

1 JUDGMENT

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5 **Introduction**

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7 1. This matter comes before the Court for a preliminary hearing to determine two short points of
8 construction concerning a trust known as the Ophelia Trust (“the Trust”).

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10 2. The Court has previously held that these points of construction should be determined as
11 preliminary issues.¹
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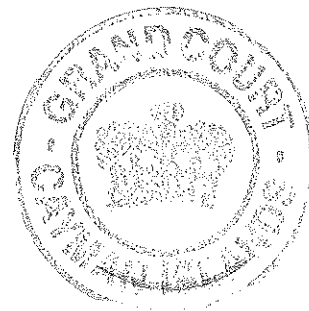
13 **Background**

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15 3. The Trust, which is governed by a trust deed dated 6 May 1996 (“the Trust Deed”), is the subject
16 of proceedings begun by Originating Summons dated 9 December 2015. The Plaintiff is the
17 current trustee of the Trust (“the Trustee”). The settlor of the Trust (“the Settlor”) died on 31
18 August 2015. The Trust Deed gave to the Settlor wide powers during her lifetime.²
19

20 4. By article 1.2.1 of the Trust Deed it was provided that, upon the death of the Settlor, the Trustee
21 shall hold the Trust fund “upon the terms set forth in any Distribution Schedule to this Trust Deed
22 which shall then be in effect.” The article then went on to make provision in the event that there
23 was no Distribution Schedule.
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¹ Ruling dated 28 July 2016

² Article 1.1



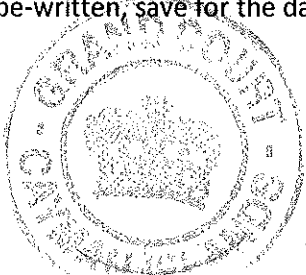
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5. The Trust Deed had attached to it a Distribution Schedule headed "*Distribution Schedule G*" ("**the original Distribution Schedule**") providing for the trust fund to be distributed to the Settlor's nephew and niece. This appears to be in a standard form with spaces for insertion of the date of the Trust Deed, the name of the Settlor, and the name and address, relationship and percentage allocation of each beneficiary. The insertions were in manuscript. This original Distribution Schedule was signed by the Settlor and on behalf of the then trustee to acknowledge receipt and acceptance.

6. There is provision in article 1.1.5 of the Trust Deed that:

"The Settlor reserves the power to amend this Trust Deed by writing delivered to the Trustee, but subject to acceptance by the Trustee. Further, subject to acceptance by the Trustee, the execution and delivery to the Trustee of a Distribution Schedule shall constitute an amendment to this Trust Deed by (a) incorporating the provisions of such Distribution Schedule in this Trust Deed, and (b) revoking any prior Distribution Schedule executed by the Settlor, but without prejudice to the prior acts of the Trustee."

7. On 22 October 1996, the Settlor signed an "*Amended Distribution Schedule G*" which incorrectly stated the date of the Trust Deed as May 21, 1996. This provided for the replacement of the remaindermen with the First Defendant ("**RDK**"). The relationship inserted is "*Friend*" and the percentage distribution inserted is "*100%*". The insertions are type-written, save for the date and



1 signature of the Settlor. The Amended Distribution Schedule was signed by the then trustee to
2 acknowledge receipt and acceptance.

3
4 8. For reasons that are unclear, a further document headed "*Distribution Schedule G*" with the word
5 "*Amended*" inserted in manuscript, and additional insertions in manuscript naming RDK as to
6 100% of the Trust Fund, was executed on 2 October 2000. This too was signed as acknowledged
7 and accepted by the then trustee.

8
9 9. The issue raised by these proceedings is whether the beneficiary of the Trust is RDK or whether
10 she has been replaced as beneficiary by the Second Defendant ("**GMB**"). GMB relies upon two
11 documents as constituting a replacement Distribution Schedule:

- 12 (a) a letter dated 13 July 2012 ("**the 2012 Letter**"); and/or
13 (b) the Declaration made on 6 March 2015 ("**the Declaration**").

