COLLAS CRILL

Under the influence? A review of a recent Cayman Islands decision that finds care for the entire beneficial class is the pivotal factor in determining undue influence

JUNE 2022

This article was first published in STEP's Trust Quarterly Review in June 2022.

- This article will cover the recent judgment of the Grand Court of the Cayman Islands (the Court), which concerned whether a declaration of exclusion by a settlor excluding beneficiaries of a trust was invalid due to a lack of capacity, undue influence, unlawful means conspiracy and/or proprietary estoppel.
- The Court held that although the late settlor had capacity, his decision was a consequence of undue influence such that the declaration of exclusion was liable to be set aside.
- The 250 page judgment, which followed a trial of almost six weeks' duration, confirms and, to some extent, re states the guiding principles for a finding of mental incapacity and undue influence respectively. It illustrates the crucial role that the factual circumstances play in determining such issues, and also provides a stark reminder that warring parties should consider alternative dispute resolution to avoid protracted, expensive and bitterly contested court proceedings wherever possible.

Uncontested evidence that the late settlor of a discretionary trust wished to take care of all relevant parties was the pivotal factor in support of a finding by the Grand Court of the Cayman Islands (the Court) that he had been unduly influenced.[1] Consequently, a 'declaration of exclusion', which sought to remove certain family members as beneficiaries of a discretionary trust, was liable to be set aside. This was despite a finding that the settlor possessed sufficient mental capacity when he executed the said declaration.

Background

Alan Poulton (the Settlor) was a successful businessperson from London. In 2003, he established a discretionary trust (the Trust) for the benefit of himself, his children and their issue. The Trust was comprised of his 50 per cent interest in a family business established by him and where two of his children were employed. Initially, the Trust's terms provided that the Settlor was entitled to 100 per cent of the Trust's income during his lifetime, with his five children (born to three mothers) becoming entitled to income and capital that accrued after his death. The children were the plaintiffs in the proceedings.

The Settlor purchased a home in Florida in the 1990s and travelled between there and London regularly. He met and married his first wife in the US in the early 1990s, with the marriage ending in 2003. He married the second

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

defendant, D, in 2004, which lasted until his death in 2016.

By 2014, D was a beneficiary of the Trust, entitled to 40 per cent of its income for her life after the Settlor's death. In early 2015, the Settlor was advised:

- of a very substantial liability to the US Internal Revenue Service (IRS) for failing to disclose the Trust; and
- that he should terminate the Trust and establish new trusts in the US to hold the Trust assets and make similar provision for his children.

On 17 July 2015, the Settlor executed:

- a deed of amendment facilitating the distribution of income and capital from the Trust to satisfy his IRS liabilities; and
- a deed of appointment, indemnity and termination, to realise the distribution of shares in the family company to himself and terminate the Trust (the Deeds).

By letter to the trustee, dated 3 August 2015, the Settlor's US lawyer (who was advising in relation to his tax issues) indicated that the Settlor intended to provide both for D and for his five children.

In October 2015, the Settlor, who was already in poor health, received a diagnosis of terminal cancer. His children last saw him in August 2015 and complained to the trustee that they were being denied access to the Settlor. They raised concerns about his mental capacity and D's undue influence.

By letter dated 24 February 2016, the Settlor removed his children as beneficiaries of the Trust (the Declaration of Exclusion) and requested that the trustee terminate the Trust and distribute the Trust fund to himself and D. D, together with her son and daughter-in-law (the third and fourth defendants, respectively) allege this letter to have been executed in March 2016. The Declaration of Exclusion also substituted D, her son and daughter-in-law as directors of the family company for two of the Settlor's children. In May 2016, the trustee resolved to give effect to the Settlor's wishes. The Settlor died in June 2016, before all corporate formalities relating to the transfer of the company previously owned by the Trust to D, her son and daughter-in-law were completed.

In the same year, the Settlor's five children commenced proceedings against D, her son and daughter-in-law, the relevant family company and the trustee. They sought declarations setting aside the Declaration of Exclusion on the following grounds:

- the Settlor had been unduly influenced by D;
- he lacked mental capacity at the relevant time; and
- as against the second to fourth defendants, improper exercise of a fiduciary power/fraud on a power, estoppel and unlawful means conspiracy.

