

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

3 **CASE NO. FSD 199 OF 2015 (NCJ)**

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5 **IN THE MATTER OF A TRUST KNOWN AS THE OPHELIA TRUST MADE BY DECLARATION OF**  
6 **TRUST BETWEEN THE SETTLOR AND THE FIRST UNION BANK AND TRUST COMPANY**  
7 **(CAYMAN) LTD ON 6 MAY 1996**

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

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

10 **Appearances:** **Mr John Machell QC and Ms Jessica Williams (Harneys) for the**  
11 **Plaintiff**

12 **Mr Hector Robinson and Mr Christopher Levers (Mourant**  
13 **Ozannes) for the Second Defendant**

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15 **Before:** **The Hon. Mr. Justice Clifford, IN CHAMBERS**

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17 **Heard:** **7 July 2016**

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#### **RULING**

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22 1. This matter comes before the Court on the Plaintiff's Summons dated 20 June 2016 seeking  
23 direction whether there should (as the Plaintiff suggests) be a preliminary hearing to  
24 determine two short points of construction. At the hearing on 7 July 2016, I acceded to the  
25 application. These are the reasons for the decision.

26 2. The application is made pursuant to Order 33, rule 3 of the Grand Court Rules ("**the GCR**")  
27 which provides:

28 *"The Court may order any question or issue arising in a cause or matter, whether of fact or*  
29 *law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to*

1           *be tried before ... the trial of the cause or matter, and may give directions as to the manner in*  
2           *which the question or issue shall be stated.”*

3           3. The proceedings, begun by Originating Summons dated 9 December 2015, concern the  
4           Ophelia Trust (“**the Trust**”) which is governed by a trust deed dated 6 May 1996 (“**the Trust**  
5           **Deed**”). The Plaintiff is the current trustee of the Trust (“**the Trustee**”). The settlor of the  
6           Trust (“**the Settlor**”) died on 31 August 2015. The Trust Deed gave to the Settlor wide  
7           powers during her lifetime.<sup>1</sup>

8           4. By article 1.2.1 of the Trust Deed, upon the death of the Settlor, the Trustee shall hold the  
9           Trust fund “*upon the terms set forth in any Distribution Schedule to this Trust Deed which*  
10           *shall then be in effect.*” The Trust Deed had attached to it a Distribution Schedule providing  
11           for the trust fund to be distributed to the Settlor’s nephew and niece.

12           5. There is provision in Article 1.1.5 of the Trust Deed that:

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

19           6. On 22 October 1996, the Settlor executed an amended Distribution Schedule which provided  
20           for the replacement of the remaindermen with the Settlor’s friend, the First Defendant  
21           (“**RDK**”). The replacement Distribution Schedule was accepted by the then trustee. For  
22           reasons that are unclear, a further amended Distribution Schedule, also naming RDK, was  
23           executed on 2 October 2000.

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<sup>1</sup> Article 1.1

- 1 7. The issue raised by these proceedings is whether the beneficiary of the Trust is RDK or  
2 whether she has been replaced as beneficiary by the Second Defendant ("**GMB**").
- 3 8. GMB relies upon two documents as constituting a replacement Distribution Schedule:  
4 (a) a letter dated 13 July 2012 ("**the 2012 Letter**"); and  
5 (b) a declaration made on 6 March 2015 ("**the Declaration**").
- 6 9. The Trustee had concerns about the Settlor's capacity to execute a replacement Distribution  
7 Schedule and neither document was accepted by the Trustee as constituting a replacement  
8 Distribution Schedule prior to the Settlor's death.
- 9 10. GMB has, in her Points of Claim, asserted that the Trustee committed breaches of trust in  
10 connection with its dealings with the Settlor before her death. The allegations relate both to  
11 what happened in 2012 (in relation to the 2012 Letter) and then what happened  
12 subsequently, particularly in 2015. The Trustee has joined issue with these allegations. If  
13 they all fall to be determined on the case proceeding directly to trial, considerable Court  
14 time and costs will be spent in dealing with them.
- 15 11. It is submitted by Mr Machell, on behalf of the Trustee, that it is unnecessary for matters to  
16 take this course. The Trustee's position is that, on a proper construction of the Trust Deed,  
17 the power to accept a replacement Distribution Schedule continues after death of the  
18 Settlor. If that contention is right, and (a) the 2012 Letter and/or the Declaration constituted  
19 a valid exercise of the power in clause 1.1.5; and (b) the Settlor had capacity, then the  
20 Trustee has indicated that it will exercise its power of acceptance. In this scenario GMB will  
21 become the beneficiary.
- 22 12. Reaching that conclusion would require the Court to find that:  
23 (a) on the proper construction of the Trust Deed, the power to accept a replacement  
24 Distribution Schedule continues after death ("**Issue 1**");  
25 (b) the 2012 Letter and/or the Declaration constituted a valid exercise of the power in  
26 clause 1.1.5 ("**Issue 2**"); and

1 (c) the Settlor had capacity at the time of the 2012 Letter and/or the Declaration (“**Issue**  
2 **3**”).