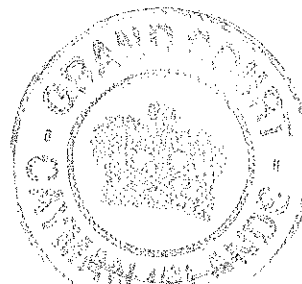
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15 10. The 2012 letter was written in Spanish and addressed to the Trustee's relationship manager at
16 Wells Fargo in Miami. It states in material part (in its English translation):

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18 *"Right now and/or through my representative (Wells Fargo), being in charge to manage*
19 *directly my assets ... in the Cayman Islands, I wish to fully establish [GMD], passport*
20 *number [number], as sole heir. This request has to be included in the Trust ... (as required*
21 *by the guidelines of the Trust). This request is valid with the signature of this document*
22 *and document to be signed in your presence, if you can make the visit...*

23 *After signing this document the legality of any other heirs ... are cancelled ...*

24 *May I ask that these requests are executed under the guidelines mentioned by me and as*
25 *required by the articles of the Trust and that those are included under its legality from*
26 *now on."*

27
28 11. The letter was signed by the Settlor and stated her Venezuelan passport number. It also included
29 her fingerprint.



1 12. No issue has been raised as to the authenticity of the signature of the Settlor on the 2012 Letter,
2 nor as to its delivery to the Trustee. However, the evidence shows that the Trustee had concerns
3 about the Settlor's capacity to execute a replacement Distribution Schedule.

4 13. There then followed the Declaration. This was described as a "Statement" of the Settlor of the
5 Trust using the powers vested in her "as established in section 1.1.1 of the Trust" and (in its
6 English translation) was as follows:

7 *"1. Herewith I state my irrevocable and absolute intention to remove all and any of the*
8 *beneficiaries that have been named so far by any means. This document replaces and*
9 *substitutes totally any document executed up to this date being opposite or contrary to*
10 *this one.*

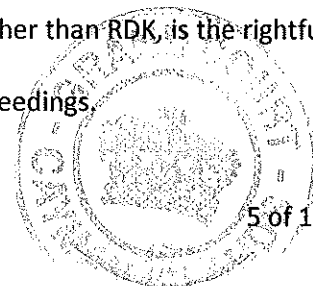
11 *2. Herewith I state my irrevocable and absolute intention to name with immediate effect*
12 *[GMB] identified by Id card [number] issued by the Bolivarian Republic of Venezuela as*
13 *the sole beneficiary of the TRUST under the conditions established by the trust. [GMB]*
14 *has the unilateral right to liquidate her interest in the TRUST only after my death and*
15 *without any further requirement.*

16
17 *3. I herewith give explicit instructions to the Trustee ... to implement the changes*
18 *mentioned in this document immediately.*

19
20 *4. It is my intention that this statement should satisfy the requirements established in*
21 *Section 1.1.1 of the TRUST and the changes should take effect immediately."*
22

23 14. The Declaration was signed by the Settlor. Again no issue has been raised as to the authenticity
24 of the signature. However, the ongoing concern on the part of the Trustee was as to the capacity
25 of the Settlor.

26
27 15. In the event neither the 2012 Letter nor the Declaration was accepted by the Trustee as
28 constituting a replacement Distribution Schedule prior to the Settlor's death. A number of issues
29 about this are raised on the pleadings. GMB asserts that now she, rather than RDK, is the rightful
30 beneficiary of the Trust. RDK has chosen not to participate in the proceedings.



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16. Against this background it has been deemed appropriate for there to be a determination of preliminary issues.