The additional grounds for relief were not pursued with any vigour at the trial. The trustee adopted a neutral role in the proceedings after the plaintiffs' claims against it were not pursued.

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

The trial

Regrettably for all of the Settlor's family members, their evidence at trial was ultimately summarised by the Court as containing 'all too often, shockingly unkind accusations being exchanged on both sides'. This was reflected in the judgment stating repeatedly that although the evidence of a subject witness was generally credible, it warranted the caveat that their 'emotional and financial interest in the outcome of the present case' required the Court to treat 'the most controversial parts' of such evidence with considerable care.

On the one hand, D asserted that the Settlor's children cared only for his money, rather than his general wellbeing and deteriorating health. On the other hand, the children contended that D had sought to distance the Settlor from his family from the time they were married and, more particularly, that she took active steps to prevent them from having any contact with their father after August 2015, by which time advice in relation to how best to deal with the IRS issue had been received. This included evidence from one son that D had refused to allow him entry to their home in Florida, despite the son having travelled from London to assist the Settlor with his tax issues. This was common ground, although D insisted that he had been locked out at the Settlor's request.

Crucial to the Court's assessment was the involvement of the Settlor's US lawyer (who advised him in relation to his IRS issues), a US accountant engaged by D from September 2015 (who the Court described as her 'exuberantly combative accountant friend')[2] and a meeting the trustee's representatives and his Cayman Islands attorney attended with the Settlor in March 2016, which required the Court's analysis of the contemporaneous documents. This is addressed in more detail below.

By way of example (but by no means exhaustive), an email from the Settlor's US lawyer to the Settlor's son, J, dated 10 August 2015, indicated that the Settlor had authorised him to speak to J about 'the IRS issue, the Cayman structure, the proposed new US trust, and related issues involving your siblings'. J had, in fact, met with the Settlor that same day in Florida. In stark contrast to this was an email many hours later to the lawyer under the Settlor's name that indicated the children 'should only be informed on factual matters dealing with the IRS. All other matters concerning the Trust and my personal assets are to be private at this time'. However, on 11 August 2015 the US lawyer assured J by email that he had told D that 'we got along great and I trust that you would be sharing information with your siblings…[and] you were going to see if the siblings could generate the cash to satisfy the IRS liability'.

By way of further example, emails from the US accountant retained by D illustrated his very aggressive approach towards the matter. This included emails from him to:

- D on 15 September 2015, proposing that private investigators should be engaged to obtain more information about two of the children's properties; and
- the Settlor's and D's Cayman Islands and London lawyers, stating that two of the Settlor's children had 'committed forgery, embezzlement and other issues'.

He had also emailed D proposing a change of Cayman attorneys following their suggestion that alternative dispute resolution should be explored, stating 'you need a fighter not a lover'.

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

Evidence was also given by the trustee's representatives and a Cayman Islands attorney who attended a meeting with the Settlor in March 2016. That evidence was supported by a contemporaneous file note taken by one of the trustee's representatives at that meeting. It recorded the Settlor confirming that the Trust was established for the benefit of his children, that he would like to speak to his children in the UK and that he would like to provide for them, but the only reason not to was that they did not care about him. Importantly, it also recorded that the trustee's representative had no concerns about the Settlor's capacity at that meeting and that the Cayman Islands attorney had suggested to the family that the signing of the Declaration of Exclusion should be filmed.

Expert evidence for the opposing parties provided competing views as to whether the Settlor had capacity. Ultimately, the Court accepted the evidence of the second to fourth defendants' expert, who opined that it was more likely than not that the Settlor had capacity to make the specific decisions at the relevant times.

The parties also adduced evidence in relation to the actual date of the video recording the Settlor's execution of the Declaration of Exclusion, which largely went unchallenged.

The judgment

Capacity

The governing principles regarding the test for capacity were essentially agreed. All parties relied on the Court's decision in *Re O Trust,*[3] which adopted the three-fold test set out in *Banks* v *Goodfellow*.[4] For the Settlor to have had capacity, he must have been able to understand the:

- nature of the Declaration of Exclusion and its effects;
- extent of the property he was disposing of; and
- claims to which he might give effect.

