A significant problem with older or bespoke trust deeds is often that they may have been rigidly drafted to suit a client’s intention or reflect statutory requirements which have long since changed. Unfortunately, they may not provide sufficient flexible powers to enable the trustee to adapt to unforeseen circumstances.

The unforeseen circumstances may be:

- A change in the settlor’s business, investment objectives and strategies
- A marriage breakdown of the settlor or a beneficiary
- Disputes involving beneficiaries a change in the settlor’s or a beneficiary’s financial circumstances
- A change in residence or domicile of the settlor or beneficiaries or location of trust assets
- A change in tax or other laws applying to the settlor or one or more beneficiaries
- A commercial trust was established for certain purposes which have been fulfilled but there is now a desire to apply the trust fund for different purposes
A commercial trust was established to facilitate particular business objectives and there has been a significant change in those objectives; or

A commercial trust established for the purposes of a particular company which is no longer appropriate due to a merger or other reorganisation of the company

As recognised above, the need or desire to restructure does not only arise in the context of private family trusts but can also arise in the context of commercial trusts including unit trusts used for investment funds, purpose trusts holding shares or security; or employee benefit and pension trusts. Some examples of the powers that may have been omitted in older or otherwise rigidly drafted trust instruments include:

- The power to delegate and sub-delegate (such as delegating the trustee’s discretionary investment powers to an investment manager)
- Modern investment powers
- The power to advance capital to a person with a contingent or presumptive interest in the trust fund
- The power to alter existing beneficial interests in the trust- for example the power to add or exclude beneficiaries and create sub-funds or separate trusts for different groups of beneficiaries in order to (i) resolve disputes or (ii) facilitate the investment of assets in separate funds into different types of investments with varying risk levels; and
- (Significantly) the power to amend the trust instruments

Bermuda’s Trustee Act 1975 includes a number of provisions which enable transactions to be effected or trusts to be varied without the involvement of the court.

Advice should be obtained in relevant jurisdictions (including the jurisdiction in which the trust assets are situated) to ensure the particular manner of effecting a transaction, variation or restructuring the trust, does not result in unforeseen adverse tax or other consequences.

In circumstances where it is not possible for the trustee to effect an amendment, transaction or to restructure under the above provisions, section 47, in particular, and section 48 of Bermuda’s Trustee Act 1975 provide the court powers to authorise a wide range of transactions, including the variation of trusts to alter beneficial interests.

In addition, section 47A of the Trustee Act, often referred to as Statutory Hastings Bass also provides the court a wide discretion to set aside transactions provided certain conditions are met. Section 47A may facilitate trustees and the beneficiaries to amicably work together to avoid an unforeseen tax or other unanticipated consequence of a distribution, appointment or other transaction.
Bermuda’s trust legislation may facilitate the implementation of transactions, revisiting of adverse transactions and restructuring of trusts more than any other jurisdiction.

This Guide may be of particular interest to practitioners advising international private or commercial clients who may benefit from establishing a structure in, or relocating a structure to, Bermuda.

This Guide will discuss in more detail some of the key provisions in Bermuda trust law that provide flexibility which practitioners can utilise to effect transactions not expressly authorised by the trust deed or to reorganise trusts in some way. Bermuda also provides a number of attractive features and structuring alternatives. These include:

- A flexible cost effective regime for the formation and administration of private trust companies (PTC’s). Unlike a number of other jurisdictions, Bermuda’s PTC regime permits corporate directors to be appointed as directors of the PTC; does not require directors or secretaries to be resident in Bermuda; and does not require a licensed administrator to administer the trust;

- A clear and extensive regime for reserved or granted powers trusts which enable a settlor to reserve extensive powers or a beneficial interest or grant such powers or interests to another person without invalidating the trust;

- Effective firewall legislation which prevents or reduces the impact of foreign laws and judgments on trust assets and on the integrity or validity of a Bermuda trust;

- The ability to create trusts which have an indefinite duration;

- The ability for a settlor (including an investment manager launching a fund) to act as a managing trustee and for other joint trustees not to be liable for the duties that are allocated to the managing trustee. An unwillingness of joint trustees to assume certain risks can on occasions restrict flexibility and increase administration and costs for an investment manager or settlor seeking to implement investment strategies with varying asset types and risk levels;

- An efficient regime for unregulated private funds and close ended funds;