The Preliminary Issues

17. The position of both the Trustee and GMB is that, on the proper construction of the Trust Deed, the power to accept a replacement Distribution Schedule continues after death of the Settlor. If that contention is right, and (a) the 2012 Letter and/or the Declaration constituted a valid exercise of the power in article 1.1.5, and (b) the Settlor had capacity, then the Trustee has indicated that it will exercise its power of acceptance. In this scenario GMB will become the beneficiary.

18. Reaching that conclusion would require the Court to find that:

- (a) On the proper construction of the Trust Deed, the power to accept a replacement Distribution Schedule continues after death of the Settlor (“Issue 1”);and
- (b) The 2012 Letter and/or the Declaration constituted a valid exercise of the power in article 1.1.5 (“Issue 2”); and
- (c) The Settlor had capacity at the time of the 2012 Letter and/or the Declaration (“Issue 3”).

Issues 1 and 2 raise the short points of construction which now fall to be determined.



1 **Issue 1**

2 19. As indicated, the issue is whether, on the proper construction of the Trust Deed, the Trustee's
3 power pursuant to article 1.1.5 to accept an amendment made by the Settlor before her death
4 continues after her death. Although both the Trustee and GMB contend that the power of
5 acceptance may be exercised after the death of the Settlor, given the position of RDK, it is an
6 issue which the Court nevertheless needs to resolve. As RDK has not been represented, the
7 Trustee has very properly put before the Court the possible contrary arguments.

8
9 20. Under the terms of the Trust Deed, the Settlor had, during her lifetime, very substantial powers.

10 She had power to:

- 11 (a) appoint the income and capital of the Trust Fund to herself or to any other person she
12 designated: article 1.1.1;
13
14 (b) revoke the Trust, in whole or in part: article 1.1.4;
15
16 (c) amend the Trust Deed (subject to acceptance by the Trustee): article 1.1.5.
17

18
19 21. The provision in article 1.1.5 (in the terms set out above) gave the Settlor the power to decide
20 who were to be the beneficiaries after her death by the execution and delivery to the Trustee of
21 a Distribution Schedule. As already referred to, article 1.2.1 goes on to provide that upon the
22 death of the Settlor the Trustee shall hold the Trust Fund upon the terms set forth in any
23 Distribution Schedule which shall then be in effect.
24



1 22. The principles for the interpretation of a document are well established by authority. In
2 **Chartbrook Ltd v Persimmon Homes Ltd**³, in the House of Lords, the question was said to be
3 one of ascertaining what a reasonable person having all the background knowledge which would
4 have been available to the parties would have understood the language in the document to
5 mean.⁴ Then in **Marley v Rawlings**⁵ the Supreme Court held that:

6 *“When interpreting a contract, the court is concerned to find the intention of the party or*
7 *parties, and it does this by identifying the meaning of the relevant words, (a) in the light*
8 *of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the*
9 *document, (iii) any other provisions of the document, (iv) the facts known or assumed by*
10 *the parties at the time that the document was executed, and (v) common sense, but (b)*
11 *ignoring subjective evidence of any party’s intentions.”*⁶
12

13 23. This approach, it was said in the **Marley** case, should be the same when it comes to interpreting
14 wills.⁷ Furthermore, these principles also apply to the construction of a trust deed, as
15 established by this Court in the case of **In Re Shiu Pak Nin**⁸.

16
17 24. Mr Robinson, counsel for GMB, submits that applying these principles it is clear that article 1.1.5
18 confers two separate and distinct powers: first, the Settlor’s reserved power to amend by
19 writing delivered to the Trustee; and second, the Trustee’s power to accept the Settlor’s
20 exercise of her power of amendment. He contends that upon delivery by the Settlor to the
21 Trustee of her valid instrument in writing, there is no further step which the Settlor is required
22 to take. It then, as he puts it, becomes a matter for the Trustee to exercise its power to accept
23 the amendment, which the Trustee may do notwithstanding the death of the Settlor.

