IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 199 OF 2015 (IKJ)

IN THE MATTER OF a trust known as the O Trust made by declaration of trust between the Settlor and the First Union Bank and Trust Company (Cayman) Ltd on 6 May 1996

AND IN THE MATTER OF the Trusts Law (2011 Revision)

AND IN THE MATTER OF GCR Order 85 Rule 2(2) (a) or (b)

CI TRUSTEES LTD

Plaintiff

-and-

(1) RDK
(2) GMB

Defendants

IN OPEN COURT

Appearances:

Mr John Machell QC and Ms Aleisha Brown of Harneys on behalf of the Plaintiff ("the Trustee")

Mr Hector Robinson QC, Mr Andrew Peedom of Mourant Ozannes on behalf of the 2nd Defendant ("D2")

The 1st Defendant ("D1") did not appear

Before: **The Hon. Justice Kawaley**

Heard: **15 – 19 January 2018**

Date of Decision: **19 January 2018**[1]

GRAND COURT · CAYMAN ISLANDS GOVERNMENT · 14/17

[1] The Judgment was delivered without a hearing in order to save time and costs.

Reasons Circulated: 19 February 2018

Reasons Delivered: 23 February 2018

HEADNOTE

Validity of exercise of power to amend distribution schedule to trust deed to change sole beneficiary-capacity of settlor-legal test-burden of proof

REASONS FOR DECISION

Introductory

1. The present proceedings were commenced by the Trustee by Originating Summons dated December 9, 2015 with a view to determining who was the true beneficiary of the trust declared by the settlor (the "Settlor") in respect of the O Trust (the "Trust").

2 Three issues were identified as requiring determination:

(1) whether the Trustee could accept an amendment to a distribution schedule made before the Settlor's death after her death;

(2) whether the 2012 letter and the 2015 Declaration constituted an exercise of the power of amendment;

(3) whether the Settlor had the capacity to exercise the power of amendment at the time of the 2012 letter or the 2015 Declaration.

3 Clifford J by a judgment dated October 18, 2016 on a trial of preliminary issues answered the first two questions in the affirmative and subsequently gave directions for the trial of the capacity issue.

4 At the beginning of the trial I acceded to a joint application by counsel and directed that, although the proceedings had been listed for hearing in open Court, the proceedings and judgment should be anonymised to protect the privacy (and safety) of the parties, in particular D2. I also directed that the file should be sealed so that any application to inspect the file would be on notice to the parties, rather than being dealt with administratively.

5 At the end of the trial on January 19, 2018, I decided that:

(1) the issue before the Court was whether or not the Settlor of the Trust had capacity to instruct the Trustee to amend the Trust Deed by changing the beneficiary from D1 to D2 on :

(a) July 13, 2012 and/or

(b) March 6, 2015;

(2) D2 was required to prove that capacity existed on a balance of probabilities;

(3) I was satisfied, more clearly in relation to the 2012 letter and more marginally in relation to the 2015 Declaration, that the Settlor did have capacity to instruct the Trustee to amend the Trust Deed; and

(4) (by consent) that the costs of the Trustee and D2 should be paid out of the Trust Fund on an indemnity basis.

6 I now give reasons for that decision.

Overview

7 It is helpful at the outset to set out a high-level overview of the context out of which the present legal and factual controversy arises:

- the Settlor was at all material times a widow who emigrated from Europe to South America in her youth where she lived without children or other family members (apart from her late husband) until her death;

- the Trust initially provided for the Settlor's nephew and niece, who lived in Europe, to be the 'remainderman';

- on October 22, 1996, the Settlor's nephew and niece (who lived in Europe) were replaced as remainderman with a local trusted friend, D1;

- in March 2012, the Settlor revoked her Will and made D2, another local trusted friend, whose husband was the Settlor's lawyer, her sole beneficiary;

- in July 2012, the Settlor sought to amend the Trust and make D2 the remainderman;

- the Trustee, who had no direct and/or historic client relationship with the Settlor became concerned about the Settlor's capacity and declined to give effect to the amendment request;

- the Settlor had historically dealt with relationship managers employed by the Trust's investment manager (the "Bank") and communicating in Spanish. The Bank had since 1996 customarily dealt with D1 in respect of the Trust's and the Settlor's personal accounts;

- the Trustee acquired the Bank's trust portfolio including the Trust in late 2010;

- the Settlor sought to effect a change of relationship manager replacing her former managers with a new manager employed by an affiliate of the Bank. The Trustee insisted that this change could not be effected without a meeting with the Settlor and an independent medical examination;

- arranging a meeting was problematic, in part because the employees of both the Trustee and the Bank were unable to travel to the Settlor's domicile because of security concerns;

- the Trustee eventually met with the Settlor in Miami in February 2015 and attempted to arrange for her to be examined by an independent physician;

- the Settlor returned to South America without being examined by an independent doctor acceptable to the Trustee. Instead she obtained medical reports from her own doctors;

- in May 2015 the Settlor made a Declaration confirming and explaining the 2012 letter;

- the Settlor died on August 31, 2015.

8 From the outset, it appeared to me that the Trustee's concerns about the Settlor's capacity in 2012 might well have been based on an understandable misreading of the facts in circumstances where key elements of the communications between the Trustee and the Settlor were 'lost in translation'. My own preliminary view, of course, was based on a combination of hindsight and information not available to the Trustee at the relevant time. By the time of the 2015 Declaration, however, it seemed far more plausible that capacity issues might well exist.