- An efficient, lightly regulated regime for exempted funds which enables such funds to be established in days rather than weeks;

- Access to one of the strongest insurance markets in the world. Insurance products are often used to provide stability, investment growth and tax efficiency with respect to private and commercial trust structures;

- An efficient regime for regulated and unregulated international pension funds;
Bermuda does not impose income or capital gains tax and international clients can apply for an assurance from the Minister of Finance that such taxes will not be imposed on structures until 31 March 2035. Bermuda also does not impose exchange controls on non-Bermuda assets;

Bermuda has a number of experienced internationally renowned licensed trust and corporate service providers;

A stable government and political and legal system. Bermuda is one of the oldest, most experienced and strongest offshore financial centres in the world and the Privy Council in the United Kingdom is the ultimate court of appeal;

Proximity to New York (approximately a 2 hour flight (US Customs can be cleared in Bermuda) and to London (approximately a 7 hour flight) and Toronto (approximately a 2 hour flight);

A number of effective international agreements which facilitate business between Bermuda and other jurisdictions; and

Bermuda’s government has adopted a Model 2 intergovernmental agreement with the United States Government (IGA) for the implementation of the Foreign Account Tax Compliance Act. A Model 2 IGA requires reporting entities to report directly to the United States Internal Revenue Service (IRS) thereby enabling entities to control and be more aware of the information which is provided to the IRS.

The Trustee Act 1975 was one of the first trust statutes in the common law offshore world. It is largely based on the English and Welsh Trustee Act 1925. It has drawn upon the tried and tested stability of that statute but has been developed to provide pragmatic structuring and restructuring opportunities and solutions to trust issues. A number of provisions have been included in the Trustee Act 1975 over the years to facilitate trustees to effect transactions which are necessary or desirable for the effective administration of Bermuda trusts but which are not expressly authorised by the terms of the trusts. A number of these provisions do not require an application to court for approval of such a transaction.

Sections 15A and section 15B of the Trustee Act 1975:

Enable trustees to delegate and authorise sub-delegation of a wide range of delegable functions of a managerial or administrative nature to a co-trustee or third party; and

Apply subject to a contrary intention in the trust instrument.

Powers which may be delegated and sub-delegated under sections 15A and section 15B include essentially all administrative powers including powers:

of investment- once the trustees have determined the investment policy for the trust;
to compromise disputes relating to the trust;

- to procure the incorporation of companies; and many others

Section 15A requires the trustees to exercise reasonable care when selecting and monitoring its delegates.

Section 15B provides that certain functions cannot be delegated by the trustee in exercise of section 15A. These include the:

- formulation of investment policy. The trustee would typically determine investment policy taking into account advice from a suitably qualified and experienced investment adviser;

- exercise of any powers under the trust instrument to distribute or apply trust property to or for the benefit of the beneficiaries;

- exercise of powers under the trust instrument to add or exclude trust beneficiaries; and

- power to revoke or vary its administrative powers or release or restrict any powers.

Section 55A of the Trustee Act 1975 provides trustees with wide investment powers in addition to the powers contained in the trust instrument. The statutory investment powers contained in section 55A may be enlarged or restricted by the trust instrument.

Section 55A provides that a trustee may purchase or acquire property of any kind, in any jurisdiction, whether or not income-producing, with or without security, for the purpose of:

- receiving an appropriate total return

- controlling or limiting risk; and

- Benefitting person in any way from the income produced by the trust property.

In some instances, the absence of flexible investment provisions could result in the trust fund losing value in real terms. Section 55A provides a solution to trustees of rigidly drafted trusts instruments which lack modern investment powers.

A power of advancement permits the trustee to distribute or apply capital of the trust fund to or for the benefit of beneficiaries even though those beneficiaries are only entitled to the capital on some contingency or following the expiration of a prior interest. For example, a trust instrument may provide:

- 50% of the trust’s capital to X on X reaching 30 years of age; or

- A life interest to Y with an interest in remainder held in trust for X upon Y’s death.
A power of advancement may be expressly included in a trust instrument. However, in the absence of sufficiently wide powers of advancement or amendment in the trust instrument, section 24 Trustee Act 1975 provides the trustees a wide power of advancement. The availability of the power in section 24 is subject to a contrary intention in the trust instrument.