³ [2009] 1 AC 1101

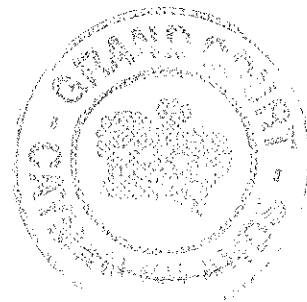
⁴ Lord Hoffmann, paragraph 14.

⁵ [2015] AC 129

⁶ Lord Neuberger, paragraph 19

⁷ Paragraph 20

⁸ 2014 1 CILR 173, per Cresswell J at page 204 (paragraph 89)



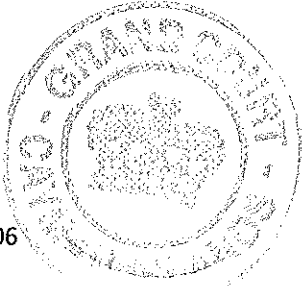
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25. In support of his submissions Mr Robinson cited the case of **Smith Barney Private Trust Company (Cayman) Limited v Cerebos and Others**⁹ a decision in this Court of Henderson J in which he referred with approval to a particular passage in **Farwell on Powers**¹⁰. This is as follows:

*“As to the period for perfecting the execution of a power, it may be laid down as a general rule that -
The consent of any person required to consent, and also all formalities annexed to the execution, must be respectively given and perfected during the lifetime of the donee of the power (Hawkins v Kemp, 3 East 410; Sug. Pow. 240, 255).
The consent, which is a material and important element in the execution, is usually required to be precedent to, or at least simultaneous with, the execution: if so, this requirement must be complied with (Greenham v Gibbeson, 10 Bing. 363). But if the terms of the power admit, there seems no real reason, in considering the execution of a power of appointment to be executed by A, subject to B’s consent, for limiting the time during which B may consent, to the duration of A’s life. A’s appointment may be said to be conditional on B’s consent: the two are independent powers; and, in the absence of all expression of intention, the consent of B may as well supplement and render valid the appointment of A, as B’s consent receives meaning and validity from the appointment of A (see Offen v Harman 1 D.F. & J.253; 29 L.J. Ch. 307).*

26. Other authorities were referred to by Mr Robinson in his skeleton argument by way of comparison and in support of his analysis.¹¹ Unlike in some cases, as he put it, where there were still functions to be carried out by the donee of the power, this was not so in the present case. Once the relevant instrument in writing had been delivered by the Settlor to the Trustee, there was nothing further to be done by the Settlor. It was then a matter for the Trustee to exercise the power to accept the amendment at any subsequent time, including after the death of the Settlor.

⁹ 2006 CILR 517
¹⁰ 3rd edition, at 159
¹¹ Whitmore-Seale v Whitmore Seale [1907] 2 Ch 332; Hawkins v Kemp [1803-13] All E.R. 506

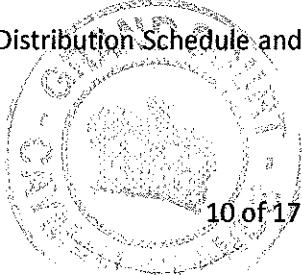


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27. Mr Machell, counsel for the Trustee, observed that the authorities referred to by Mr Robinson tended to be concerned with powers exercisable at the same time. Here, however, the power reserved to the Settlor in article 1.1.5 was not exercisable with the consent of the Trustee, but was subject to acceptance by the Trustee. It necessarily follows from this that the acceptance by the Trustee has to be after the exercise of the power by the Settlor.

28. In Mr Machell's submission, applying the established principles of construction and a common sense approach, it is clear from a reading of the Trust Deed that the intention was to give the Settlor powers during her lifetime to decide who was to benefit from the Trust Fund, both before and after her death; and (subject to any questions of capacity) those powers were clearly intended to continue right up until her death.