THE ORAL EVIDENCE

The Plaintiff's case

Nicholas Quin

9 Mr Quin, a lawyer by training, was the Trustee's Managing Director from October 2010, having previously worked for three years as in-house counsel. He gave his evidence under cross-examination in a straightforward, non-argumentative manner and was a generally impressive witness whose credibility was not challenged. His first direct involvement with the matter was in January 2015 shortly before the February 2015 meeting with the Settlor took place. The most significant aspects of Mr Quin's evidence may be summarised as follows:

- in late January before the meeting took place, he consulted with a relationship manager at the Bank who advised him that "*the Settlor was a very gullible and lonely person and had been taken advantage of in the past*";

- he received advice from an in-house counsel, Ms Ahmed, and prepared questions to put to the Settlor designed to assess her capacity to amend the Trust;

- when the first meeting took place on February 17, 2015 (between Mr Quin, his Spanish-speaking colleague Ms Batista and the Settlor), the prepared questions were put. The Settlor appeared unaware of the value of her estate or the Trust assets, and was only clear about wanting to replace D1 with D2 as beneficiary. Her repeating a desire to help those whom had helped her appeared to be rehearsed;

- as a result of this meeting he was not satisfied of her capacity, and broke to consult with his team. In the resumed second meeting (with additional attendees being D2 and her husband Dr PE) he advised the Settlor and her party that the Trustee wished her to undergo an independent medical assessment. The Trustee was unable to arrange a medical assessment before the Settlor was scheduled to leave Miami;

- before alternative medical examination arrangements were concluded, on March 17, 2015 the Trustee received from Miami attorneys Marcell Felipe a copy of the 2015 Declaration;

- while the Trustee was still seeking to agree a doctor to carry out the medical examination, on April 22, 2015 Marcell Felipe forwarded four medical reports from doctors in the Settlor's domicile;

- the Trustee was not satisfied with these reports, and continued efforts to arrange an independent examination. On June 19, 2015 a call was placed to the Settlor who sounded lucid but complained of health problems, particularly with her eyes.

Fauzia Ahmed

10 Ms Ahmed is an Ontario-qualified lawyer who at all material times was employed by the Trustee as Senior In-house Counsel and/or Assistant Managing Director. She joined the Trustee in or about September 2010 and became Chief Compliance Officer

of Royal Trust Corporation of Canada in February 2016. She also gave her evidence under cross-examination in a straightforward non-argumentative manner and was a generally impressive witness whose credibility was not challenged. The most significant aspects of Ms Ahmed's evidence may be summarised as follows:

- she first became directly involved with the Trust in July 2012 when a relationship manager who had known the Settlor for 20 years (GG) referred the 2012 letter (dated July 13, 2012) to her on July 16, 2012;

- GG expressed concerns about the letter, describing it as "very odd" and inconsistent with previous correspondence from the Settlor, an assessment Ms Ahmed was not able to verify;

- on July 20, 2012, she took part in a conference call with GG, a Trustee colleague who spoke Spanish (Mr Kimbert Solomon) and the Settlor. In the course of this conference call, in which her colleague, after introductions by GG, did all the talking, the Settlor appeared confused, said her memory was bad and was unable to identify what day it was or where she was. Ms Ahmed fairly conceded that it was possible that the Settlor did not want to speak to Mr Solomon;

- at the time, as a result of the call, she was very concerned about the Settlor's capacity to amend the Trust Deed and recorded these concerns in an email that same day to GG;

- three days later GG reported that the Settlor and D2 had called GG and indicated that the Settlor had wanted D2 to participate in the call which had already taken place on July 20, 2012;

- on August 24, 2012, Ms Ahmed received a letter from the Settlor explaining that she had been unable to speak properly when the July 20 call was made and had shortly thereafter called GG to explain;

- various attempts were made to speak to the Settlor again by phone and by a letter dated October 29, 2012 the Settlor advised that she wished a Mr LD to represent her at the Bank. This change of relationship

manager still required the Settlor's capacity to be assessed, because it involved transferring the Trust assets to an affiliate of the Bank;

- she successfully called the Settlor with Mr Solomon on January 8, 2013 and on February 7, 2013. On the first occasion the Settlor said she was unwell and hung up the phone. On the second occasion she said she did not know what they were talking about and did not know what date it was;

- she next heard from Dr PE on behalf of the Settlor in January 2015.

SD

11 Ms SD first met the Settlor as a child and was like an aunt to Ms SD and her sisters. Although this witness moved to the United States in 1995, she was in touch with the Settlor by telephone and made rare visits to her in South America. Ms SD appeared to me to be a longstanding friend of the Settlor whose evidence was motivated wholly or substantially by genuine concern about the possibility that the Settlor had been taken advantage of. I found her to be a credible witness.

12 The highlights of her evidence may be summarised as follows:

- when she called the Settlor was often sleepy and not vocal, reporting that she slept in the day because she could not sleep at night;

- the Settlor was generous and gave her gifts. However, on one visit Ms SD discovered that the Settlor imprudently filled out blank cheques and said that D2 had encouraged her to sign several cheques when she could as sometimes her hands were shaky. (The suggestion that the Settlor had physical difficulties with signing documents was confirmed in a general sense by the video recording of the signing of her amended Will in March 2012 as she appeared to be loosening the stiff fingers of her right hand before she signed the document);

- during a September 2013 visit, the Settlor gave Ms SD a cheque drawn on an account which later turned out had been closed;

- during a May 2014 visit, the Settlor seemed confused and said that she was poor, suggested Ms SD's mother had been rich (she had not been) and had lost all her money, stolen from an account in the United States. She also stated that she wanted to go to Miami to take money, which was "not much", out of an account. The Settlor mentioned the Trust on this visit, but Ms SD could not remember in what respects. She also mentioned having luggage with valuables stolen from her closet;

- Ms SD felt that the Settlor was being controlled by D2, who would appear and listen to their conversation every time Ms SD visited. When questioned about her medication, the Settlor would say to ask D2.

