise of a power could only be a hostile application – most probably by
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Many common-law jurisdictions have been unwilling to see the rule in *Re Hastings-Bass* consigned to history, instead deciding it would be better to preserve the rule by placing it on a statutory footing.

beneficiaries – to set aside the exercise due to a breach of trust or fiduciary duty, or alternatively a claim for compensation against the trustee. Such an application would be fraught with difficulty, with modern trust companies relying on encapsulation measures in the trust instrument, and with the defence to any negligence action under the control of professional indemnity insurers. It would also be potentially toxic to the whole trust relationship, as the beneficiaries would be forced to sue trustees for their past mistakes in the exercise of their powers.

Practically speaking, then, the *Hastings-Bass* jurisdiction represented a positive development: a pragmatic replacement of hostile litigation with a jurisdiction that enabled trustee errors to be corrected simply and consensually.

For this reason, many common-law jurisdictions – particularly those with well-developed and sophisticated trust industries – have been unwilling to see the rule in *Re Hastings-Bass* consigned to history, and instead have taken the policy decision that it would be better to preserve the rule by placing it on a statutory footing. The first jurisdiction to do this was Jersey, and now Bermuda, by the Trustee Amendment Act 2014 (TAA 2014), is also reintroducing the *Hastings-Bass* jurisdiction in statutory form.

**ANALYSIS OF THE ACT**

The TAA 2014 gives the court a new statutory jurisdiction that is intended to replicate the court’s jurisdiction under what might now be called the ‘classic rule in *Re Hastings-Bass*’.

The jurisdiction is triggered when two conditions are met:

- First, ‘in the exercise of a power, the person who holds the power did not take into account one or more considerations (whether of fact, law or a combination of fact and law) that were relevant to the exercise of the power, or took into account one or more considerations that were irrelevant to the exercise of the power’.

- Second, ‘but for his failure to take into account one or more such relevant considerations or his having taken into account one or more such irrelevant considerations, the person who holds the power would not have exercised the power, or would have exercised it but on a different occasion or in a different manner’.

If these conditions are met, then the court has a discretion to set aside the exercise of the power in whole or in part, and either unconditionally or on terms.

While the jurisdiction will not be exercised where to do so would prejudice a bona fide purchaser for value of trust property, and is otherwise intended to be subject to the usual rules regarding the grant of equitable relief; the jurisdiction is extremely flexible, allowing the court to undo the exercise of fiduciary powers based on flawed or incomplete information.

Importantly, the new legislation does not force the court to act: it merely confers a new tool for those instances where something has gone wrong in the exercise of a fiduciary power. While the purpose of both the Jersey and the Bermuda laws is the same – to enshrine the *Hastings-Bass* jurisdiction in statute – the new Bermudian legislation has some interesting and distinctive features. To give just two examples:

- The Bermudian Act gives the court jurisdiction to set aside the exercise of ‘fiduciary powers’, a term that is defined in the Act. Thus, the new statutory jurisdiction in Bermuda would be available in relation to powers exercised by non-trustee fiduciaries. The jurisdiction would appear to be wider than its Jersey counterpart, which applies only to the acts of trustees and those exercising a power ‘over or in relation to a trust or trust property’. Considering that one of the most notable cases on *Hastings-Bass* – *Pitt v Holt* itself – concerned a power exercised by a non-trustee fiduciary (a receiver under mental-health legislation), this broader scope arguably replicates the *Hastings-Bass* jurisdiction more accurately.

- Under the Bermudian legislation, the court is given the discretion to ‘set aside’ the exercise of a power. To the extent that the exercise of a power is set aside, ‘the exercise of the power shall be treated as never having occurred’. By contrast, the Jersey court is empowered to ‘declare that the exercise of a power... is voidable and... has such effect as the court may determine or... is of no effect from the time of its exercise’. The relief available under the Jersey law is potentially very wide: if the exercise of a power can have ‘such effect as the court may determine’, is it possible that the court could decree that the flawed exercise of a power may have some different effect, perhaps even the effect that the trustees originally intended? By contrast, the relief available in Bermuda is potentially narrower but more straightforward: if a power is set aside, then, to that extent, it is treated as never having been exercised.

The precise nuances of this new jurisdiction will be revealed only when it is analysed and applied by Bermuda’s Supreme Court. The court is being given a new discretion; while it will doubtless be exercised judicially, and only where it is just in all the circumstances to do so, the discretionary nature of the jurisdiction makes it impossible to say when and how it will be applied in practice. What is certain, however, is that Bermuda’s courts have just been given a flexible new tool for those instances where something has gone awry in the exercise of a fiduciary power.