Section 24 is unique in that, unlike a number of other jurisdictions’ statutory powers of advancement, it provides, the trustee may when exercising the power:

- permits a trustee to exercise a power of advancement to substantially alter the beneficial interests in any existing trust;
- is retroactive and therefore applies to trusts created at any time; and
- only applies where the trust property consists of money or securities not considered by equity or law as land.

Before exercising the power under section 24, a trustee is required to obtain the written consent of each beneficiary whose prior life or other interest (whether vested or contingent) may be affected by the exercise of a power.

Section 48 of the Trustee Act 1975 provides the court the discretion to consent to a variation of both beneficial interests and administrative provisions in trusts on behalf of beneficiaries who are unable to consent for themselves such as minors, mentally incapacitated or unborn beneficiaries. The court may provide consent on a person's behalf if doing so would be for that person's benefit.

Section 47 has become well known as a unique feature of Bermuda’s trust law not offered in other jurisdictions. Section 47 provides the court power to permit transactions not authorised by the trust instrument. These powers may include:

- variation of beneficial interests in the trust
- extension of the duration of the trust period
- variation of investment powers
- addition of powers to appoint-trustees; and
- ratification of decisions made by (de-facto) trustees in circumstances where there was no defect in a trustee’s appointment or retirement

Section 47 differs considerably from provisions in the laws of other jurisdictions which may only permit the court to:

- vary administrative powers of trust; or
consent to variations on behalf of beneficiaries who are unascertained, minors or otherwise do not have the capacity to provide consent.

Section 47 stands apart from such provisions (including section 48 of the Trustee Act 1975) because it:

- does not require the consent of all adult the beneficiaries of capacity for the court to exercise its discretion; and
- adopts a wide definition of transaction enabling beneficial interests (not just administrative provisions) to be varied.

While section 48 provides wide powers to the court to vary beneficial interests, the consent of all ascertained adult beneficiaries with capacity is required before the court will make such an order. Consequently, an application under section 48 may fail even if only one beneficiary objects to the proposed order. In addition, trust instruments often describe classes of beneficiaries in wide terms and obtaining the consent of all necessary beneficiaries would often be expensive and difficult, if not impossible.

For the court to exercise its discretion to approve the transaction under section 47, it needs to be satisfied that the proposed transaction is expedient. Expedient has been construed to mean that the transaction must benefit the trust as a whole rather than just some of the beneficiaries. This can include providing for more efficient administration of the trust. There is no requirement to demonstrate that all beneficiaries benefit in the same way or to the same extent.

In GH and IJ –v- KL where, on application of executors of a will creating testamentary trusts, the Court determined it expedient to authorise the following transactions:

- a variation of beneficial interests in the trust instrument to authorise (i) income to be accumulated; and (ii) payment out of each settled share an amount of money to the children of the current life tenant;
- the addition of a successor professional trustee to replace a trustee who was unwilling to act;
- inclusion of a power in the trust instrument for family members to appoint a successor trustee;
- consent of a beneficiary to resettle his share of his or her residuary interest in the trust, subject to the consent of an independent third party; and
- variation of investment powers.

In Re ABC Trusts [2012] Bda LR 89 the Court made orders to approve transactions to vary trusts under section 47 to:

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2 Ibid.
extend trust perpetuity periods so not to, for example, deprive future generations of the benefit of the trusts; and avoid potentially ruining comparatively young beneficiaries should they come into substantial sums of money at a young age;

- include modern trustee charging provisions; and

- remove the requirement to consider the law of Prince Edward Island when determining whether or not a particular object is charitable.

The rule developed from the English and Welsh case of in *Re Hastings Bass* \(^3\) had until recently been construed as providing the court the power to declare a fiduciary’s exercise of a discretion void if:

- the effect of the exercise was different from that which the fiduciary had intended; and

- it was clear the fiduciary would not have acted as it did had it not failed to take into account relevant considerations, or had it not taken into account irrelevant considerations.

The rule in *Re Hastings Bass* had been used to great effect to render void from the outset transactions such as those outlined above. This resulted in the transactions being treated as though they had never happened. As a consequence, the trustee or beneficiary may have been able to avoid or substantially reduce a significant tax liability.

Section 47A of the Trustee Act 1975 preserves and provides statutory clarification to the rule developed from *Re Hastings Bass* as it had been applied and developed prior to the United Kingdom (UK) Court of Appeal and Supreme Court decisions in *Pitt v Holt* and *Futter v Futter*. \(^4\)

Section 47A provides the court discretion to set aside a fiduciary’s exercise of a power where the exercise of that power was flawed. If the court decides to set aside a fiduciary’s exercise of its power it can do so in whole or part, unconditionally or on such terms as the court may think fit.

