



CAUSE NO: FSD 2024-0259 (JAJ)

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

**IN THE MATTER OF SECTION 48 OF THE TRUSTS ACT (2021 REVISION) AND ORDER 85,
RULE 8 OF THE GRAND COURT RULES**

AND IN THE MATTER OF THE ESTATE OF CGJ

IN PRIVATE

**Appearances: Mr Christopher Levers, Mr Ben Harle and Mr Jordan Constable of Ogier
(Cayman) LLP for Neville Hicks**

Before: The Honourable Justice Jalil Asif KC

Heard: On the papers

Judgment: 30 October 2024

Trusts—application to court for determination of questions—determination of which assets held on inter vivos trust and which assets within deceased's estate—whether trustee can adopt a replacement deed of trust

Wills—whether schedule to will validly incorporated by reference

JUDGMENT

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A. Preliminaries

1. This matter concerns the administration of an *inter vivos* trust and the estate of the settlor of the trust. In brief, Mr Neville Hicks, who is the trustee of the trust and executor of the estate, seeks certain declarations and directions from the Court pursuant to section 48 of the Trusts Act and GCR O.85, r.8. The cause is subject to a confidentiality order made by Kawaley J on 28 August 2024. Accordingly, I refer to the deceased as CGJ and to the two primary beneficiaries of the trust and estate as MDJ and JOJ. In addition, I have omitted all unnecessary factual details and have used additional anonymised names within this judgment as appropriate.

B. Factual background

2. CGJ lived in the Cayman Islands for nearly 40 years before their death. They died in March 2023. CGJ is survived by their spouse, MDJ, and their child, JOJ. MDJ has Caymanian Status. JOJ was born in the Cayman Islands and is a Caymanian citizen. JOJ is currently at university in the United Kingdom and MDJ is currently mainly living in the UK to be closer to JOJ. The result is that both MDJ and JOJ are currently resident in the United Kingdom for tax purposes.

3. JOJ first moved to the UK for educational reasons in 2017 with MDJ. The tax consequences of this prompted some restructuring of the family's estate planning at that time.
4. Prior to 2017, the family assets, comprising real property and investments in the Cayman Islands, were owned via a Cayman Islands company, K Ltd. K Ltd's directors were CGJ and MDJ. K Ltd had one issued share. Initially, the share was registered to Codan Trust Company (Cayman) Ltd, which held the share as trustee of the J Trust, which CGJ and MDJ had created as joint settlors. Under the terms of the J Trust, the trustee's power to sell or dispose of the share was limited unless the protector consented. In 2014, XBJ replaced Codan Trust Company (Cayman) Ltd as trustee of the J Trust, and Codan transferred the assets within the J Trust, primarily the share in K Ltd, to XBJ.
5. On a day in August 2017, the precise date of which is not material:
 - 5.1 XBJ, as trustee of the J Trust, signed a share transfer document to transfer the share in K Ltd to CGJ.
 - 5.2 CGJ and MDJ, as the directors of K Ltd, resolved to approve the share transfer and to approve MDJ's resignation as a director of K Ltd.
 - 5.3 CGJ and MDJ executed a document recording that the share transfer to CGJ was not to diminish or affect MDJ's right to claim that the share in K Ltd and/or K Ltd's assets are marital property.
 - 5.4 CGJ executed a Declaration and Acknowledgement and Deed of Amendment, Appointment and Resignation, declaring that they held the share in K Ltd on trust for a discretionary class comprising CGJ, MDJ, JOJ and JOJ's issue.
6. In addition, the protector of the J Trust signed a Consent confirming that they had received proper notice of and irrevocably consented to the share transfer from J Trust to CGJ. The Consent is undated. Its wording suggests that it was prepared and executed at a later date. I do not have any information that indicates when this was. Of note, the Consent states:

"Pursuant to the powers vested in the Trustee of the Trust under clause 3.1 of the Trust Deed, the Trustee transferred on [date] day of August, 2017 the sole issued share of [K Ltd], being an asset held in the Trust Fund to [CGJ], being a member of the Discretionary Class of Beneficiaries as defined in the Trust Deed"

This is materially identical to the language used in the Declaration of Termination executed by XBJ in May 2023, as mentioned below, which suggests that it may have been prepared and signed at about the same time.