5. TAA 2014, s2
6. Ibid
7. Ibid
8. Ibid
9. See the explanatory memorandum
10. Trusts (Amendment No.6) (Jersey) Law 2013, s1
11. TAA 2014, s2
12. Trusts (Amendment No.6) (Jersey) Law 2013, s1
13. Again, this mirrors the classic rule in *Re Hastings-Bass* see Broadnax v Granville-Grossman [2001] Ch 523

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The reservation or grant of certain powers by settlors has always been possible under Bermuda's trust law but, historically, there was some uncertainty about exactly how far settlors could go without calling the validity of the trust structure into question. The recently passed Trusts (Special Provisions) Amendment Act 2014 (TAA 2014) now provides statutory clarity and certainty in this area.

The TAA 2014 expressly lists certain interests and powers that can be retained by a settlor or granted to a third party (e.g. a protector or beneficiary) without thereby prejudicing the validity of a trust. It also clarifies that the retention or grant of these powers, and interests, will not cause the property in the trust to become part of the settlor's estate. Introducing certainty in this area distinguishes Bermuda from some of the other major offshore jurisdictions.

The concern for lawyers who previously sought to reserve extensive powers to settlors was that the intended transfer of trust assets might be interpreted as a testamentary disposition under the Wills Act 1988 with the consequence that assets remained in the personal estate of the purported settlor. Generally, the new law paves the way for the creation of valid trusts where the settlor may retain (or grant to a trusted family friend, protector or beneficiary) a fairly large degree of control over the wealth settled on trust, providing international settlers with the flexibility they seek.

The TAA 2014 expressly states that any and all of the following interests or powers can be reserved by the settlor, or granted to a third party:

- in the case of a reservation to the settlor or other donor of trust property, a power to revoke the trust in whole or in part;
- a power to vary or amend the terms of a trust instrument or any of the trusts, purposes or powers arising thereunder in whole or in part;
- a power to decide on or give directions to advance, appoint, pay, apply, distribute or transfer the trust property;
- a power to act as, or give directions as to the appointment or removal of, directors or officers of companies owned by the trust, or to direct the trustees how to exercise voting rights with respect to the shares of such companies;
- a power to give directions as regards investments or the exercise of any powers or rights arising from such trust property;
- a power to appoint, add, remove or replace any trustee, protector, advisor or other office holder or advisor;
- a power to add, remove or exclude any beneficiary, class of beneficiaries or purpose;
- a power to change the governing law and the forum for administration of the trust; and
- a power to restrict the exercise of any powers, discretions or functions of a trustee by requiring that they shall only

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1. Which include, inter alia, power to revoke and a general power of appointment.
2. It must be a ‘limited beneficial interest’; otherwise beneficial and legal ownership has not been bifurcated into trust.
3. The requirement for certain formalities to create a valid testamentary disposition was of particular concern in this context.
4. Settlor is defined, in this part of the TAA 2014, to include a testator who grants powers under a testamentary trust and a person who declares a trust over assets held beneficially by that person (subsection 2A(8)).
5. Subsection 2A(1)(a) and (b)
6. Subsection 2A(2)
7. Subsection 2A(6)
8. We believe this approach is unique in the offshore world, but note that Guernsey provides automatically that all such powers are non-fiduciary, subject to the terms of the trust.
9. Subsection 2A(7)
be exercisable with the consent, or at the direction, of a person or the persons specified in the trust instrument.

This is a very wide suite of powers, but it is comparable to similar lists found in parallel statutes in the Cayman Islands, Jersey, Guernsey and some other offshore jurisdictions. It may be that Bermuda has a slightly wider list than a few other jurisdictions, but there is not much in it.

THE POWERS’ EFFECT ON TRUSTEE DUTIES AND LIABILITIES

The TAA 2014 makes it clear that trustees will not be in breach of their fiduciary or equitable duties for complying with the valid exercise of the powers listed in the Act.

The TAA 2014 also provides that no person (unless formally appointed as trustee and holding a vested interest in trust property) will be deemed to be a trustee by reason only of the grant or reservation of any of the powers specified in the TAA 2014. This helps avoid the unintended consequences of settlors or protectors being deemed to be trustees by virtue of their control over the trust property, which could mean that the tax residence or situs of a trust could be deemed to be a high-tax jurisdiction. It could also mean that certain duties could apply to the relevant settlor or other power-holder unexpectedly. Many of the other offshore jurisdictions do not expressly clarify this point.