29. As he pointed out, there is obviously potential for there to be a time lag after the execution by the Settlor of a replacement Distribution Schedule: some time will inevitably elapse between the Trustee receiving a Distribution Schedule and the relevant officer being in a position to decide whether to accept the new schedule; and, in some situations, it may be necessary for the Trustee to make enquiries and, perhaps, take advice or seek the directions of the Court before deciding whether it is appropriate to accept. Given, as he submits, that the obvious intention was to give the Settlor power to change the post-death beneficiaries right up to the time of her death, that intention would potentially be defeated in cases where the Settlor executed the replacement Distribution Schedule shortly before her death if (to be a valid exercise of the power) the replacement Distribution Schedule had to be executed, delivered and accepted before her death. It is quite possible that the Settlor could execute a Distribution Schedule and

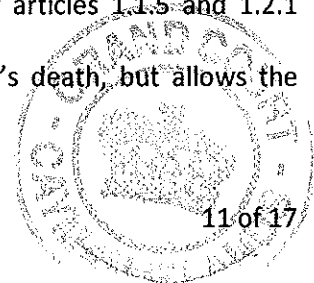


1 die shortly afterwards without the Settlor or the Trustee having any idea that this would
2 happen.

3
4 30. In considering whether there is any contrary argument, Mr Machell identified two points. Firstly,
5 it might be said that the powers in article 1.1.5 are subject to the opening words of the article
6 "*During the lifetime of the Settlor*": so it might be argued that both the exercise of the power by
7 the Settlor and the acceptance by the Trustee have to be within the lifetime of the Settlor.
8 Secondly, article 1.2.1 refers to the Trustee, upon the death of the Settlor, holding the Trust
9 Fund on the terms of any Distribution Schedule which shall "*then be in effect*" and it could be
10 said that "*then*" refers to the date of death.

11
12 31. The answer to these points, in my view, is that article 1.1.5 is the primary provision for this
13 purpose which must be construed first, whereas article 1.2.1 is a consequential provision which
14 ought not to be construed in such a way as to defeat the primary provision. As far as the
15 opening words of article 1.1 are concerned, common sense dictates that they should not require
16 acceptance by the Settlor during the lifetime of the Settlor for the practical reasons referred to
17 by Mr Machell. As for the words "*then be in effect*" in article 1.2.1, it seems to me that properly
18 construed they refer to the Distribution Schedule in force from time to time. The other
19 possibility is that if "*then*" refers to the date of death, then articles 1.1.5 and 1.2.1 should be
20 properly construed on the basis that a new Distribution Schedule (once it has been accepted) is
21 to be treated as coming into force at the time it was executed.

22
23 32. In conclusion on Issue 1, in my judgment, a proper construction of articles 1.1.5 and 1.2.1
24 requires a Distribution Schedule to be executed prior to the Settlor's death, but allows the



1 Trustee's acceptance to occur post-death. I am satisfied that this gives effect to the obvious
2 intention in the Trust Deed read as a whole.

3

4 **Issue 2**

5 33. The question of whether the 2012 Letter and/or the Declaration constituted a valid exercise of
6 the amendment power in article 1.1.5 of the Trust Deed (subject to the acceptance by the
7 Trustee and the issue of the Settlor's capacity) is also a matter of construction.

8

9 34. As stated by Murphy J in *Al-Ibraheem v Bank of Butterfield International (Cayman) Limited*¹²,
10 how a power is to be exercised, and the conditions to be satisfied for its valid exercise, are to be
11 determined purely as a matter of construction of the enabling instrument¹³. The authorities
12 there referred to establish that the only steps necessary for the exercise of a power are those
13 specified in the enabling instrument, but they must be strictly complied with.