The conditions which need to be satisfied before the court can exercise its discretion are that:

(a) Firstly, the fiduciary:

   (i) did not take into account one or more considerations that were relevant to the exercise of the power; or

   (ii) took into account one or more considerations (whether of fact, law or a combination of fact and law) that were irrelevant to the exercise of the power; and

(b) Secondly, but for the failure to take into account such relevant considerations, or having taken into account such irrelevant considerations, the person who holds the power:

   (i) would not have exercised the power;

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\(^3\) [1975] Ch. 25.
(ii) would have exercised the power, but on a different occasion to that on which it was exercised; or

(iii) would have exercised the power, but in a different manner to that in which it was exercised.

Importantly, the conditions may be satisfied without it being alleged or proved that in exercise of the power, the person who holds the power, or any adviser to such person, acted in breach of trust or duty. This is one of the key aspects of the application of the rule in Re Hastings Bass which abruptly changed with Pitt v Holt, Futter v Futter. Following Pitt v Holt and Futter v Futter, without the benefit of a provision of comparable effect to section 47A, courts in the UK (and other common law jurisdictions whose ultimate courts of appeal is the Privy Council in the UK) are required to find that the fiduciary acted in breach of its duties before it will consider setting aside a transaction based on an application of Re Hastings Bass.

In both Pitt v Holt and Futter v Futter the fiduciaries relied on advice from apparently competent tax advisers. The advice turned out to be wrong. The UK Court of Appeal and Supreme Court each held the fiduciaries were not in breach of duty for relying on the advice. Accordingly, those courts refused to set aside the fiduciaries exercise of power based on Re Hastings Bass.

The application to the court to set aside the exercise of a fiduciary power under section 47A may be made by:

- the person who holds the power;
- the trustee of the trust, or beneficiary of the trust or, in the case of a purpose trust, a person who the trust instrument expressly gives standing to enforce the trust or a person with sufficient interest in the trust;
- where the power is conferred in respect of a charitable trust, the Attorney-General; and
- with the leave of the court, any other person.

Section 47A provides that a court cannot make an order to wholly or partly set aside a transaction which would prejudice a bona fide purchaser for value of any trust property without notice of the matters which would allow the court to set aside an exercise of power. However, this does not prevent the court making an order to grant the relief under section 47A if a purchaser for value consents.

Section 47A has retrospective application so that, to the extent the exercise of power is set aside under the section, the exercise of the power shall be treated as never having occurred. Accordingly, clients with existing trusts governed by the laws of another jurisdiction may wish to explore re-domiciling the trust to Bermuda in order to bring an application in Bermuda with the view of setting aside an exercise of a trustee’s power- even if the power was exercised prior to the introduction of section 47A. Very jurisdictions provide courts the powers that are available under section 47A.

Bermuda’s Supreme Court may also set aside a disposition of a fiduciary or non-fiduciary (including trustees’, settlers and persons who make hold powers in respect of trust property).
The test for setting aside transactions on the grounds of mistake was confirmed by the UK Supreme Court in *Pitt v Holt and Futter v Futter*[^5] to require the court to ask itself whether there has been a causative mistake (of fact or law) of so serious a character that it would be unjust for the recipient of the disposition to retain the property.

There was some suggestion in *Pitt v Holt, Futter v Futter* that a court may on public policy grounds refuse to set aside a transaction on the basis of mistake if the transaction was, for example, motivated by tax planning notwithstanding the tax planning involved did not constitute illegal tax avoidance. *In the matter of the BigDug Limited Remuneration Trust*[^6] the Guernsey court rejected this approach indicating that if the tax planning was legal then the court was not required to conduct an enquiry to determine if, on public policy grounds, the court should refuse to set aside the disposition. It is submitted that the Bermuda courts would adopt an approach similar to that of Guernsey on this issue.

Bermuda trust law provides several unique and flexible provisions to facilitate transactions, amendments and restructuring of trusts that for whatever reason may have not authorised by a particular trust instrument. These provisions may provide solutions to overcome restrictions and other problems with an existing trust structure. They also may be applied to create a new and flexible structure.

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[^6]: Royal Court of Guernsey, 15 January 2015.