PREMISES ON WHETHER A POWER IS FIDUCIARY

The TAA 2014 also clarifies that the terms of a trust deed governed by Bermudian law may expressly provide that the person who holds the powers listed in the Act shall not be subject to a fiduciary duty. This approach (unique to Bermuda) is useful where, for example, powers are being given to protectors who may be trusted family friends and on whom there is no desire to impose strict fiduciary standards of liability. For example, if the settlor is a beneficiary and holds a power to appoint trustees, it may well be desirable and reasonable that the settlor be able to exercise that power either for their own benefit or at least without the exercise being subject to review by the beneficiaries in court from a fiduciary duty standpoint. After all, it is the settlor’s property that is gifted into trust, and therefore it should be subject to such conditions as they may dictate. This approach reinforces the public policy in favour of freedom of disposition of one’s property.

Uniquely, the TAA 2014 provides certainty by creating statutory presumptions on the fiduciary nature of the reserved powers. The new presumptions apply to Bermuda trusts created after the new legislation comes into force and are subject to overriding contrary intention in the trust instrument. For such new trusts only, it shall be presumed that:

- if the powers are granted to a beneficiary or reserved by a settlor, those powers will be personal and non-fiduciary (as long as the power-holder is not the sole trustee); and
- in any other case, the powers will be fiduciary.

These provisions will appeal to clients from jurisdictions that do not recognise trusts, since such clients are often unfamiliar with the trust concept and reluctant to release full control over assets to trustees.

By setting out presumptions, Bermuda’s amended legislation not only creates certainty, but also flexibility, since the presumptions can be overridden by express terms in the trust.

LIMITING TRUSTEES’ DUTIES

Another innovative and progressive provision adopted under the TAA 2014 is the power of appointment, which allows the settlor to choose, in limited circumstances, to limit the persons to whom trustee duties are owed to the power-holder (during their life). The subsection provides that, where a person holds a power to revoke, a general power of appointment, or the present beneficial interest, the trust instrument may provide that, for so long as the settlor, beneficiary or other holder of the power is not the sole trustee, the trustee will owe no duty to any other person in relation to that part of the trust property affected by the powers or interest referred to above. A similar provision is contained in the California Probate Code and US Uniform Trust Code.

This is rare in the offshore trust world but logical in some cases when designing trust terms.

With regard to the ‘present beneficial interest’ test, the intention here is that, where a beneficiary is the sole lifetime beneficiary of a trust, the fiduciary duties with respect to that trust property can reasonably be limited to that beneficiary if the settlor so wishes. This sort of provision is commonplace in the US trust and estate practice, as regards certain versions of the grantor trust form.

Subsection 2A(4) may have the effect of enabling trustees to limit disclosure of trust information and accounting to the relevant beneficiary and/or settlor who holds the power to revoke or general power of appointment.

In the case of the general power of appointment, this provision de facto categorises the power-holder as the primary beneficiary of the trust, even if it is technically possible that that person might not be within the otherwise defined class of beneficiaries. This is logical since the person holding a general power of appointment is in a position of control and, for bankruptcy purposes, it is arguably tantamount to ownership.

CONCLUSION

These new legislative provisions will render Bermuda trusts more attractive to the international settlor. In particular, they will appeal to clients from jurisdictions that do not recognise trusts, since clients from such jurisdictions are often unfamiliar with the trust concept and reluctant to release full control over their assets to trustees.

The new legislation provides clarity as to what interests and powers can be retained or granted to third parties. It also provides flexibility, where, for example, a settlor wishes to appoint a family member to oversee certain aspects of the trust administration (e.g. monitoring of investment managers), and at the same time ensure that they are absolved of any fiduciary liability.

Bermuda now has the most comprehensive reserved powers legislation of any offshore jurisdiction, emphasising its position as a modern and sophisticated domicile for international trusts.
Bermuda has broadly similar legislation to that of England and Wales dealing expressly with the variation of trusts. Section 48 of the Bermudian Trustee Act 1975 closely mirrors s1 of the Variation of Trusts Act 1958. These provisions allow the court in each jurisdiction to provide consent to a variation on behalf of beneficiaries who are unable to consent for themselves. The Bermudian statute provides further flexibility, however, in s47. This section supplies the court with the jurisdiction to confer upon trustees additional powers even though those powers might result in a variation of beneficial interests.

This article compares s47 with s57 of the Trustee Act 1925 in England and Wales, which, while similar, is narrower in scope. It will be suggested that s47 provides Bermuda with a competitive advantage.

SECTION 57, TRUSTEE ACT 1925
Section 57 authorises the court to confer additional powers on trustees to undertake transactions relating to trust property where the trust instrument does not provide the power for the trustees to do so. The key provision, s57(1), reads as follows: ‘Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power... the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose...’ (Emphasis added.)