7. CGJ drafted their own Will and accompanying letter of wishes, which they executed on the same day in August 2017. The Will appoints Mr Hicks as executor and provides that “*all of my property*” should be held on trust for the benefit of MDJ and JOJ. CGJ directs Mr Hicks to their letter of wishes for details of how to apply such assets. In addition, the Will seeks to incorporate a Schedule by reference.
8. The Schedule to the Will has a handwritten title: “*Schedule to Last Will and Testament [CGJ]*”. The Schedule comprises 6 pages of relatively standard executor’s powers and trustee’s powers in relation to a Cayman Islands trust. The Schedule appears to have been initialled by CGJ but not by the witnesses to CGJ’s execution of the Will.
9. The Letter of Wishes is addressed to Mr Hicks, purportedly as trustee of the J Trust and as executor of CGJ’s Will and is signed by CGJ. It includes certain preferences expressed by CGJ as to the way in which Mr Hicks should deal with the assets in CGJ’s estate. Of relevance to the questions before the Court, CGJ referred to and distinguished between “*the assets of the [J Trust]*” and CGJ’s “*personal property*”, and included a Schedule to the Letter of Wishes, listing the items that CGJ considered were assets of the J Trust and the items they considered their personal property. CGJ stated that whilst these assets were under separate ownership as a matter of law, they intended Mr Hicks to treat their personal property as being held on trust for MDJ and JOJ and to be guided by the terms of the J Trust and the Letter of Wishes in making distributions from CGJ’s estate.
10. The Schedule to the Letter of Wishes listed the assets of the J Trust as being the share in K Ltd registered in CGJ’s name, and then listed the assets of K Ltd, namely a property in the Cayman Islands, property and land in North Carolina, USA, and certain investments. It separately listed CGJ’s personal property, comprising certain bank accounts, shares, an interest in a property in the Bahamas and some motor vehicles. The Schedule has a manuscript endorsement, which Mr Hicks recognises as being in CGJ’s handwriting, indicating that it had been updated in November 2021.

11. In February 2023¹, CGJ signed a written resolution appointing Mr Hicks as an additional director of K Ltd.
12. In March 2023, CGJ died.
13. Finally, of relevance, in May 2023 XBJ executed a Declaration of Termination as trustee of the J Trust on the ground that there were no funds or assets held in the J Trust. XBJ recited that they had transferred the share in K Ltd to CGJ in August 2017 as one of the discretionary beneficiaries of the J Trust. Mr Hicks says in his evidence that this was prompted by Mr Hicks querying with XBJ the position regarding ownership of the share in K Ltd.

C. Issues for Determination

14. Against this background, Mr Hicks has identified the following issues on which he seeks a determination of the Court:
 - (1) Is the share in K Ltd part of CGJ's estate?
 - (2) Should the Schedule to the Will be treated as being legally valid and part of the Will?
 - (3) Should the Will be construed so that CGJ's estate is held on a discretionary trust for MDJ's and JOJ's benefit ("the Will Trust") and, if so, what are the terms of the Will Trust?
 - (4) Would Mr Hicks be acting reasonably if he were to administer the Will Trust on the terms set out in a detailed Deed of Amendment and Restatement, which has been agreed and approved by MDJ and JOJ as all the beneficiaries of the Will Trust.
15. In my judgment, issue 1 above gives rise to a further issue, namely, if not part of CGJ's estate, on what basis is the share in K Ltd held and by whom should it be held?

¹ Wrongly stated by Mr Hicks in his evidence to have been executed in July 2023, after CGJ had died, apparently on the basis that the date was in US format.

D. Issue 1 – The status of the share in K Ltd

16. Mr Hicks queries whether, when the share in K Ltd was transferred to CGJ in August 2017, CGJ thereafter owned it legally and beneficially or whether they held it on trust. Mr Hicks notes that none of the transfer document, the resolution to recognise the transfer or K Ltd's Register of Members states or implies that CGJ was to receive or to hold the share other than personally. Against this is CGJ's Declaration executed the same day to the effect that they held the share in K Ltd on trust. Mr Hicks comments that there is no evidence as to the order in which the transactions took place on that day, so Mr Hicks queries whether CGJ was the legal and beneficial owner of the share at the time that they executed the Declaration. Mr Hicks also notes that if CGJ held the share on trust on the same terms as the J Trust (as per the Declaration), then CGJ's purported appointment of Mr Hicks as trustee did not comply with the appointment provisions in the J Trust deed, applicable by reference, and arguably was therefore invalid.
17. The first point to record is that, however the share in K Ltd was held after August 2017, it was clearly no longer an asset of the J Trust. The share was transferred out of the J Trust to CGJ by way of a discretionary distribution of the assets of the J Trust in their favour. This follows from:
- 17.1 the terms of the transfer executed by XBJ in August 2017; and
- 17.2 the terms of the Declaration of Termination executed by XBJ in May 2023, which recites that:
- “Pursuant to the power vested in the Trustee under clause 3.1 of the Settlement the Current Trustee transferred on [date] August, 2017 the sole issued share of [K Ltd], being an asset held in the Trust Fund to [CGJ], being a member of the Discretionary Class of Beneficiaries as defined in the Settlement.”*
- This analysis is also consistent with the terms of the undated Consent executed by the protector.
18. Secondly, at no time was CGJ ever a trustee of the J Trust. The trustees of that trust were Codan Trust Company (Cayman) Ltd and then XBJ. CGJ did not and could not declare himself an additional trustee of the J Trust. In other words, once the share in K Ltd left the J Trust, it did not return to the J Trust as a trust asset.
19. Thirdly, it is clear from the contemporaneous documents that CGJ received the share in K Ltd from XBJ in their personal capacity.