The Court accepted the trustee's submission that (citing *Re O Trust*) the party positively asserting that capacity existed had the burden of proving it on the balance of probabilities.

In determining whether the Settlor's terminal cancer diagnosis had an effect on his capacity, the Court applied the following judicial guidance in determining the weight to be applied to the expert evidence:

- the relevant criteria 'are not matters that are directly medical questions… [but] matters for common-sense judicial judgment on the basis of the whole of the evidence';[5]
- the issue as to testamentary capacity 'is not to be delegated to experts';[6] and
- where an experienced lawyer attends a meeting 'and has formed the opinion from a meeting or meetings that the testatrix knows what she is doing… [it] should only be set aside on the clearest evidence of lack of mental capacity'.[7]

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

A key consideration for the Court was whether the decision to execute the Declaration of Exclusion in March 2016 was more complex than his decision to execute the Deeds, given his terminal cancer diagnosis in the intervening period. The Court held that the latter decision was not more complicated to any material extent and that the Settlor did not suffer from any permanent cognitive impairment on March 2016 or at any other material time. The expert evidence, combined with the opinion of two experienced lawyers and the trustee's representatives (who attended the meeting on 2 March 2016) supported that view.

Undue influence

In the Court's view, the circumstances leading up to the execution of the Declaration of Exclusion raised 'more cogent concerns' about undue influence.[8]

Central to the Court's determination of this issue was the fact that while:

'[e]ach side in their written evidence has accused the other of morally reprehensible conduct [e]ach side in their oral evidence commendably appeared to accept that Alan did genuinely love and want to take care of them all'.[9]

The Court cited with approval the UK House of Lords decision in *Royal Bank of Scotland* v *Etridge (No 2)*[10] and held that:

- the equitable doctrine of undue influence will apply where 'the influencer has preferred their interests over those of the influenced party'; and
- it is 'pivotally concerned with protecting a vulnerable person whose interests have been compromised in the particular circumstances of the impugned transaction, rather than about attributing blame for why the donor should be granted relief'.[11]

The Court also cited with approval, inter alia, the following in support of its rejection of the second to fourth defendants' submission that undue influence required a transaction that was 'wrongful':

- the observations of Lady Justice Arden (as she then was) in *Jennings* v *Cairns*: 'The fact that the conduct of the person exercising influence is unimpeachable is not by itself an answer to a claim in undue influence';[12]
- the Court will interfere not on the ground that any wrongful act has been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused;[13] and
- it was not an ingredient of undue influence that the wrongdoer cheated the victim, because the court scrutinises the circumstances in which the transaction, under which benefits were conferred on the recipient, took place and the nature of the continuing relationship between the parties, rather than any specific act or conduct on the part of the recipient.[14]

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

The critical question was, in fact, whether the decision was made by the Settlor 'only after full, free and informed thought about it'.[15]

It was largely common ground that once a claimant established a relationship of vulnerability and a transaction that was, prima facie, inconsistent with normal affairs, the evidential burden shifted, such that the claimant would be entitled to the benefit of a presumption. Consequently, the Court held that:

'any beneficiary to a trust who is removed by a deed of exclusion (or heir who has been disinherited by a new will) possesses the requisite standing to complain that the legal act which interfered with their actual or contingent entitlement is invalid'.[16]

Ultimately, the Court held that the Settlor was vulnerable to undue influence after his terminal cancer diagnosis in October 2015 until his death. He was largely bedridden, frail and heavily reliant upon D to manage his financial affairs. He was legally blind, in declining health and suffering from anxiety. He was 'in a position of extreme dependency on [D] for both his personal and financial needs'.[17] The Court identified the following factors in support of that determination:

- The trustee was not initially willing to implement the Settlor's plans after the Deeds were executed.
- The effects of isolation from the Settlor's children on his ability to remember them were illustrated at the March 2016 meeting.
- Invitations by the Settlor's former Cayman Islands and London lawyers to consider a compromise were rebuffed, resulting in a change of lawyers.
- The Settlor, being clearly 'beyond sensible argument',[18] had a very limited role in instructing his US, Cayman Islands and London lawyers.
- Various requests by the children to see and/or speak to their father after his terminal cancer diagnosis (including those made in writing) were rebuffed and he was surprised to hear at the March 2016 meeting that they wished to see him.
- The decision to prefer D's interests over his children only occurred after the Settlor became heavily reliant upon her, which followed his terminal cancer diagnosis.
- The vigour with which steps were taken to terminate the Trust after the Settlor's terminal cancer diagnosis (which were not completed by his date of death) suggests an appreciation of his limited life expectancy.