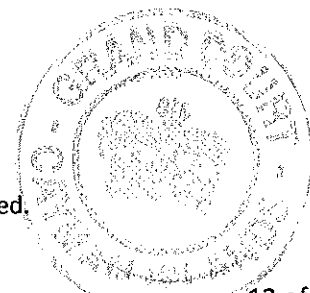
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15 35. Here it is necessary to determine what is required to constitute a Distribution Schedule for the
16 purpose of this Trust and whether the 2012 Letter and/or the Declaration can be properly
17 construed to be such a Distribution Schedule. It is not a question, as was suggested in one part
18 of his argument by Mr Robinson, of whether there has been an amendment of the Distribution
19 Schedule. As Mr Machell correctly pointed out, the matter for determination is whether there
20 has been a replacement of the Distribution Schedule by one or other or both of the documents
21 in question.

22

¹² 1999 CILR 436, at page 454

¹³ See also Thomas on Powers, 2nd edition, paragraph 7.103, and the cases there cited.

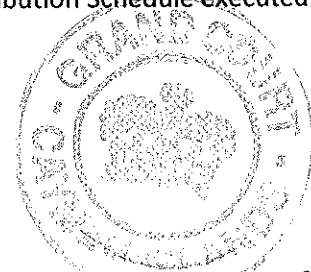


1 36. The Trustee has made no admission as to whether either document constitutes a valid exercise
2 of power. For her part, GMB submits that both documents are valid for this purpose: that they
3 meet all the requirements of a Distribution Schedule and are capable of being accepted as such
4 by the Trustee, subject only to the question of capacity.

5
6 37. Mr Robinson, on behalf of GMB, submits that article 1.1.5 must be read in light of the provisions
7 of article 1.2.1 which provides that, upon the death of the Settlor, the Trust Fund shall be held
8 upon the terms set forth in "*any Distribution Schedule*" to the Trust Deed which shall then be in
9 effect. He places particular emphasis on the word "*any*". Significantly, as he points out, the term
10 "*Distribution Schedule*" is not a term defined in the Trust Deed. There is no prescribed form to
11 be used for such purpose.

12
13 38. As has been referred to, the Original Distribution Schedule was in a standard form document
14 with additions, as was the Amended Distribution Schedule G. However, there appears to be no
15 requirement for the use of this form G or any other particular form. Mr Robinson submits that
16 the only requirements for a valid Distribution Schedule are those set out in article 1.1.5, namely
17 that:

- 18 (a) It must be in writing;
19 (b) It must be executed by the Settlor;
20 (c) (subject to acceptance by the Trustee) it must have the effect of incorporating the
21 provisions of such Distribution Schedule in the Trust Deed; and
22 (d) In such event it must have the effect of revoking any prior Distribution Schedule executed by
23 the Settlor.



1 39. I accept that these are the requirements for a valid Distribution Schedule. The question then is
2 whether they are met in the case of the 2012 Letter and/or the Declaration.

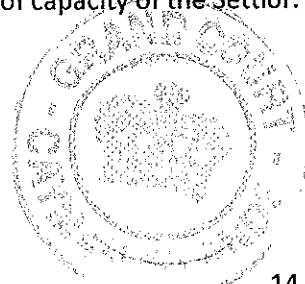
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4 The 2012 Letter

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6 40. The 2012 Letter obviously meets the writing requirement. It was duly signed by the Settlor and
7 delivered to the Trustee, matters which are not in issue.

8
9 41. It also appears to express an intention on the part of the Settlor: (a) that its provisions be
10 incorporated in the Trust, stating that *"This request has to be included in the Trust ..."*; and (b)
11 that the effect should be the revoking of any prior Distribution Schedule because of the stated
12 wish *"to fully establish [GMB] ... as sole heir"* and the instruction that *"After signing this*
13 *document the legality of any other heirs ... are cancelled"*.

14
15 42. On behalf of the Trustee, Mr Machell raises the question whether these words, particularly the
16 reference to *"sole heir"*, are a sufficient recording of the terms on which the Trust Fund is to be
17 held after the death of the Settlor. In my view the words, together with the other words
18 referred to, are sufficiently clear for this purpose and suffice to constitute a valid Distribution
19 Schedule. This it seems to me was the plain intention of the Settlor.