The advantage of a s57 application is that, unlike an alternative application under the Variation of Trusts Act 1958, s57 does not require the trustees to obtain the consent of all beneficiaries of full capacity – an expensive and challenging proposition in the case of a large number of geographically dispersed beneficiaries.

The authors would like to thank Andrew Matheson, Associate, Dispute Resolution, Baker & McKenzie, for his assistance with this article.

Keith Robinson and Anthony Poulton explain why Bermuda’s legislation on the variation of trusts gives the jurisdiction an edge over England and Wales.
This does not mean, however, that s57 provides an unqualified and procedurally simple method for obtaining wide-ranging powers. On the contrary, a close reading of the full provision indicates otherwise, and the courts have been careful to safeguard the boundaries of this power.

‘Management or administration’
The first point to note is that s57(1) is limited to the ‘management or administration’ of trust property. This has been held to encompass transactions of trust property additional to those listed in s57, including:
- the partition of a trust where there is no other power to do so;
- the blending of funds bequeathed by different wills to the same trusts;
- the purchase of a tenant for life’s debts encumbering their life interest and providing by insurance for the reinstatement of the fund at their death;
- the sale of trust property which would otherwise have been impossible;
- investment in otherwise unauthorised securities;
- the extension of borrowing powers;
- the authorisation of delegation to investment managers and of holding assets in the names of nominees.

However, the courts appear to have drawn a line at sanctioning the variation of beneficial interests. That said, it is worth noting that the recent cases of Southgate v Sutton [2012] 1 WLR 326 and English & American Insurance Co Ltd [2013] EWHC 3360 demonstrate the court to be willing to retain a measure of fact-dependent powers. On the contrary, a close reading reveals a wide definition of ‘management and administration’, despite it being found in s57 and that have been held to ‘simply on the grounds that it is designed in a way the absence of any power for that purpose vested in the trustees...the court may by order confer upon the trustees...the necessary power for the purpose.’ (Emphasis added.)

The Bermudian provision does not contain the limiting words ‘in the management and administration’ that are found in s57 and that have been held in England and Wales not to permit the variation of beneficial interests. In addition, the Bermudian statute provides in s47(4) an expansive definition of ‘transaction’ that is derived from s64 of the Settled Land Act 1925. Section 47(4) provides that: ‘Where any transaction affecting or concerning any property vested in trustees, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees...the court may by order confer upon the trustees...the necessary power for the purpose.’

Broad jurisdiction
It is this wide definition of ‘transaction’ together with the lack of any limitation to ‘management and administration’ that allowed the Bermudian court in GHIJ v KL (2010) Bda LR 86 to approve an application under s47 that included providing the trustees with the power to vary beneficial interests. Ground CJ noted that s47 was an amalgam of the two English and Welsh statutes and that the lack of any limitation in the Bermudian statute to administrative matters must be presumed to have been deliberate.

The Chief Justice also held that, drawing on case law decided under the Settled Land Act 1925, the definition of ‘transaction’ was ‘very broad’ and allowed the court to approve a reorganisation of the trust in question with certain variations (including to beneficial interests) provided that it was ‘expedient’. In applying the case law under s57 as to the meaning of ‘expediency’, the Chief Justice held there was no limitation in the statute that prevents the sanction of an arrangement simply on the grounds that it is designed in the interests of tax efficiency.

There has now been a second reported Bermudian case on the application of s47. In Re ABC Trusts [2012] Bda LR 89, Kawaiely CJ followed with approval GHIJ v KL and noted that s47 gives the court a very broad jurisdiction indeed to authorise transactions in relation to trust property which have the effect of varying the terms of a trust deed.

CONCLUSIONS
The Bermudian court’s close examination of the derivation of s47 from the 1925 reforms of the law of trusts in England and Wales provides an interesting example of the law of one offshore financial centre taking a dramatic turn. This has provided much-needed flexibility in Bermudian law and a practical mechanism to modernise trusts, while at the same time ensuring careful judicial oversight. In practice, s47 is a powerful tool for the resolution of complex trust disputes and, for the time being at least, it is uniquely available in Bermuda.
Asian aspirations

JOE FIELD TALKS TO HANNAH DOWNIE ABOUT BERMUDA AND ITS APPEAL FOR ASIAN CLIENTS

Although Bermuda is often classified as a ‘Caribbean jurisdiction’, it is 1,200 miles north of the Caribbean, and 600 miles east of the US state of North Carolina. ‘It’s a little like grouping Mexico and South America together as part of the same zone, even though they are separated by great distance, and Mexico, technically, is part of North America,’ Joe Field TEP explains.

