

These Reasons for Judgment have been signed and dated by the Judge. The Judge gives leave for them to be reported in this anonymised form. The Reasons for Judgment are being distributed on the strict understanding that in any report no person other than the advocate may be identified by his or her true name or actual location.

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

Cause No. FSD 56 of 2019 (RMJ)

BETWEEN (1) A (as Trustee of the Trust) PLAINTIFF

AND

- (1) B (in his capacity as Protector of the Trust)**
- (2) C (in his capacity as Protector of the Trust)**
- (3) D**
- (4) E**
- (5) F**
- (6) G**
- (7) H**
- (8) I**
- (9) J**
- (10) K**
- (11) L**
- (12) M**
- (13) N**
- (14) O**
- (15) P**



(BENEFICIARIES OF THE TRUST) DEFENDANTS

IN CHAMBERS AND IN PRIVATE

Appearances: Ms. Shan Warnock-Smith QC instructed by Mr. Colin Shaw and Mr. Thomas Shaw of Colin Shaw & Co. for the Plaintiff

Mr. Andrew De La Rosa instructed by Ms. Morven McMillan and Mr. Adam Huckle of Maples and Calder for the First and Second Defendants

Mr. Francis Tregear QC instructed by Mr. Charles Moore of Harneys for the Third Defendant

Ms. Catherine Newman QC instructed by Mr. Carlos de Serpa Pimentel, Ms. Anya Martin and Mr. Esmond Brown of Appleby for the Fourth to Fifteenth Defendants

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Before: **The Hon. Justice Robin McMillan**

**Heard and
Decided:** **17 December 2019**

**Draft Reasons
for Judgment
Circulated:** **10 February 2020**

**Reasons for
Judgment
Delivered:** **13 February 2020**

HEADNOTE

Application under section 48 of Trusts Law (2018 Revision) – Identification of relevant principles of construction – Need to give effect to intention as expressed in words actually used – Reading a trust document as a whole

REASONS FOR JUDGMENT

1. The matter before the Court arises from an Originating Summons dated 5 April 2019 issued by the Trustee of the Trust in question (“the Plaintiff”).
2. A Declaration was sought concerning the extent of the Power of Variation conferred on the Plaintiff by Article 5.25 of the Trust.
3. The Trust is a Cayman Islands governed discretionary trust set up by the late Settlor in December 1998.
4. On 17 December 2019 having heard the Application this Court granted a Declaration as to the proper construction of the relevant provision and gave brief reasons as to why it did so. The reasons are now set out more fully in these Reasons for Judgment.



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5. The Application was made under section 48 of the Trusts Law (2018 Revision) by which any Trustee can apply “*for an opinion, advice or direction on any question respecting the management or administration of the trust money*”.

6. Article 5.25 which deals with the Plaintiff’s Power of Amendment of the Trust states:

“The Trustees may, with the consent of the Settlor during his lifetime, at any time and from time to time by instrument in writing vary, add to, revise or modify, the terms and conditions of this Settlement except that no such amendment may be made which either changes any Beneficiary hereunder or alters that [sic] terms of clause (1) of subsection 3.4 of this Settlement.”

7. The question which then arises for determination is that while Article 5.25 currently gives the Plaintiff the power to amend the Trust Deed with the consent of the Settlor (i.e. when the Settlor was alive), does Article 5.25 also give a similar power once the Settlor had died? There is also a question as to the meaning of the prohibition against an amendment which “changes” any Beneficiary.

8. Article 3.4, which appears as an Amendment dated 25 June 2001, stipulates that on the death of the Settlor certain sums shall be paid to a former wife of the Settlor and that subject to such obligation the Plaintiff shall distribute income and capital to the Beneficiaries other than the former wife with a power to amend the relevant governing Schedule “D”.

9. This, it is argued, also strongly indicates that there would still be the continuing power to amend following the Settlor’s death, but not in relation to the specified payments to the former wife.