20
21 43. Accordingly, the 2012 Letter constituted a valid exercise of the amendment power in article
22 1.1.5, subject only to acceptance by the Trustee and the question of capacity of the Settlor.



1 The Declaration

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3 44. The Declaration also plainly meets the writing requirement. There is no issue as to its execution
4 by the Settlor.

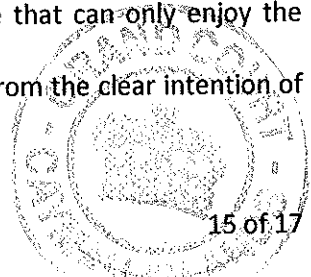
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6 45. It wrongly refers to exercising powers in article 1.1.1 of the Trust Deed, rather than article 1.1.5.
7 However, that said, the words used are plain enough for the purposes of article 1.1.5. It
8 expresses the Settlor's "*irrevocable and absolute intention to remove all and any of the*
9 *beneficiaries that have been named so far by any means.*" It also serves to incorporate its
10 provisions in the Trust Deed and revoke any prior Distribution Schedule. The words used are:

11 *"This document replaces and substitutes totally any document executed up to this date*
12 *being opposite or contrary to this one.*

13
14 *Herewith I state my irrevocable and absolute intention to name with immediate effect*
15 *[GMB] ... as the sole beneficiary of the TRUST under the conditions established by the*
16 *trust."*

17
18 46. Mr Machell raises the question, by way of contrary argument, whether the words used are
19 sufficient to identify the terms of the trust after the Settlor's death. In my judgment they are
20 sufficient for this purpose.

21
22 47. He also drew attention to the apparent intention to name GMB as sole beneficiary (before and
23 after death) albeit on terms that permitted GMB to "*liquidate her interest in the TRUST only*
24 *after my death*". The point made is that whilst article 1.1.1 gives the Settlor power to appoint
25 income and capital "*to any other person so designated*", it does not permit the addition of a
26 further beneficiary as such and certainly not (expressly at least) one that can only enjoy the
27 appointed assets after death. This may be so, but it does not detract from the clear intention of



1 the document to remove the existing beneficiary and to replace the existing beneficiary with a
2 clearly identified replacement.

3
4 48. In my judgment the Declaration, objectively construed, evinces the same clear intention as the
5 2012 Letter. That intention was to remove the existing beneficiary and to replace the existing
6 beneficiary with a specified party. It meets the requirements of a Distribution Schedule and
7 constituted a valid exercise of the amendment power in article 1.1.5 (subject only to acceptance
8 by the Trustee and the issue of capacity of the Settlor).

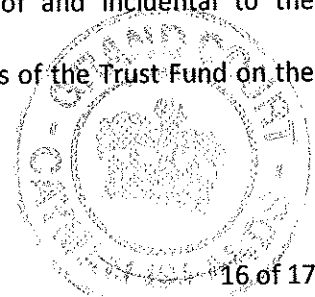
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10 **Conclusion**

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12 49. On analysis, and for the reasons given, in my judgment the questions raised by both Issues 1 and
13 2 should be answered in the affirmative.

14
15 50. As far as Issue 1 is concerned, on the proper construction of the Trust Deed, the Trustee's power
16 pursuant to article 1.1.5 to accept an amendment made by the Settlor before her death
17 continues after her death.

18
19 51. With regard to Issue 2, both the 2012 Letter and the Declaration constituted an exercise of the
20 amendment power in article 1.1.5 of the Declaration of Trust (subject to the acceptance by the
21 Trustee and subject to the Settlor's capacity).

22
23 52. There will be the usual order as to costs. The Trustee's costs of and incidental to the
24 determination of the Issues shall be raised and paid out of the assets of the Trust Fund on the
25 indemnity basis. The remaining costs are reserved.



1 Dated this 28 of October 2016

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4 The Hon Justice Nigel Clifford QC