D2's evidence (all witnesses, save where otherwise indicated, gave their evidence in Spanish through an interpreter)

D2

13 D2, an insurance broker and real estate agent, having become the Settlor's sole estate beneficiary in March 2012, was seeking to be recognised as her sole Trust beneficiary as well. The importance of the present case to her may well explain, at least in part, why her right hand was visibly shaking as she held the Bible and took the oath. She gave the crucial and controversial parts of her evidence with a conviction which she doubtless felt would be convincing but which to my mind only highlighted the need to approach her testimony with considerable care. The most pertinent aspects of her testimony may be summarised as follows:

- she first met the settlor in 2000 in relation to real estate business and eventually became close to the Settlor who regarded her as a daughter;

- the Settlor rarely mentioned her relatives, but mentioned a sister who was in her eighties and a niece and nephew, all of whom were living in Europe;

- for the last ten years of the Settlor's life, D2 would call her daily, assist her with shopping and deal with medical emergencies. The Settlor regularly visited D2's home and became fond of her husband and children;

- D2 learned more about the Settlor's business affairs when arrangements were made for D2 to become her estate beneficiary, but first heard about the Trust and the Bank before 2010. The Settlor discussed the Trust and described GG as her relationship manager and ME as responsible for handling the Settlor's personal accounts with the Bank. She explained that D1 replaced her niece and nephew as estate and Trust beneficiary (in late 1996) because she wanted someone to take care of her in her old age. D1's husband and the Settlor's husband had the real relationship, and after both husbands died she had little contact with D1, who lived in the capital (several hours' drive away). GG and ME appeared to be close to D1 and eventually the Settlor fell out with D1 because she never saw original Bank statements;

- D2 was present when the Settlor called GG to explain the circumstances of the July 20, 2012 telephone call on July 23: it was not made at the agreed time, she was having a bath with staff and she did not recognise the Trustee's employee who was calling her. This full explanation was only documented in a letter signed by the Settlor dated August 22, 2012 and received by the Trustee later that month. However, the July 23, 2012 telephone call to GG by the Settlor in which D2 participated was confirmed by an email of that date from GG to Ms Ahmed. This email recorded D2 as saying that the Settlor had asked her to participate in the call with the Trustee on the Monday, and Mr Solomon was explaining that the call had taken place on the previous Friday;

- D2 disputed GG's characterisation of the Settlor to Mr Quin as being someone who was gullible, lonely and had been taken advantage of in the past. She stated that the Settlor had merely been the victim of theft; an employee had stolen and forged cheques, and the Bank compensated the Settlor for this;

- neither D2 nor her husband had taken advantage of the Settlor by influencing her decision to make D2 a beneficiary. The Settlor retained a sharp mind throughout;

- D2's son recommended LD as an alternative relationship manager for the Trust.

14 D2 appeared to me to be in general terms a credible witness. She displayed what I regarded as genuine pride when she explained how the Settlor told her she wanted her to be her beneficiary because she was like a daughter to her. However her insistence that the Settlor at no point between 2012 and 2015 was confused was on its face incredible yet this assertion seemed to be regarded by D2 as an article of faith. It was a central theme which ran through almost her entire case. I also felt that D2 sought to diminish the extent to which the Settlor had become dependent on her, despite the fact that such dependency was consistent with the desire to reward D2 for such assistance.

15 I nonetheless regarded her as a fundamentally decent and honest woman who had exaggerated parts of her evidence out of a combination of self-interest and a conviction in the moral justice of her cause.

Dr PE

16 Dr PE is not only the Settlor's former attorney. The Settlor's sole estate beneficiary and proposed sole beneficiary of the Trust is his wife. He took the oath with great gusto, unblinkingly looking me in the eye. The closeness of his connections with the merits of the present case created the obvious need to treat the most controversial aspects of his testimony with considerable care. The main aspects of his evidence may be summarised as follows:

- he was introduced to the Settlor by his wife in 2005, and acted as her lawyer until her death ten years later. Typically he would attend the Settlor's home and take oral instructions and where needed prepare documents later;

- he was instructed by the Settlor to change her initial Will and on March 1, 2011 he took her to a notary's office where the signing of the new documents was notarised and filmed. The Will was later entered in a public register;

- in July 2012 he was instructed to make his wife beneficiary of the Trust. He found neither request surprising. He prepared the July 2012 letter with the assistance of Bank documents referring to the Trust as the Settlor did not have any actual Trust documents;

- in March 2015 he prepared the 2015 Declaration, which he explained in his oral evidence was typed at the Settlor's home and printed off for her to sign.