‘To me, Bermuda is a very English jurisdiction. If you come from England and you don’t look too far to the horizon, you may think you’re in the Midlands. The customs are much the same and it has a very English feel. It also suffers from cold winters,’ he says.

Joe Field TEP is Of Counsel at Withers Bergman LLP, a winner of the STEP Founder’s Award for Outstanding Achievement in 2011, and a trusted advisor to international high-net-worth families. His work involves structuring the affairs and estate planning of his clients, and it has recently taken him to Asia, where he lived for the best part of five years. Throughout his time there, Joe worked closely with Asian families and businesses.

AN ATTRACTIVE PROPOSITION

For an individual who wishes to establish a ‘safe haven’ for their family in a pleasant and secure place, Bermuda is an interesting and relatively open jurisdiction. ‘Bermuda is attractive to Asian families because it’s stable, it’s secure, it’s in close proximity to the US and it has very good weather – at least for much of the year,’ says Joe. Perhaps one of the biggest draws is the ease with which families are able to stay permanently in Bermuda, and, additionally, the relatively straightforward process of obtaining Bermudian permanent residence. Joe explains: ‘For families from Singapore and China, getting permanent residence can be a magical event.’

Bermuda has a robust legal system and court structure, and a favourable tax system – important factors for families looking to base their financial affairs there. Joe explains that Bermuda has had far fewer problems than a number of other jurisdictions when it comes to issues relating to money laundering, as it has traditionally been highly selective in who it allows to operate in the jurisdiction. ‘Bermuda has never had bearer-share companies or bank secrecy, and is seen by many as the jewel in the crown of Atlantic jurisdictions in terms of security,’ says Joe.

There are also four very substantial advantages to doing business in Bermuda, particularly from a Chinese perspective: ‘Bermuda is only 90 minutes by air from New York; its agreement with the US means that you can clear US customs in Bermuda; its international airport has capacity to take any plane made; and, as mentioned previously, it has friendly laws for foreign visitors who wish to become permanent residents. In fact, I believe Bermuda is trying to create further flexibility in that area.’

Joe believes, however, that Bermuda can do even more to increase its value proposition to the Chinese market. The introduction of legislation allowing gambling would be a start: ‘The appetite for gambling seems to be without limit, particularly for Asian clients. Perhaps Bermuda could look to Monte Carlo or Singapore for inspiration – a couple of discreet casinos here and there – something at the opposite end of the scale from Macau,’ he suggests.

CAPITALISING ON OPPORTUNITIES

Bermuda already benefits from its tourist industry by levying tourism taxes: cruise-ship taxes, a yacht tax, a hotel tax, and so on. However, Joe suggests that perhaps the Bermudian government should turn more of its attention to hotels. The hotel industry in Bermuda has struggled for a number of years due to myriad issues, including labour problems, real estate valuations and visa issues. Joe explains: ‘The hotel industry really needs a shot in the arm; it needs to be a little innovative and creative in attracting new business. Attracting the Chinese makes a lot of sense and it shouldn’t cost a great deal to promote because the infrastructure’s there already.’

Joe isn’t talking about following the Bahamian example of building a 3,000-room
hotel – just three or four modest builds. ‘Local people won’t stand for a large development, plus you have all kinds of environmental issues with building a huge hotel – how much electricity it is going to consume, and water is perennially a problem for Bermuda – but these issues need to be addressed.’

There is, Joe says, another factor to consider: traditionally, the hotel business has been a great source for local employment in Bermuda, but Chinese-speaking employees will be essential if Bermuda wants to cater to Chinese tourists: ‘When you have a Chinese audience that doesn’t speak a word of English, that’s a slightly different equation.’

RISING TO THE CHALLENGE

Of course, Bermuda is also an established trust jurisdiction and home to the insurance industry. There is, at times, a perception that legislative initiatives coming out of the Bermudian parliament tend to be more favourable and protective of the insurance sector than the trust business. Joe, however, notes: ‘I don’t think one is mutually exclusive of the other; Bermuda can promote its insurance business, its tourism business and its trust business. Indeed, in Asia, the demand for trusts seems to be growing dramatically.’

What he does underline are the challenges the offshore trust industry faces in light of the global tax-transparency agenda: ‘I think the entire offshore trust industry is going to have to go through some fairly rigid remodelling as we move forward, because clearly the things that we’d hallmarked as offshore trusts are not the hallmarks of what major governments of the world are looking for.’