Together with the contemporaneous documents, the removal of the beneficiaries by the Declaration of Exclusion 'was nonetheless an eyebrows-raising event in undue influence terms'.[19] The presumption of undue influence properly arose as a consequence of the relationship of trust and confidence, together with the Settlor having entered into a transaction without the benefit of relevant independent legal advice, which ultimately benefited D at the expense of his children.

No weight was placed on the fact the trustee observed no signs of undue influence, because the reality was that they were looking for signs of coercion or duress, and undue influence 'does not always manifest itself in overt, crude acts of domination'.[20] The Court also cited with approval the principles outlined in *E(C)* v *E(B)*[21]

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

for assessing the evidence in undue influence cases (in what was believed to be the first undue influence case before the Court) and held that the Settlor was 'an extremely sensitive man who was quite averse to family conflict and prone to being influenced by others into changing his mind'.[22]

Ultimately, it was clear to the Court that the Settlor's decision was 'inevitably heavily shaped' by D and her accountant friend. This included:

- not telling the Settlor about the various attempts the children were making to contact their father;
- denying the children any contact with him; and
- only obtaining legal advice from those who were retained for him by someone committed to advancing D's interests.

Improper exercise of a fiduciary power/fraud on a power; estoppel and unlawful means conspiracy

As stated above, those claims were not pursued at trial. In any event, the Court held that if it was required to consider them, they would have been dismissed.

Comment

The Court's comprehensive assessment of the relevant authorities, together with its evidential analysis, demonstrates the complexities of an application for declaratory relief where undue influence and/or lack of capacity are alleged. It is also clear that the factual matrix will significantly influence the Court's determination of such an application.

The postscript to the judgment is also a salient reminder about the need for parties in trust disputes properly to consider the true wishes of a settlor, taking into consideration all relevant factors. It included the statement that:

'[U]ltimately the parties will probably always regret that they could not collectively find a way to rally together at [the Settlor's] bedside in his last days. Had they done so they might have heard or felt what must have been his strong desire: that they honour his memory acknowledging the love that he had for them all'.[23]

[1] *Re The Poulton Family Trust* – FSD 121 of 2016. Unreported judgment dated 18 February 2022, per Justice Kawaley.

[2] At para.8

[3] [2018] (1) CILR 59, in which the author appeared for the successful second defendant.

[4] (1869-70) LR 5 QB 549

[5] *Zorbas* v *Sidiropoulos (No 2)* [2009] NSWCA 197

[6] *Key* v *Key;* [2010] 1 WLR 2020

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

[7] *Burgess* v *Hawes* [2013] EWCA Civ 94

[8] At para.423

[9] At para.349

[10] [2002] 2 AC 773

[11] At para.437

[12] [2003] EWCA 1935

[13] *Hammond* v *Osborne* [2002] EWCA Civ 885, per Sir Martin Nourse, where the influencer was someone other than the donee.

[14] *Gouldbourne* v *Gouldbourne,* Civil G0207 of 2014, judgment dated 8 April 2021 (unreported)

[15] Above, note 13. This section contains a non-exhaustive summary of Kawaley J's very comprehensive assessment of the relevant jurisprudence.

[16] At para.456

[17] At para.466

[18] At para.466(g)

[19] At para.478

[20] At para.491

[21] [2016] (1) CILR 179, citing the passage from *NS* v *MI* [2007] 1 FLR 444 in relation to duress or coercion.

[22] At para.493

[23] At para.608

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.

COLLAS CRILL

For more information please contact:



Andrew Peedom

Partner | Cayman

t: +1 345 914 9603 | **e:** andrew.peedom@collascrill.com

This note is a summary of the subject and is provided for information only. It does not purport to give specific legal advice, and before acting, further advice should always be sought. Whilst every care has been taken in producing this note neither the author nor Collas Crill shall be liable for any errors, misprint or misinterpretation of any of the matters set out in it. All copyright in this material belongs to Collas Crill.