



Of Sound Mind and Memory: New Guidance for Trustees Regarding Settlor Capacity in the Cayman Islands

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The question of whether an individual has the mental capacity to exercise his or her legal rights or powers is one fraught with difficulties, and inevitably subject to great debate. In the recent decision of *CI Trustees Ltd -v- RDK and GMB*¹, the Grand Court of the Cayman Islands (the “Court”) was asked to consider whether or not the settlor of a Cayman Islands trust had capacity to exercise her power to amend the trust deed to change the sole beneficiary of the trust. For the reasons explained below, the Court found that, on the balance of probabilities and in circumstances where the settlor had since passed away, the settlor did have capacity, at the material times, to amend the trust deed.

The Cayman Islands Trust

The O Trust (the “Trust”) was established pursuant to a trust deed dated 6 May 1996 (the “Trust Deed”). The Trust was a Cayman Islands trust, containing “reserved powers” provisions sanctioned by the *Trusts Law (as revised)*. One of those reserved powers was a power, found at Article 1.1.5 of the Trust Deed, to amend the Trust Deed “by writing delivered to the Trustee, but subject to acceptance by the Trustee”.

The trustee of the Trust was CI Trustees Ltd (the “Trustee”). The settlor of the Trust was a childless widow, and resident of a Spanish-speaking country in South America (the “Settlor”). Evidence was given in the course of the proceedings, from representatives of the Trustee, to the effect that the Settlor was known to be “a very gullible and lonely person” who had “been taken advantage of in the past”. In July 2012, the Settlor sent a letter to the Trustee (the “2012 Letter”), stating that she wished to amend the Trust Deed to remove the sole beneficiary of the Trust (referred to in the judgment as “RDK”) and to replace her with the Settlor’s friend (“GMB”). It is noteworthy that GMB was also the wife of the Settlor’s lawyer. While the Trustee was satisfied that the Settlor had written the 2012 Letter, the Trustee was concerned about the Settlor’s mental capacity to properly exercise her power of amendment. The Settlor had appeared confused during telephone calls with representatives of the Trustee and, on other occasions, had refused to speak with the Trustee at all. As a result, the Trustee declined to give effect to the Settlor’s amendment request set out in the 2012 Letter.

A few years later, in July 2015, the Settlor issued a declaration (the “2015 Declaration”) which stated the Settlor’s “irrevocable and absolute intention to remove all and any of the beneficiaries that have been named so far by any means as well as to name with immediate effect [GMB] as the sole beneficiary of the Trust”. Despite the time that had passed since the 2012 Letter was issued, the Trustee remained concerned about the Settlor’s capacity to make the 2015 Declaration and it had attempted

¹ Unreported, FSD 199 of 2015, Kawaley J, 19 January 2018.

to arrange, on a number of occasions and without success, for the Settlor to be assessed by independent medical practitioners. Evidence was also given that the Settlor appeared to be influenced by GMB, who seemed to control who visited the Settlor and her day-to-day movements.

The Settlor died in August 2015, before the Trustee had given effect to her requested amendments to the Trust Deed. Article 1.1.5 of the Trust Deed provided that, on the death of the Settlor, the Trustee was to hold the trust fund *“upon the terms set forth in any Distribution Schedule to this Trust Deed which shall then be in effect”*. At the time of the Settlor’s death, the Trust Deed had an outdated distribution schedule annexed to it: the Trustee was therefore concerned to determine whether it should in fact give effect to the 2015 Declaration and distribute the trust fund to GMB rather than to RDK.

Preliminary Issue

In an initial judgment in the proceedings², the Trustee asked the Court to determine, as a preliminary issue, whether or not it could authorise the exercise of the Settlor’s reserved power to amend the Trust Deed, provided in writing by the Settlor prior to her death. The Court determined that, in light of the wording of the Trust Deed, the Settlor’s death did not impact on the Trustee’s ability to later give effect to the Settlor’s written exercise of her power to amend. In interpreting the Trust Deed for this purpose, the Court held that Article 1.1.5 was two-pronged: it conferred on the Settlor a power to amend, and on the Trustee a power to accept that amendment. It followed that the Settlor must have actively exercised the power to amend during her lifetime and that, subsequently, the Trustee must have actively accepted (or, as the case may be, rejected) the exercise of the Settlor’s power.