20. Fourthly, CGJ then executed a declaration of trust in respect of the share in K Ltd, such that they held it on trust on the same terms as were applicable to the J Trust, as amended by CGJ's Declaration (which I shall call the M Trust). In response to Mr Hicks' comment that there is no evidence as to the sequence of events, such that he questions whether CGJ's declaration of trust was valid, I consider that the presumption of regularity applies (*omnia praesumuntur rite et solemniter acta esse*). This has the result that the transfer of the share from XBJ to CGJ is to be presumed to have been completed before CGJ made their declaration of trust, so as to make both steps effective rather than to render one of them ineffective.
21. I do not consider that the absence of any record that CGJ held the share in K Ltd on trust other than in the Declaration is significant. In particular, the absence of any note on K Ltd's Register of Members is of no significance. Indeed, I would not expect K Ltd to make such a record because Article 11.1 of its Articles of Association contains the common provision that the company is entitled to treat the registered owner as the absolute owner, and the company does not have to recognise any equitable interest in a share. Moreover, Article 11.2 expressly states:

"11.2 No person shall be entitled to recognition by the Company as holding any share upon any trust and the Company shall not be bound by, or be compelled in any way to recognise, (even when having notice thereof) any equitable, contingent, future or partial interest in any share or any other right in respect of any share except an absolute right to the entirety of the share in the holder. If, notwithstanding this Article, notice of any trust is at the holder's request entered in the Register of Members or on a share certificate in respect of a share, then, except as aforesaid:

- (a) such notice shall be deemed to be solely for the holder's convenience;*
- (b) the Company shall not be required in any way to recognise any beneficiary, or the beneficiary, of the trust as having an interest in the share or shares concerned;*
- (c) the Company shall not be concerned with the trust in anyway, as to the identity or powers of the trustees, the validity, purposes or terms of the trust, the question of whether anything done in relation to the shares may amount to a breach of trust or otherwise; and*
- (d) the holder shall keep the Company fully indemnified against any liability or expense which may be incurred or suffered as a direct or indirect consequence of the Company entering notice of the trust in the Register of Members or on a share certificate and continuing to recognise the holder as having an absolute right to the entirety of the share or shares concerned."*

22. Fifthly, the answer to Mr Hicks' concern that CGJ's appointment of Mr Hicks as replacement trustee of the M Trust did not comply with the formal requirements incorporated by reference from the J Trust deed is that, as settlor of the M Trust and acting in the course of creating that trust, CGJ was not bound by the terms of the J Trust deed. CGJ was entitled to appoint whomever they wished as first trustee

of the M Trust. The requirement that the protector appoint new trustees was not operative and did not bite on CGJ as settlor.

23. Thus, in my judgment, the share in K Ltd is held by Mr Hicks on trust for MDJ and JOJ on terms mirroring those of the J Trust, as amended by CGJ's Declaration, but separately from the J Trust. The share in K Ltd is not part of CGJ's estate.

E. Issue 2 – Should the Schedule to the Will be treated as being legally valid and part of the Will?

24. The short answer to this question is that the Grand Court has already granted probate of the Will on 4 July 2023, including the Schedule to it. Unless and until the grant of probate is challenged or set aside, Mr Hicks is entitled to consider that the Schedule forms part of the Will and is to be acted upon.

25. The longer answer is that I agree with the submissions filed on behalf of Mr Hicks that the Schedule does not fall foul of the prohibition in s.6 of the Wills Act because it does not purport to make any disposition or direction as to the administration of CGJ's estate, it merely contains details of the powers available to the executor in respect of the trust created by the Will. The Schedule is clearly referenced within the Will, and that reference is sufficiently certain to make clear what document is being referred to. I therefore conclude that the Schedule is incorporated into the Will by reference.

F. Issue 3 – Should the Will be construed so that CGJ's estate is held on a discretionary trust for MDJ's and JOJ's benefit ("the Will Trust") and, if so, what are the terms of the Will Trust?

26. I agree with the submissions for Mr Hicks that the Will and the Letter of Wishes should be construed together in determining the intention behind and terms of the Will Trust, and that there is no need to look further to ascertain CGJ's intention as the nature and intention of the trust.