17 Mr Machell QC demonstrated in cross-examination that Dr PE was a stubborn witness unable or unwilling to accept that he had made an obvious and inconsequential mistake in his Witness Statement. Like D2, he was unwilling to countenance and unable to explain why various witnesses viewed the Settlor as being confused at various points between 2012 and 2015. The proposition that she never had lapses in her mental functioning, again, seemed inherently improbable. In my own questioning from the Bench, I sought to explore the possibility that the Settlor's lawyer might have cautioned her about speaking to the Trustee's representatives on her own. At this point he appeared to me to become more of a lawyer than a husband, and somewhat defensively stated that he told the Settlor she had to speak to the Trustee on her own at the 2015 Miami meeting. When asked whether he was anxious at this point about the possibility of an independent doctor nominated by the Trustee reporting that the Settlor lacked capacity, he conceded with surprising frankness that of course he was concerned.

18 I regarded him as a fundamentally decent and honest man who had exaggerated parts of his evidence out of a combination of self-interest and a conviction in the moral justice of his wife's cause.

Dr WA

19 Dr WA was a family medical practitioner who was the Settlor's doctor from August 11, 2010 until her death. He gave is evidence in a very confident manner. The most important aspects of his evidence may be summarised as follows:

- at no point throughout his dealings with the Settlor did she demonstrate "*a diminishing mental awareness*" such that he had concerns about her ability to take care of her own affairs;

- he exhibited a Clinical History Record to his Witness Statement, which showed that in 2010 she suffered from various ailments including Type II diabetes, chronic hypertension and post-traumatic paraplegia of the lower and upper left limbs, and that she was taking various medications including insulin;

- he saw the Settlor on May 3, July 1 and August 7, 2012 when she was diagnosed as suffering from an acute intestinal infection and joint disease for which she was prescribed medication (May 3), an ulcer, for which she was prescribed medication (July 1), and an acute urinary infection for which she was prescribed medication (August 7, 2012). (Dr JT, a psychiatric expert, was subsequently cross-examined on this clinical History Record which he had not previously seen. He insisted that none of these medications had side-effects which would cause confusion, but very reluctantly-and only when pressed by Mr Machell QC-conceded that an acute urinary tract infection could cause confusion);

- he treated the Settlor for acute bronchitis on October 21, 2014 and on December 17, 2014, when her condition had worsened;

- he prepared a Medical Report dated April 6, 2015 for the Trustee which, described her as asymptomatic and stable, despite her longstanding ailments, and opined that "*from the neurological point of view she is alert, coherent, time oriented, space and person showing no other symptom*";

- the patient was asymptomatic from December 17, 2014 until July 1, 2015 when she again had an acute urinary infection and was given medication which would not be expected to affect her neurological state;

- her condition worsened on August 28, 2015 and she died on August 31 2015, primarily due to a blood clot affecting her lungs;

- despite generally displaying an impressive grasp of medicine, Dr WA did not impress the Court with his refusal to acknowledge even the possibility that the Settlor may have suffered from dementia or manifested even occasional signs of confusion or forgetfulness.

20 Dr WA was too partisan a witness for me to place much reliance on his evidence about the Settlor's overall mental capacity, standing by itself. However I found no reason to doubt his detailed Medical Record as regards his patient's physical symptoms throughout the 2010-2015 period. I found no reason to doubt his evidence that, when he examined the Settlor, he found her to be mentally competent. Viewing his evidence in conjunction with other credible evidence about the Settlor's capacity to sign the 2012 letter, Dr WA provided some support for D2's case on capacity both on July 13, 2012 and on March 6, 2015.

Dr AG

21 Dr AG knew the Settlor for some 20 years, and acted for her as a lawyer in relation to a fraud complaint between late 2010 and early 2011. He was a distinguished looking older man who gave his evidence in a straightforward manner. He testified that:

- he saw the Settlor regularly after 2011 because she visited his sister, although he admitted that his interactions with her were somewhat perfunctory;

- he last saw the Settlor during the Christmas period in 2013, after which he believed she spent most of her time at her own home;

- throughout his dealings with her until he last saw her in late 2013, he never had any reason to doubt her competence.

22 I found Dr AG to be a credible witness who supported D2's case on the Plaintiff's capacity when she signed the July 2012 letter.

Dr PC

23 Dr PC was an attorney who knew the Settlor from 2010 until her death. Giving his evidence in a straightforward manner, he testified that:

- he acted for her in making a criminal complaint of fraud involving the Settlor's local bank between late 2010 and early 2011;
- he never doubted her competence to give instructions;
- he would see her at a mall until 2014 when spent most of time doing work outside of the region and she appeared quite mentally functional.

24 I found Dr PC to be a credible witness but his evidence was of only marginal relevance to the Settlor's capacity in July 2012.

Dr JT

25 Dr JT was a psychiatrist who prepared a report on the Settlor's competence on her behalf in April 2015 and provided an Expert Report to this Court. He was regretfully an often partisan expert witness who was unwilling to concede even on a hypothetical basis any position which was inconsistent with his 2015 diagnosis in relation to the Settlor. He opined that:

- the Settlor was of full mental capacity, although his 2015 Report admitted that she did not know what day of the week it was when she was asked and the questions he asked did not specifically test her awareness of her financial position;
- he was reluctant to concede that dementia patients have good days and bad days or can conceal their symptoms from strangers and to admit even the possibility that the Settlor was in 2015 suffering from dementia;
- he admitted under cross-examination that he had not read Dr WA's Medical History and denied without any equivocation that any of the medications prescribed might cause confusion. I found his certainty

about potential side-effects surprising, bearing in mind that the medications were for physical ailments;

- he reluctantly conceded when pressed that the acute urinary infection the Settlor was diagnosed as suffering from on August 7, 2012 could cause confusion.