The Court found that, by delivering a valid written amendment to the Trust Deed to the Trustee, the Settlor had validly and properly exercised her power of amendment. All that remained was for the Trustee to separately exercise its power to accept the written instrument as a proper exercise of the Settlor’s power to amend if it considered it appropriate to do so. The Settlor’s death had no impact on this process.

Capacity

In the substantive proceedings, the Court was then asked to consider whether the Settlor had the capacity to exercise the power to amend at the time it was exercised. In considering the question, the Court noted that the most practical approach to capacity in the circumstances of this case was to require the party positively asserting that capacity existed to prove that it did on the balance of probabilities (following the civil standard of proof).

The Court found that there was no dispute as to what are the essential requirements for establishing capacity in this context: the same test which applies to the making of wills should also apply to the exercise of any other impugned legal powers. That test requires proof of testamentary capacity (so, proof of the capacity to understand certain important matters relating to the instrument in question such as its nature and effect, the extent of the property which is being disposed of, and the claims which might arise as a result) and, as a separate requirement, actual knowledge and approval of the contents of the instrument.

The Court also noted that the level of understanding required depends on the circumstances of each case and the particular transaction which it is to effect.³ Capacity is *“not necessarily a black and white issue”* and a testator or donor might suffer from conditions which deprive them of capacity under some circumstances, while in others, full capacity was enjoyed. In such cases, the crucial question is whether capacity existed at the time that the relevant instrument was executed and whether the testator’s *“mind and memory”* were sufficiently sound to enable him or her to know and understand the business in which he or she was engaged at the time his or her will was executed.⁴ The Court noted the leading English case of *Banks -v- Goodfellow*⁵ where, despite having been confined to the *“county lunatic asylum [and remaining] subject to certain fixed delusions”* for many years before making his will, the testator’s gifts were deemed valid because he was capable of conducting business at the time of executing his will.

² Unreported, FSD 199 of 2015, Clifford J, 28 October 2016

³ Citing *In re Beaney* [1978] 1 W.L.R 770.

⁴ This is consistent with the decision of the Honourable Chief Justice in *In re Lindzon* (deceased) 19 February 2015

⁵ (1870) LR 5 QB 549

The Evidence

In considering the evidence in this case, the Court noted that the Trustee was right to be concerned about capacity given that the Settlor was 82 years old at the time of giving her instructions; the instructions themselves offered no explanation as to the Settlor's motivations, and the Settlor had at times sounded confused and refused to talk to the Trustee. Despite this, the Court found that any confusion on the part of the Settlor at material times was *"transitory in nature and attributable to a variety of factors which were individually and cumulatively more plausible than a complete loss of mental capacity"*. In particular:

- The medical evidence indicated that the Settlor could be suffering from ailments that caused temporary confusion;
- The Settlor clearly preferred face to face meetings to telephone conversations and was not comfortable *"speaking to strangers"* even in the presence of a translator;
- The evidence indicated that the Settlor was prone to *"bouts of confusion"* possibly caused by sleep problems, rather than a lasting and critical cognitive decline; and
- The evidence that the Settlor had insisted that she reward those who had helped her by changing the beneficiary to GMB was *"insightful"* and showed a *"clarity of intent"*.

When considering the case as a whole, the Court noted that neither the Trustee nor RDK had positively asserted incapacity and concluded that the Settlor's decision to nominate GMB was entirely rational and did not operate to disinherit anyone with a stronger moral claim to her generosity.⁶ The Court determined that there was no solid basis for concluding that the Settlor lacked capacity altogether in the requisite legal sense and at the time she executed the 2015 Declaration, the Settlor's mind and memory were sufficiently sound to enable her to know and understand the business in which she was engaged. She had been clear then, and for a few years later, about the essentials of her instructions and her motivations for them. The Settlor therefore had capacity to instruct the Trustee to amend the Trust Deed.

Conclusion

While each case concerning the legal capacity of the settlor of a Cayman Islands trust will fall to be determined on its own facts, the judgment in this case is a helpful reminder of the key legal tests to be applied to those facts and the medical and circumstantial considerations to which the Court will have regard. In this case, language barriers, family connections (or lack thereof), personality traits of the Settlor, and scepticism on the part of the Trustee as to the motives of those caring for the Settlor had together given rise to "plausible" concerns that capacity issues may have existed. However, applying the legal tests, it was clear that capacity was not an issue and the beneficiary preferred by the Settlor was entitled to receive a distribution from the Trust.

⁶ RDK had never challenged her removal as a beneficiary, and had taken no active part in the proceedings before the Court despite having been made a defendant.

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