10. The issue before the Court is further identified in the Written Submissions of Mr. Andrew De La Rosa at paragraph 27:

“27. The central question is whether the objective meaning of the words used in Article 5.25 is that the power is exercisable after the



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Settlor's death subject to the exception "that no such amendment may be made which either changes any Beneficiary hereunder or alters [clause 3.4(1)]." The Protectors submit that it does, for the following two main reasons:

27.1 *Syntax.* *The punctuation in the first part of Article 5.25 is important. The positioning of the comma after "during his lifetime" means that, grammatically construed, the power given to the Trustee is operative (a) whilst the Settlor is alive, with his consent, and (b) following the Settlor's death, at any time and from time to time by instrument in writing.*

27.2 *Articles 3.4(1).* *The reference to Article 3.4(1) is a reference to that provision of the Trust Deed which directs the Trustee as to the distribution of income and capital upon the death of the Settlor to [the former wife]. The objective implication is that the Settlor wished to protect against the Trustee amending his former wife's potential interest in the Trust Fund after he had died. It follows that the Settlor must have intended for the power of amendment within Article 5.25 to be effective following the Settlor's death."*

11. Another helpful point is stated at paragraph 10.2 of Ms. Shan Warnock-Smith QC's Written Submissions, that the amendment to the variation power made by the 2001 Deed of Amendment was made with the consultation of the Settlor, "*who must, therefore, be taken to have understood that the Trustee would continue to have the power to amend or vary after his death when, self-evidently, his consent would not be available.*"
12. The Court agrees entirely with the impeccable logic of this analysis in terms of the surrounding relevant circumstances.
13. Turning to the applicable principles of construction, these are succinctly set out by Ms. Catherine Newman QC at paragraph 27 of her Written Submissions:



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“27. *As for the principles applicable to construction, the Court will be very familiar with these and the Beneficiaries expect there to be little or no difference between the parties:*

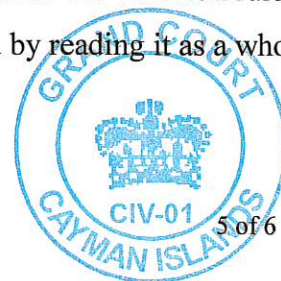
- a. *The court looks for the intention as expressed: IRC v Raphael [1935] AC 96 at 142 per Lord Wright;*
- b. *Words in the English language are given their ordinary meaning;*
- c. *The factual matrix should be taken into account: ICS v West Bromwich Building Society No 1 [1998] 1 WLR 896 HL at 912 per Lord Hoffmann;*
- d. *“The surrounding circumstances which are relevant are those which exist or are in the reasonable contemplation of the settlor when the settlement is made, not future unforeseen circumstances”:* See *Lewin on Trusts 6-011;*
- e. *Evidence of subjective intention is not admissible;*
- f. *For the treatment of ambiguities, equivocations and uncertainties, see Lewin 6-012-6-016.”*

14. In relation to the present case, the Court considers the language of Lord Wright in *IRC v Raphael [1935] AC 96* at page 142 of particular assistance:

“It must be remembered at the outset that the court, while it seeks to give effect to the intention of the parties, must give effect to the intention as expressed, that is, it must ascertain the meaning of the words actually used”.

15. This observation is particularly helpful in relation to what may summarily be called the “syntax point”.

16. It is also instructive that Lord Wright at page 146 draws attention to the common rule of construction that the meaning of a document must be ascertained by reading it as a whole.



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17. Once again, this approach is especially helpful in relation to what may summarily be called the “Article 3.4(1) point.”
18. The Court would emphasise that the task before it although certainly an important one is not necessarily because of that a difficult one.
19. When one looks at the intention of the Settlor as expressed in the language of the Trust documents and when one gives words in the English language their ordinary meaning and construes the language of the Trust Deed as a whole, it is beyond any doubt whatever that the Power of Variation is exercisable after the death of the Settlor.
20. The Court accepts unreservedly the cogency of both the argument as to syntax and the argument as to the status and function of Article 3.4(1). When looked at both separately and in combination, they amply indicate that the Plaintiff’s Originating Summons Application as to construction can admit of only one rational outcome, and on that basis the appropriate Declaration has thus been made. The Court also accepts the submissions of the parties that the prohibition on an amendment which “changes” any Beneficiary simply means that no Beneficiary (as defined) may be added or excluded in exercise of the Power of Variation. It does not impose a restriction on varying the interest of a Beneficiary.

Robin McMillan

**THE HON. JUSTICE ROBIN MCMILLAN
JUDGE OF THE GRAND COURT**