26 I would have been unable to place any great weight on Dr JT's crucial expert evidence about the mental capacity of the Settlor in April 2015, if I was required to rely solely on his testimony. However, viewing his opinion evidence together with other evidence, Dr JT's evidence did provide some support for D2's case that the Settlor had capacity to sign the 2015 Declaration.

Dr JZ

27 Dr JZ was a former South American attorney now living in Florida who represented the Settlor in relation to, inter alia, two similar labour claims by former employees in 2012 and 2014. He gave his evidence in a straightforward manner. He testified that:

- D2 was always present when the Settlor met with him at her home, but he insisted that the Settlor always gave him instructions and he never doubted her competency in 2012 or in 2014;

- he last saw the Settlor in a restaurant with D2 and her family at the end of June or early July 2015 and she appeared coherent then;

- he considered that the Settlor's mental sharpness was normal, not unusual, for her age.

28 I found Dr JZ to be a credible witness and that his evidence provided some support for D2's case that the Settlor had capacity to sign the 2012 letter. It provided only minimal support for D2's case for capacity in relation to the 2015 Declaration.

LD (Miami Dade County Circuit Court deposition read into evidence)

29 LD was a countryman of the Settlor who was approached by D2's Florida-based son, whom he only knew professionally, in 2012 and asked to take over management of her accounts with the Bank. He currently works for an affiliate of the Bank. He testified that:

- in or about November 2012 he had two conversations with the Settlor by phone and met her once;
- initially he explained he could not represent her but once he joined the Bank's affiliate he said that he could. He then met the Settlor at her home with D2's son later that month and had no concerns about her capacity;
- the Settlor's main reason for changing managers was to have someone who could visit her and provide more control over her accounts;
- it was eventually decided by the Bank, that the proposed managerial changes could not take place until the Settlor's capacity to make this decision had been confirmed. Before this position was clarified, Mr LD's operational manager sent an email to the Bank reporting that the deponent had found the Settlor to be "*of sound mind*". Mr LD denied using that particular phrase, but said he had told his colleague that he had no concerns about the way the Settlor spoke to him.

30 I found his evidence to be credible and broadly supportive of D2's case that the Settlor had capacity to sign the 2012 letter. His testimony provided only minimal support for D2's case in relation to the 2015 Declaration.

The Settlor (June 4, 2015 Declaration read into evidence under a Hearsay Notice)

31 This document signed by the Settlor and dated June 4, 2015[2] set out a personal and non-legalistic narrative of the Settlor's dealings with the Bank and the Trust. The highlights of the narrative may be summarised as follows:

[2] The Settlor's identification card indicates that she was born on 06/04/30, it being clear from its date of issue (27-06-05) that this means April 4, 1930. On this basis she was 85 when she made the June 4, 2015 Declaration, 84 when she made the crucial 2015 Declaration (on March 6, 2015) and 82 when she signed the July 2012 Letter.

- D1 and her husband introduced the Settlor and her husband to the Bank and the original Trustee in 1995-1996;

- D1 was made beneficiary of the Trust in place of the Settlor's niece and nephew on the basis of an agreement that D1 would support the Settlor in her old age;

- D1 did not live up to this agreement in 2003 the Settlor sought a change of beneficiary to the son of a friend of hers. This request was brushed off by the Bank despite the Settlor explaining that her decision had nothing to do with any misconduct on D1's part;

- due to health problems she did pursue the matter with the Bank but she took up the issue again after her health improved in 2011 and made arrangements to travel to Miami for a personal meeting. In June 2012 she was advised not to travel and so sent the July 2012 Letter to the Bank requesting a change of beneficiary from D1 to D2;

- her attempts to complete this change so as to be able to benefit from the money deposited by the Bank and the Trustee are then described. She refers to a telephone call to D1 in 2015 in which she explained that it was because D1 had not taken care of her that she was removing her as a beneficiary. The final words of the Statement are: "*En tal sentido pido Justicia*" ("*In this regard I ask Justice*").

Legal findings

Burden of proof

32 Mr Machell QC invited the Court not to be distracted by a technical approach to the burden of proof and to adopt the simple position that it was for D2 to establish that the Settlor had capacity at either of the two material times as, the issue having been put in question, D2 was seeking to rely on the validity of the exercise of the Settlor's power to change the Trust's beneficiaries. Although Mr Robinson QC invited the Court to rely on the presumption of capacity, he was ultimately confident that if required to do so his client could prove her case.

33 I did not find it necessary to decide the question, which was not illuminated by any authority placed before me, as to whether the presumption of capacity which arises in relation to a duly executed will (*Devas and others-v-Mackay* [2009] EWHC 1951 (Ch) at paragraph [61]) applies to instruments made under a trust. The Trustee having admittedly genuine doubts about the matter and having invited the Court to determine the issue of the Settlor's capacity, in my judgment the most practical approach was as follows. To require the party positively asserting that capacity existed to prove that it did on the balance of probabilities.

The legal test for capacity

34 The legal test for capacity, like most legal tests, had two dimensions to it. Firstly, and least flexibly, what does the law recognise as the essential requirements for establishing capacity, requirements which will usually be the same from case to case? Secondly, and most flexibly, how ought the test to be applied from case to case, depending on the factual circumstances of the case before the Court?