27. Based on the documents I have seen, I find that CGJ intended that the Will Trust should be discretionary in nature.

28. I disagree with Mr Hicks' submission that the class of potential beneficiaries under the Will Trust is limited to MDJ and JOJ. Notwithstanding the repeated references to MDJ and JOJ alone, I do not consider that that construction is consistent with CGJ's expressed wish that:

“Another objective is to maintain the Estate so that it supports [MDJ] through [their] life in the fashion that [MDJ] is accustomed and as well as [JOJ] during [their] lifetime and hopefully [their] children in the same way.” (Emphasis added)

I interpret this passage as expressing CGJ's wish that JOJ's children should be included within the class of beneficiaries, but that CGJ recognised that the assets within the Will Trust might be exhausted before any distributions could be made in their favour.

29. Mr Hicks, as trustee of the Will Trust, has discretion to distribute income to the beneficiaries and also to advance capital if required, subject to CGJ's intention that Mr Hicks do so in a tax efficient manner and that he protects the trust assets from potential third-party claims.

G. Issue 4 – Would Mr Hicks be acting reasonably to adopt the Deed of Amendment and Restatement, approved by MDJ and JOJ?

30. For the reason expressed in the previous section of this judgment, not all of the potential beneficiaries are presently before the Court in that JOJ's unborn children are not represented. The consent of the Court is therefore required to Mr Hicks' proposal to vary the terms of the Will Trust by adopting the proposed Deed of Amendment and Restatement as the new terms on which to administer the Will Trust. However, at the same time, the question of adding to the class of beneficiaries does not arise, since I have concluded that JOJ's unborn children are already within the class of beneficiaries.

31. I accept the submission that the questions for the Court are, as set out in AA v BB (unreported, 14/02/20):

- “(1) Does the trustee have power to enter into the proposed transactions?*
- (2) Is the Court satisfied that the trustee has genuinely formed the view that the proposed transactions are in the interests of the trust and its beneficiaries?*
- (3) Is the Court satisfied that this is a view that a reasonable trustee could properly have arrived at?*
- (4) Has the trustee any conflict of interest, and if so, does the Court consider that the conflict prevents it from approving the trustee's decision?”*

32. I have also had regard to the guidance in *Lewin on Trusts (20th edition)*, referred to in Mr Hicks' submissions.
33. I am satisfied that it is appropriate for the Court to approve Mr Hicks' proposed variation to the terms of the Will Trust to adopt the Deed of Amendment and Restatement for the following reasons:
- 33.1 Mr Hicks has power to execute the Deed of Amendment and Restatement;
- 33.2 Mr Hicks' evidence is that he has genuinely formed the view that the proposed transaction is in the interests of the trust and its beneficiaries;
- (a) Mr Hicks is supported in that view by MDJ and JOJ, who both wish the Will Trust to be administered in future on the basis of the Deed of Amendment and Restatement;
- (b) the interests of JOJ's unborn children do not seem to me to depart materially from those of JOJ;
- (c) adopting the Deed of Amendment and Restatement will reduce or eliminate uncertainty regarding the terms of the Will Trust, should avoid the need for future applications to the Court and will provide Mr Hicks with additional flexibility regarding the administration of the Will Trust in the best interests of MDJ, JOJ and JOJ's children;
- (d) I am told that there should not be any adverse tax consequences of the proposed change for MDJ or JOJ;
- 33.3 I am satisfied that Mr Hicks' conclusion that the adoption of the Deed of Amendment and Restatement is in the beneficiaries' best interests is one that a reasonable trustee could reach; and
- 33.4 I am satisfied that the potential conflict of interest between Mr Hicks and the beneficiaries does not prevent the Court from approving Mr Hicks' decision:
- (a) the extent of the potential conflict of interest relates to Mr Hicks' intention to include a charging clause in the Deed of Amendment and Restatement;
- (b) it appears that the main reason for wishing to introduce the charging clause is that Mr Hicks intends to appoint an independent corporate trustee, who will wish to be remunerated for its services, with Mr Hicks to become the protector of the Will Trust;

- (c) most professional trustees expect to be remunerated for their work, and I do not consider that Mr Hicks' desire to include a charging clause is unreasonable – even if he were to remain as trustee; and
- (d) the introduction of the charging clause has been appropriately disclosed to MDJ and JOJ, who are content with it.

H. Conclusion

34. For the reasons set out in detail, I therefore grant the declarations sought, subject to the qualifications set out.

Dated 30 October 2024

Filed 30 October 2024



**THE HONOURABLE JUSTICE JALIL ASIF KC
JUDGE OF THE GRAND COURT**