Joe predicts the use of offshore trusts will decline in many parts of the world, particularly jurisdictions with aggressive tax-avoidance regimes. But it’s not bad news for Bermuda: ‘As wealth accumulates, I think more people in many parts of Asia and China will set up trusts,’ says Joe. Bermuda’s experienced and established trust industry is ideally placed to administer trusts for Asian and Chinese clients; indeed, Bermuda’s largest trust institutions have done business in Asia for a very long time. In keeping with this theme, Bermuda has recently enacted two important pieces of legislation that deal with some significant trust issues: • the Trustee Amendment Act 2014, which permits the courts to grant relief where a genuine mistake has been made with respect to trust investments (such was the rule until very recently in England and Wales under the Hastings-Bass doctrine); and • the Trusts (Special Provisions) Amendment Act 2014, which permits settlors or certain third parties to retain extensive powers under a trust. Prior to the enactment of this provision, Bermuda followed the English and Welsh rule that, should powers be reserved by a party other than a trustee, the trust might be void. Under the new rule, several powers, including the power to direct investments, can be reserved by the settler, or to certain other named persons under the trust deed.

‘Quo fata ferunt’ (‘whither the fates carry us’) is Bermuda’s motto. The island certainly has fortune to thank for its location and climate, but, with so many opportunities waiting to be seized, why leave everything to fate? ‘I think Bermuda’s a wonderful place and I wish it every success in the world. There are lots of opportunities that can be explored to ensure the success of the jurisdiction. It has a well-educated and extremely enthusiastic population, and I would like to see Bermuda thrive,’ enthuses Joe.

JOE FIELD TEP IS OF COUNSEL
AT WITHERS BERGMAN LLP
With a stable social and political environment, tax-neutrality, a British common-law system, pragmatic regulation, blue chip reputation, and robust, high-tech infrastructure, Bermuda has a sophisticated business ecosystem for the establishment of international trust structures.

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Founded in 1994, the Bermuda Association of Licensed Trustees (BALT) acts as a representative body and forum for all companies licensed by the Bermuda Monetary Authority to carry on trust and related business in Bermuda.
Why Asia trusts in Bermuda

Nicholas Jacob explains why Asian families are embracing fiduciary structures abroad

Many Asian families want, and feel comfortable with, fiduciary structures close to home. Nevertheless, there is clear rivalry for that business between Hong Kong and Singapore. And a number of families feel that structures elsewhere benefit them. Why?

FAMILY AND CULTURAL ISSUES

One of the major issues for Asian families is confidentiality. In certain Asian jurisdictions, this concern arises mainly due to a desire to ensure the personal safety and security of the patriarchs and their families. They do not want others to know who holds the shares and liquid assets in the family business. They are concerned about people moving around between fiduciary offices and spreading information. If the structures are outside Asia, this is less likely to be of concern.

Asian families may also be attracted by the significant skills available in Bermuda, some of the Caribbean islands, and the UK offshore islands, which are more mature than the jurisdictions of Singapore and Hong Kong in this respect. However, Singapore and Hong Kong are catching up fast and, from a skills point of view, there is real rivalry between the Asian jurisdictions and others.

Culturally, one of the main issues is retention of control, as well as the fact that to discuss death is to attract it. The control issue is a major concern; even if a structure is set up outside Asia, a significant degree of control is likely to be retained there, which may prove a structural weakness.

PRIVATE TRUST COMPANIES, RESERVED POWERS AND THE FAMILY OFFICE

Private trust companies (PTCs) are another element in the quest for control, and they are becoming increasingly popular. Although PTCs can be formed in Singapore and Hong Kong, many are formed outside Asia, even if run in Asia (there can be local tax consequences to this). Even if the PTC is formed and run in Asia, the holding vehicle (for instance, a Bermudian purpose trust) will have to be outside, for example, Singapore, as Singapore does not have purpose trust legislation.

Reserved powers are also very common within Asia for the purpose of retaining control.

The family office concept is not well developed in Asia, as much of its wealth is relatively new. There are probably only about 30 single family offices in the region now, although it is anticipated that this number will grow by another 20 or so within the next two or three years. Some families have family offices outside the region, where the concept is more established.

FORCED HEIRSHIP AND OTHER ISSUES

In some jurisdictions, religious considerations may affect the family’s financial affairs and asset allocation, as will local laws such as forced heirship. Many families wish to be freed from the forced heirship rules, and trusts in other jurisdictions often enable them to achieve this.

The expertise available in major centres such as London and New York is important in developing structures for Asian families. Such centres provide better access to service providers in Bermuda, the Caribbean and Europe.