35 There was no dispute as to what the essential requirements for establishing capacity are, and that the same test which applies to the making of wills should apply to the exercise of any other impugned legal powers. The relevant test was stated most clearly and concisely by Gibson LJ in *Hoff-v-Atherton* [2004] EWCA Civ 1554 as follows:

> *"[33] It is a general requirement of the law that for a juristic act to be valid, the person performing it should have the mental capacity (with the assistance of such explanation as he may have been given) to understand the nature and effect of that particular act (see, for example, Re K (Enduring Powers of Attorney) [1988] Ch 310 at p. 313 per Hoffmann J). To make a valid Will the law requires what is always referred to as testamentary capacity and, as a separate requirement, knowledge and approval. The latter requires proof of actual knowledge and approval of the contents of the Will. The two requirements should not be conflated. The former requires proof of the capacity to understand certain important matters relating to the Will. What those matters are were stated by Cockburn C.J. in Banks v Goodfellow (1870) LR 5 QB 549 at p. 565:*
>
> > *'It is essential .... that a testator shall understand the nature of his act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he might give effect ....'"*

36 Various cases helped to illustrate how the courts apply this standard test in different factual circumstances. One important feature of the present case was that the July 2012 Letter and the 2015 Declaration were both drafted by D2's husband, who acted at all material times as the Settlor's lawyer. Mr Robinson QC rightly submitted that the standard of proof remained the civil standard, even where the person preparing to benefit has prepared the relevant instrument. In *Fuller-v-Strum* [2001]EWCA Civ 1879, Chadwick LJ opined as follows:

> *"72. I am satisfied that there is no basis for an approach that requires, in all cases, that a person propounding a will which he has prepared, and under which he takes a benefit, must satisfy the court by evidence which excludes all doubt – or by evidence which excludes all reasonable doubt (the standard of proof required in criminal proceedings) – that the testator knew and approved the contents of the will. The standard of proof required in probate proceedings (as in other non-criminal proceedings) is satisfaction on the preponderance (or balance) of probability. But the circumstances of the particular case may raise in the mind of the court a suspicion that the testator did not know and approve the contents of the document which he has executed which is so grave that, as Viscount Simonds observed in Wintle v Nye, it can hardly be removed."*

37 Another important legal principle is that the level of understanding required depends on the circumstances of each case. As Martin Nourse QC (as he then was) stated in *In re Beaney* [1978] 1 W.L.R. 770 at 774 E-F:

> *"The degree or extent of understanding required in respect of any instrument is relative to the particular transaction which it is to effect…Thus at one extreme, if the subject matter and value of a gift are trivial in relation to the donor's other assets a low degree of understanding will suffice. But, at the other extreme, if its effect is to dispose of the donor's only asset of value and thus, for practical purposes, to pre-empt the devolution of his estate under his will or on intestacy, then the degree of understanding required is as high as that required for a will, and the donor must understand the claims of all potential donees and the extent of the property to be disposed of."*

38 It was common ground that the same level of understanding required to establish capacity to execute a will was required. However, I understood the quoted *dictum* to support a somewhat broader (and ultimately self-evident) proposition as well. The extent of property and the number and quality of other potential claims would also

influence the precise level of understanding required on the facts of each potential case.

39 The cases also demonstrated that capacity was not necessarily a black and white issue and that a testator or donor might suffer from conditions which deprived of 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. In *In re Lindzon (deceased)*, Cayman Islands Grand Court, judgment dated February 19, 2015, Smellie CJ found that capacity existed in a case involving the following facts (at paragraph 4):

> *"…The evidence is that her illnesses would not have incapacitated her mentally, but depending on her condition from day to day, they could have been debilitating enough to have diminished her capacity to grasp and fully understand the complexities of a document like the 2005 Will."*

40 Admittedly, the result in that case was reached in large part in reliance on the presumption that a duly executed will was valid. But the point for which I relied upon it was the narrower proposition that D2 did not have to prove that the Settlor was always lucid and competent between July 2012 and April 2015. This important practical point was vividly illustrated by the facts of the leading case of *Banks-v-Goodfellow* (1870) LR 5 QB 549 where the testator had for many years prior to his will been confined to the "*county lunatic asylum* [and] *remained subject to certain fixed delusions*" (at 551). In that case the gift in favour of the testator's niece (which disentitled his son as heir at law) was held to be valid because he was capable of conducting business at the relevant time.

41 The latter two cases also illustrate another important practical legal principle, that the courts generally apply a low evidential threshold designed to enlarge rather than to narrow the scope of the dispositive powers of elderly testators or donors. D2's counsel relied in this regard on *In re Walker (deceased)* [2014] EWHC 71 (Ch) and the following passage in the judgment of Nicholas Strauss QC:

> *"32. I also think that Ms. Taylor is right to submit that, traditionally, the threshold for testamentary capacity has been kept fairly low, so as not to deprive elderly persons of the ability to make wills in their declining years. Several U.S. decisions were cited in Banks to this effect, including Stevens v. Vancleve 4 Washington at 267:-*

'...The question is not so much what was the degree of memory possessed by the testator? As this:...To sum up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and understood the business in which he was engaged at the time he executed his will?'"