3 13. Issues 1 and 2 raise short points of construction. The Trustee has suggested that they could  
4 be resolved in a half day hearing. Given that the Court is conversant with the issues, it may  
5 even be that they could be resolved more quickly than that.

6 14. So far as Issue 1 is concerned, the Trustee has pleaded that, on the proper construction of  
7 the Trust Deed, the Trustee’s power to accept an amendment made by the Settlor before  
8 her death continues after her death.<sup>2</sup> This is also the case of GMB. But, given the position of  
9 RDK, this is still a matter that the Court will need to resolve. These are proceedings begun by  
10 Originating Summons by the Trustee for the Court to determine the rightful beneficiary of  
11 the Trust. As it appears that RDK will not be represented, the Court will require the Trustee,  
12 adopting a neutral role for this purpose, to put such contrary arguments as there may be.  
13 This is consistent with the nature of the proceedings.

14 15. On Issue 2, the Trustee has expressly pleaded that it is neutral.<sup>3</sup> The Trustee has made no  
15 admission whether either document constitutes a valid exercise of the power. But again (on  
16 the assumption that RDK remains unrepresented) and having regard to the nature of the  
17 proceedings, the Court would expect the Trustee in its neutral position to put such contrary  
18 arguments as there may be.

19 16. It is submitted on behalf of the Trustee that it is clearly appropriate for Issues 1 and 2 to be  
20 resolved at a short hearing in advance of the trial. The contention is that if the issues are  
21 resolved in GMB’s favour, then the matter can proceed to trial simply to determine the  
22 question of the Settlor’s capacity. On the other hand, it is said, if the matter does not  
23 proceed in this way, then it would be necessary to proceed to trial to deal not just with the  
24 capacity question, but also the allegations that the Trustee committed breaches of trust.

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<sup>2</sup> Points of Defence paragraph 3.9

<sup>3</sup> Points of Defence paragraph 3.11

1 That, it is submitted, is unnecessary to determine who is the remainderman of the Trust and  
2 would be a waste of court time and costs.

3 17. However, it is not accepted on behalf of GMB that these Issues 1 and 2 should be  
4 determined prior to trial. It is submitted by counsel on her behalf that the Issues are not  
5 suitable for preliminary determination and a trial of them as such would likely lead to delay  
6 and significant costs being unnecessarily incurred.

7 18. On Issue 1, her attorneys have taken the point in correspondence that there is no issue on  
8 the pleadings between the Trustee and GMB having regard to the Trustee's admission that  
9 the power to accept an amendment made by the Settlor continues after her death.  
10 Therefore, it is contended that, in circumstances where there is no difference between the  
11 Trustee and the Second Defendant on the matter, it would be disproportionate to have the  
12 Court determine, as a preliminary issue, what has effectively been agreed between the  
13 parties. This, however, ignores the position of RDK and the proper role of the Trustee in  
14 these proceedings. It will still be necessary for the Court to determine the issue. As already  
15 indicated, having regard to the background to and nature of the proceedings, the Court will  
16 require the Trustee, adopting a neutral role, to ensure that all arguments are before the  
17 Court, including any that can properly be made contrary to the contentions of GMB, to allow  
18 for a fair and proper determination of the issue.

19 19. The same point really arises on Issue 2. In this instance the attorneys for GMB rely on the  
20 fact that the Trustee has not elected to advance a positive case on the validity of the 2012  
21 Letter or the Declaration. So it is contended that it cannot be said that the validity of either  
22 document is a serious question to be determined which warrants being heard as a  
23 preliminary issue. But again the answer is that the Court will still need to make a proper  
24 determination of the issue with the assistance of the Trustee, in its neutral role, putting any  
25 material arguments before the Court.

1 20. It is accepted on behalf of GMB that if either of Issues 1 or 2 were answered in the negative,  
2 the case would likely be disposed of (subject to any appeal). But this, it is contended, is a  
3 highly unlikely outcome based on the evidence and the pleadings.

4 21. At the hearing the main thrust of the argument by counsel for GMB was that the alleged  
5 breaches of trust are central issues in the Second Defendant's case and will require  
6 determination in any event. It is contended that these issues will have to be tried because  
7 they go to GMB's claims in respect of costs. These claims are for an order that the Trustee  
8 indemnify the Trust Fund for what are said to be consequent costs and expenses, including  
9 the Trustee's costs and the Second Defendant's costs of the proceedings. So, it is submitted,  
10 the proposed trial of preliminary issues would serve no useful purpose as there will likely still  
11 have to be a full trial. A trial of these preliminary issues would probably not, it is contended,  
12 lead to the case being disposed of, which is what is required for an order of the kind sought,  
13 made only in the most limited of circumstances.