Many of the families’ children will be likely to have studied, worked, have set up subsidiaries, or worked for subsidiaries or branches in other countries. This makes it easier for structures to be held outside Asia. These considerations may become more relevant in the future. However, many Asian businesses will nevertheless seek to have service providers (or relationship officers) within Asia so that they can talk to them easily. Notwithstanding this, ensuring that there is excellent communication with the trustees is of the upmost importance, and regular meetings are essential.
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For families with Latin American roots or other connections to the continent, Bermuda is an excellent jurisdiction in which to base their long-term family governance, succession and management planning.

LATIN AMERICAN FAMILIES

Despite Latin America’s size and huge cultural diversity, I propose that there is a common connection among families on the continent: a desire to grow their wealth over multiple generations. I further propose, as James Hughes suggests in his book *Family Wealth – Keeping It in the Family*, that wealth is based not just on assets, but on the well-being of each family member, in terms of such criteria as education, community participation, engagement in the arts and other factors reflective of the family’s values. Any mechanism and rules for decision-making, if they are to be successful, must reflect those values.

However, modern families face a difficult decision when it comes to choosing the jurisdictional nexus for their overall family and business governance, due to a range of complicating factors, such as same-sex marriages, divorce, children from multiple marriages, adoptions (sometimes from abroad) and *in vitro* fertilization. Latin American families also often include members who reside in different countries, such as the US, Spain or other EU countries. Furthermore, some family members may have a spouse who is not originally from a Latin American country, while other family members living in the US or an EU country may have no future plans to return to their home country. The family may also control or have interests in businesses with operations in several countries, and have property and participate in investments in yet other countries.

So how does a family choose a jurisdiction as the base of their governance, management and succession plans? How can a family measure the success of its plans?

THE BERMUDIAN SOLUTION

Bermuda’s laws (and Bermuda’s community of legal, trust and other professionals who provide a framework for the application of these laws) are attuned to provide:

- the basis for a constitution via which families can provide for the realisation of their members’ potential;
- legal relationships, including trusts, that provide for the long-term succession of the family’s interest in property;
- modern corporate law to support holding companies for home-country and global business enterprises; and
- laws relating to limited partnerships and funds that provide for the management of family investments, including those in traditional and non-traditional investment vehicles.

Together, the laws are sufficiently comprehensive to provide a family with the tools for successful governance, long-term management and succession. Furthermore, and equally importantly, the legal, trust and professional community generally displays forward and empathetic thinking that meets the interests of the families it serves.

Planning for a family’s relationship to government can be difficult in certain Latin American countries, where political systems, governments and the laws governing property rights, businesses and taxes have been unstable over the course of the past 30 or more years. Add in factors such as military regimes, dictatorships, social upheaval, hyper-inflation and currency controls, and long-term planning can be challenging.

However, the laws of Bermuda and the Bermudian community of legal, trust, accounting and investment and management professionals provide the tools for assisting Latin American families with far-ranging and long-term governance planning. It is a jurisdiction that allows Latin American families to craft a constitution for decision-making, management and succession plans that are consistent with their values – the building blocks for effective family decision-making.

Edmund W Granski, Jr  on the factors that make Bermuda a sound choice for Latin American families with succession planning on their mind.
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Today’s private-client and wealth-management community recognises Bermuda as a world-class, international business centre ideally suited to the setting up of trust companies and the servicing of high-net-worth clients. With a stable social and political environment, tax-neutrality, a common-law system based on that of England and Wales, pragmatic regulation, a sterling reputation, and robust, high-tech infrastructure, Bermuda is a uniquely sophisticated business ecosystem that is well positioned to handle international trust structures and wealth-management needs.

Bermuda is a British Overseas Territory with a Westminster-style government, situated in the mid-Atlantic (one hour ahead of Eastern Standard Time and four hours behind Greenwich Mean Time, a time zone that facilitates global business communication). Daily direct flights to Gatwick and major US east-coast cities also make Bermuda a convenient location for conducting international business affairs, not to mention a wealth of expertise in a long-established pool of service providers that includes the leading accountancy firms, as well as high-calibre legal, telecommunications, banking, insurance and e-commerce professionals.

THE OFFSHORE DOMICILE OF CHOICE
There has never been a better time to choose Bermuda as an offshore domicile for trusts and private clients. The past 18 months have seen a variety of proactive moves by the Bermuda government and the Bermuda Monetary Authority to increase the island’s appeal. Recent regulatory and legislative amendments have reduced bureaucratic red tape to encourage the influx and retention of intellectual capital.