Findings: the factual matrix

42 In approaching the evidence relating to the capacity issue, I found the following surrounding circumstances generally supportive of applying a low threshold of proof in relation to the capacity issue:

- the Settlor decided to nominate D1 (a trusted local friend) rather than geographically distant relatives as principal beneficiary shortly after establishing the Trust in 1996;

- the Settlor's decision to nominate D2 instead (a trusted local friend who had provided active support for several years) was entirely rational and did not 'disinherit' anyone with a stronger moral claim to her generosity;

- in March 2012, the Settlor changed her Will and made D2 her beneficiary instead of D1 in respect of all of her domiciliary assets. The Will was published and has never apparently been challenged by D1;

- D1 was made a party to the present proceedings but elected to take no active part in them;

- the impugned exercise of the Settlor's power under the Trust involved essentially simple assets (Trust assets and personal assets held in three accounts maintained by one financial institution-the Bank) and only two individuals (substituting one beneficiary for another). The new beneficiary was not someone she had just met but someone with whom she had had a close relationship for several years (by 2012);

- the Settlor's May 2015 statement explaining her motives for changing beneficiaries was unchallenged by D1 even though she was afforded an opportunity to do so in the present proceedings.

43 This picture only emerged in the context of evidence filed in the present proceedings. The Trustee's concerns about the validity of the Settlor's instructions were clearly reasonable in all the circumstances having regard to the fact that:

- the Settlor appeared confused or incoherent whenever the Trustee's employees' spoke to her on the telephone;

- the Trustee had no current or historic direct relationship with the Settlor and worked through the Bank's relationship managers, who had traditionally interacted with D1 on behalf of the Settlor;

- the Trustee assumed responsibility for the relevant Trust and personal accounts not from inception but some 10 years after the Trust was settled;

- after the Trustee raised the capacity issue, the Settlor's response (seeking to change her representative at the Bank rather than meeting the capacity concerns head on) would only have elevated the concerns of a reasonable trustee in the Trustee's position, rather than allayed them.

Findings: the Settlor's capacity when executing the July 2012 Letter

44 The preponderance of the evidence supported a confident finding that the Settlor had capacity to execute the July 2012 Letter. Most crucially, I found that:

- there was no credible evidence that the Settlor was suffering from an incapacitating and degenerative ailment like dementia in July 2012. After all, when she met with Mr Quin and the Trustee's representatives in Miami in February 2015, almost three years later, although her memory was in some respects poor, she was clear about the essentials of her instructions and her motivations for them. When her longstanding friend Ms SD saw her in May 2014, she mentioned the Trust and wishing to go Miami to access money in an account. This was broadly consistent with

the language used in the Settlor's June 4, 2015 Declaration in which she, *inter alia*, wrote of her longstanding attempts to get control of "*her money*" ;

- there was credible evidence that the Settlor was capable of giving instructions in relation to legal matters up to early 2011, especially from Dr AG (who saw her throughout 2012 socially as well) and Dr JZ, who took instructions from her in 2012 and 2014 in relation to legal matters. These witnesses appeared to me to be independent witnesses with no personal interest to serve who, in any event, gave their evidence in a neutral and credible manner.

45 I found that it was in all the circumstances reasonable for Ms Ahmed to be concerned about the Settlor's capacity because of the following considerations:

- the Settlor was 82 years old when the change of beneficiary instruction was given and received;
- the July 2012 Letter offered no explanation as to the motivation behind the change of beneficiary request;
- the primary relationship manager cast suspicion on the reliability of the July 2012 Letter;
- the Settlor sounded confused when first contacted by phone;
- the Settlor's response to the Trustee raising concerns about her capacity, essentially attempting to change Relationship Managers, could not reasonably have allayed the Trustee's concerns;
- the Settlor refused to talk and sounded confused when contacted a second and third time, respectively, by phone in January and February 2013.

46 In light of all the evidence placed before the Court, I was ultimately satisfied that assuming the Settlor was actually confused on the two occasions when effective

attempts were made by the Trustee to have a telephone conversation with her, such confusion 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:

- the most credible and cogent evidence as to medical conditions the Settlor was suffering from which might cause temporary confusion came from D2's expert, Dr JT, under cross-examination. He admitted that the urinary tract infection the Settlor was diagnosed as suffering from on August 7, 2012 (which presumably would have manifested symptoms earlier) could have caused confusion;

- the Settlor clearly preferred face to face meetings to telephone conversations and it possible that her apparent confusion was partly caused by discomfiture with speaking with 'strangers';

- Ms SD's independent evidence about encounters with the Settlor over the 2012 to 2014 period was more consistent with the Settlor suffering bouts of confusion, possibly contributed to by sleep problems, rather than any more lasting and critical cognitive decline;

- not only was a written explanation provided in August 2012 to explain why the Settlor sounded confused in the July telephone call, once the Trustee's letter identified this issue, even before the Trustee's letter was received, the Settlor and D2 called the Relationship Manager back within days. This clearly demonstrates that, despite her apparent incoherence, the Settlor had in fact been coherent enough during the July telephone call to relay to D2 afterwards whom had called;

- the consistent suggestion by D2's witnesses that that the octogenarian Settlor, who was being medicated for a variety of serious aliments from time to time was never even temporarily confused simply beggared belief. However, Mr Quin's evidence about the Settlor's insistence on February 17 2015 that she wanted to reward those who had helped her by changing the beneficiary to D2, was insightful. Despite her lack of clarity about the value of the Trust assets and her own investment account, this clarity of intent was inconsistent with the suggestion that she had been legally incapacitated by a

progressively worsening condition such as dementia in July 2012, almost three years earlier.