14 22. It is right that the authorities show that caution must be exercised in this regard. Preliminary  
15 issues have often been warned against as, in oft cited words, "*treacherous short cuts*".<sup>4</sup> A  
16 number of cases establish that preliminary issues will only be ordered in limited  
17 circumstances where special grounds exist.<sup>5</sup> In the case of **In the Matter of The Ojeh Trust**<sup>6</sup>  
18 the Chief Justice helpfully set out the factors for the Court to consider in the exercise of its  
19 discretion. These include:

- 20 (a) whether determination of the issues would completely dispose of the case or at least a  
21 significant aspect of it;

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<sup>4</sup> Tilling v Whiteman [1979] 1 All ER at 744, per Lord Scarman

<sup>5</sup> In the Matter of Sphinx Group of Companies [2009] CILR 28; TMSF v Wisteria Bay Limited & Ors [2007] CILR 310; Garcia v McAlpine (Cayman) Limited and Rankine [2006] CILR 69; Wahr Hansen & Anor v Compass Trust Company Limited 7 Ors [2004-05] CILR Note 49; In the Matter of the T Trust [2002] CILR Note 1; Basedow v Stone [1988-89 Note 4

<sup>6</sup> [2008] CILR Note 3

- 1 (b) whether the costs and time involved in preparation for trial, and for the trial itself,  
2 would be significantly reduced; and  
3 (c) the degree of risk that a trial of preliminary issues would increase costs or delay the trial  
4 overall.

5 23. In my view, on a proper consideration of these factors in the present case, it is right to  
6 exercise the discretion to order the trial of preliminary issues. The course proposed by the  
7 Trustee will lead to the disposal of the case with a considerable saving of time and costs. If  
8 Issues 1 and 2, the short points of construction, are decided against GMB, that will be the  
9 end of the action (subject only to any appeal). However, even if they are properly resolved  
10 on a preliminary basis in her favour, then there will only need to be a comparatively short  
11 trial (of something in the region of 2 days) on the question of capacity at the relevant time  
12 (Issue 3). The Trustee does not, in its Points of Defence, deny capacity; the position rather is  
13 that it does not admit it, so putting GMB to proof.<sup>7</sup> Accordingly, she will be able to lead  
14 evidence which can be tested by the Trustee. This is to be contrasted with a full trial of all  
15 the other wide ranging and contentious issues on the pleadings which is likely to require 5 to  
16 6 days following extensive preparation, discovery and exchange of witness statements. On  
17 proper analysis, this would be unnecessary because GMB does not have to establish breach  
18 of trust to prove that she is the rightful beneficiary. The Court will only deal with such issues  
19 as are necessary to decide the question raised by the Originating Summons. So I am satisfied  
20 that the disposal of the case in the manner proposed by the Trustee will significantly reduce  
21 the costs and time involved.

22 24. This is not to say that, if she succeeds in the case, GMB will be prevented from pursuing her  
23 claim for costs. She will no doubt argue in this event that the Trustee should have given  
24 effect to the valid exercise of the power without the need for proceedings. It can be  
25 anticipated that the Trustee will respond that even if the Trustee had accepted the

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<sup>7</sup> Points of Defence paragraphs 3.4 and 3.8

1 amendment and matters had come to a head before the Settlor's death, in the  
2 circumstances the Originating Summons would still have been issued in any event to obtain  
3 the directions of the Court. The question then will be whether the Trustee should meet the  
4 costs of the proceedings or whether, on her alternative claim, GMB will be entitled to the  
5 usual order in these types of proceedings for parties' costs to be paid out of the trust fund.

6 25. Accordingly, on the pivotal question raised by GMB as to the likely need for a full trial of the  
7 action, I reject the submissions made on her behalf and I accept the analysis of the Trustee.  
8 For the reasons given this action can be properly and economically disposed of, on the basis  
9 proposed, without an extensive trial of all the pleaded issues.

10 26. Therefore, I conclude that the appropriate course is for the Court to direct, pursuant to GCR  
11 Order 33, rule 3, that a hearing is listed on a date to be fixed (with a time estimate of half a  
12 day) to determine:

13 (1) whether, on the proper construction of the Trust Deed, the Trustee's power pursuant to  
14 clause 1.1.5 to accept an amendment made by the Settlor before her death continues  
15 after her death;

16 (2) whether:

17 (a) the 2012 Letter; or

18 (b) the Declaration,

19 constituted an exercise of the amendment power in clause 1.1.5 of the Declaration of Trust  
20 (subject to the acceptance by the Trustee and subject to the Settlor's capacity).

21 27. In the meantime, paragraphs 3 to 9 of the previous order of the Court, giving directions in  
22 this matter, are stayed until further order of the Court.

23 28. The Trustee's costs of and incidental to the application shall be raised and paid out of the  
24 Assets of the Trust fund on the indemnity basis. The remaining costs are reserved.

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1 Dated this of July 2016

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4 **The Hon Justice Nigel Clifford QC**