Work-permit reform is just one of the progressive changes aimed at cultivating international business. Term limits on work permits for expatriate employees have been abolished, and new work-permit categories introduced. Under the enhanced system, a business being established on the island automatically receives five work permits for senior employees, while a ‘global’ permit allows a Bermuda operation to move key executives to the island without advertising their positions. In addition, Bermuda’s Incentives for Job Makers Act 2013 allows firms to apply for work-permit waivers for senior staff and, for those eligible, permanent residency.

Bermuda is considered a well-regulated, reputable and tax-neutral jurisdiction, with no tax applied to profits, income, dividends or capital gains. There is a payroll tax of up to 14 per cent, usually split between employer and employee. Bermuda continues to be a leader in global tax transparency and has negotiated 41 bilateral tax information exchange agreements with other jurisdictions, most of which are also signatories to the Council of Europe’s Multilateral Convention on Mutual Assistance in Tax Matters. Bermuda was the first offshore jurisdiction elevated to the white list category of the OECD, which rates the island at the same level of tax transparency as other G8 and G20 nations, such as the UK, US and Germany.

While Bermuda ticks such tactical boxes for facilitating global business, a trump card is that the island also happens to be a very desirable place to live, thanks to its breathtaking beauty, subtropical climate, location and enviable standard of living.

A HELPING HAND
For companies contemplating Bermuda as a domicile or clients seeking to establish a Bermuda family office or trust, a concierge-style resource is available through the Bermuda Business Development Agency (BDA), which is a public-private partnership set up to facilitate key connections with the market and simplify the process of doing business in Bermuda. Companies seeking to learn more about adding the appropriate offshore structure to their businesses or wealth-management model can contact the BDA for more information.1

Additional information about Bermuda is available at www.bermudabda.com

1 Additional information about Bermuda is available at www.bermudabda.com

ROSS WEBBER
CHIEF EXECUTIVE OF THE BERMUDA BUSINESS DEVELOPMENT AGENCY

WWW.STEP.ORG/JOURNAL | BERMUDA SUPPLEMENT 21
Bermudian commercial properties are proving increasingly alluring to foreign individuals and corporations, write Penny MacIntyre and Fozzia Rana-Fahy.

A high number of net-worth individuals are considering commercial real estate opportunities in Bermuda. Investors and developers are being attracted by the chance to get value for money, with a handful of trophy commercial properties selling for highly competitive prices over the past 30 months, such as:

- The 32-acre, three-beach property prices over the past 30 months, such as: properties selling for highly competitive money, with a handful of trophy commercial properties selling for USD14 million for retail and office buildings, commercial properties (from USD800,000 to USD177,000) and the proposed development of Ariel Sands. Investors and developers are increasingly alluring to foreign individuals and corporations, allowing commercial immigration, potentially opening Bermuda's doors to an increasing number of high-net-worth individuals who wish to distribute their wealth in, and obtain access to, another jurisdiction with a strong regulatory and legal reputation.

Bermuda’s private client industry, property industry and government all continue to work together to develop opportunities for individual and corporate investment in Bermuda. As Mark Twain said: ‘You can go to heaven if you want. I’d rather stay in Bermuda.’

**LEGISLATIVE CHANGE**

Recent legislation allows companies to wholly own the commercial properties they occupy. While high-net-worth individuals were already able to individually purchase residential properties with an annual rental value (ARV) of USD177,000 and above, on 27 March 2014 the Bermuda government enacted the Companies Amendment Act 2014, affecting the ability of local and exempt companies to acquire land in Bermuda. Under previous legislation, exempt companies were only able to acquire land by way of a lease or tenancy agreement. Subject to ministerial consent and other provisos set out in an accompanying policy issued by the Bermudian government (e.g. restrictions regarding renting to third parties), the recent changes allow for the following:

- local and exempt companies can now acquire residential properties with an ARV of USD177,000 and above;
- local and exempt companies can now hold commercial property if it is to be used for business purposes;
- local companies may acquire and hold land that is defined as mixed-use property (i.e. a combination of offices and residential units).

This legislative change, in tandem with changes to immigration policy in Bermuda (e.g. the introduction of the global work permit and immigration law amendment to the Incentives for Job Makers Act 2011), has helped to promote Bermuda as a more competitive jurisdiction in which to undertake business and make investments, enabling foreign individuals to own commercial properties they occupy. This legislative change, in tandem with changes to immigration policy in Bermuda (e.g. the introduction of the global work permit and immigration law amendment to the Incentives for Job Makers Act 2011), has helped to promote Bermuda as a more competitive jurisdiction in which to undertake business and make investments, enabling foreign individuals to own commercial properties they occupy.
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