47 I also considered but rejected the possibility (which was merely hinted at by Mr Quin in his account of his February 2015 meeting with the Settlor and was never positively asserted) that the Settlor was subject to undue influence on the part of D2 and her husband. His suspicions were probably in part aroused from the briefing that he had received from the relationship manager to the effect that the Settlor was gullible and had been taken advantage of in the past, at least as far as the recent past was concerned. That suggestion of historic vulnerability was, as a result of the cross-examination of Mr Robinson QC, shown to be unsubstantiated. Ms SD was to my mind a very valuable witness in this regard, because she saw the Settlor on more than one occasion after she had changed her Will and signed the July 2012 Letter. Ms SD was someone whom the Settlor had known far longer than D2 and whom one might have expected the Settlor to have complained to if she was being pressured by D2. Despite Ms SD's concerns about the influence of D2, whom she may well have regarded as a stranger, the Settlor made no complaints about D2 to her US-resident friend. On the other hand, she confirmed that D2 was in fact providing substantial help to the Settlor by testifying that the Settlor suggested D2 was more familiar with her medical regimen than the Settlor herself. Such reliance by the Settlor on D2 supports rather than undermines the rationality of the Settlor wishing to "reward her".

48 Further and in any event, as already noted above, D2 and her husband appeared to me to be fundamentally decent people who had more likely than not acted throughout with the predominant conviction that they were fulfilling the Settlor's wishes. While it was obvious that their evidence was in some respects coloured by self-interest, I ultimately found no basis for even suspecting that they had from the outset manipulated a vulnerable person and advanced a deceptive scheme designed to achieving purely selfish ends.

49 The most persuasive single piece of oral evidence in this regard was Dr PE's answer to my own query at the end of his re-examination as to whether he was worried in 2015 about the possibility of the Trustee's doctors concluding that the Settlor lacked capacity. D2's case was that the Settlor was at all time lucid and never showed any signs of confusion or forgetfulness, and it was almost a mantra which many of her witnesses seemed compelled to intone in an almost ritualistic manner. If the Settlor's lucidity was as consistent and clear as D2 and some of her witnesses insisted, there

should have been no anxiety whatsoever about the possibility of the Settlor 'failing' an independent medical examination. Dr PE's admission that he was worried that the Settlor might be found to lack capacity if examined by the Trustee's medical experts provided, in my judgment, valuable reassurance that he was not the sort of witness willing to say anything to advance his wife's cause.

Findings: the Settlor's capacity when executing the 2015 Declaration

50 It only remains to set out briefly why I was satisfied, somewhat more marginally, that the Settlor also possessed the necessary capacity when she executed the 2015 Declaration. The possibility that the Settlor's capacity had diminished since July 2012 was suggested by the following main considerations:

- the passage of time (almost three years, from her 83rd to 85th year);
- the likelihood that the Settlor's health was in general decline (she died at the end of July 2015).

51 Dr WA's record revealed that the Settlor was seen by him three times in 2012 for various infections (May 3, July 1 and August 7), and was next seen on June 20, 2013, October 21, 20104 and December 17, 2014 (the last two for bronchitis) and then at the beginning of July 2015. Clearly the Settlor, perhaps making a superhuman effort determined to put her affairs in order at last, was well enough to travel to Miami in February, 2015. And, health crises apart, she clearly had ongoing ailments (principally high blood pressure, diabetes and mobility problems) for which she was receiving medication all the time. The medical record produced by D2 painted a picture of a variable health pattern on the part of an aging patient who had long-term health challenges which did not directly affect her mental capacity.

52 I was satisfied that there was the sort of gradual decline that one might expect between the ages of 82 and 85 in a person with such health challenges between July 2012 and April 2015. Non-partisan evidence which supported this conclusion came in particular from three sources:

- Dr AG testified that the Settlor did not get out much after Christmas 2013; and

- Ms SD reported that the Settlor appeared to be sleeping a lot during the day and seemed confused when she saw her in May 2014. However the Settlor also mentioned getting money from an account in Miami, which reflected the Settlor's framing of what she had been trying to do for years in the Declaration (or Statement) she later signed just under three months before her death;

- Dr JT acknowledged that when he examined her in April 2015 she did not know what day of the week it was.

53 On the other hand, despite the exaggerated case advanced by D2 seeking to portray the Settlor's mental lucidity as nothing less than perfect, I found no solid basis for concluding that she lacked capacity altogether in the requisite legal sense. The simplicity and rationality of the Settlor's crucial instructions had to be taken into account as a central part of the evidential analysis. They entailed changing the Trust beneficiary in line with the change to her Will made in March 2012 and the July 2012 Letter in relation to the Trust. The sole beneficiary was being changed from one unrelated friend who had not taken care of her to another who had. The extent of the Trust assets amounted in practical terms to the contents of two investment accounts. Despite Mr Quin's perhaps understandable suspicion that she sounded coached, he confirmed the clarity of the Settlor's stated wishes in this regard at the February 2015 meeting.

54 In these circumstances, bearing in mind that neither the Trustee nor D1 was positively asserting incapacity, I concluded that it was more likely than not that when she executed the 2015 Declaration, the Settlor's "*mind and memory* [were] *sufficiently sound to enable* [her] *to know and understood the business in which [*she] *was engaged at the time*": *In re Walker (deceased)* [2014] EWHC 71 (Ch) (at paragraph 32).

Conclusion

55 For the above reasons, on January 19, 2018 the remaining questions to be determined on the Trustee's Originating Summons were determined by this Court deciding that the Settlor of the O Trust had capacity to instruct the Trustee to amend the Trustee Deed by changing the beneficiary from D1 to D2 on :

(a) July 13, 2012; and

(b) March 6, 2015.

IAN RC KAWALEY
JUDGE OF THE GRAND COURT