

Transferring assets in to a trust? A timely warning about documentation...

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Was the trust empty, or emptied?

The Privy Council decision in *Gany Holdings (PTC) v Khan and Others* (on appeal from the Court of Appeal of the British Virgin Islands) provides a timely warning on the importance of properly documenting transfers of assets into a trust. It also highlights the dangers for trustees of not knowing what assets are in a trust before making distributions to beneficiaries.

Mr Rangoonwala (Mr R) established a discretionary trust for the benefit of himself and his family 16 years before his death. The primary issue in the case was what assets had been properly transferred to the trust before his death. The secondary issue was whether the trustee's decision to distribute the entire fund to the settlor's son, Asif, shortly after the settlor's death could be set aside if the trustees had an incorrect understanding of what assets were in the trust.

Background

Mr R led a long and successful business career in Pakistan, London, Hong Kong, Malaysia. In 1982 he established the ZVM Trust, the beneficiaries of which were his second wife, his children and the children's spouses. Within a year of establishing the ZVM Trust, the settlor exercised the power he had reserved under the trust terms to appoint a private trust company, Gany Holdings (Gany) as sole trustee.

From the early 1980s onwards, Mr R delegated to his son, Asif, the management and control of virtually all of Mr R's business interests. None of Mr R's other children were involved in the affairs of the businesses or the ZVM Trust. Over the years, Asif took over effective control of Gany. He was Gany's sole director and shareholder (by virtue of being in possession of the bearer shares in the company). Following Mr R's death in 1998, it was Asif who succeeded to Mr R's power to remove and appoint trustees of the ZVM Trust. However, within 30 days of Mr R's death, Asif appointed his mother and two other close associates as directors of Gany. Asif told his siblings that they would be receiving a share of the ZVM Trust amounting to approximately US\$2 million each. In order to receive their distribution, Asif said that they would need to waive claims in relation to the ZVM Trust and also with regard to Mr R's estate. The waivers were duly provided by the siblings and the distributions made. Within a matter of months and only 6 months after Mr R's death, Gany, as trustee of the ZVM Trust, resolved to wind up the trust by distributing the entire fund to Asif.

A number of years later, questions over the distribution of the ZVM Trust began to arise and Asif acting with his brother Khalid made proposals to their siblings that further amounts would be distributed to each of them. The information available at that time suggested that the value of the assets in question was around Euro90 million; considerably more than the value that had been discussed in 1998.

By 2012 discussions over the further amounts to be distributed to Asif and Khalid's siblings were floundering. Lawyers acting for Gany then informed the siblings that the ZVM Trust had no assets and had not had any assets since 1998. One of Mr R's children, Zorin, commenced proceedings against Gany and against her brother Asif seeking a proper accounting of the assets comprised in the ZVM Trust. Gany's response to the proceedings was to state, even more starkly, that the ZVM Trust had never comprised any assets other than the nominal sum of US\$100 that was settled originally in 1982. It was later conceded by Gany that the ZVM Trust did in fact own some assets in the form of shares in a Hong Kong company called ECL HK, but it asserted that the company owned little or no assets beneficially.

What should be presumed?

At the first instance trial, the information provided by Asif led to the Court concluding that there was no evidence of any assets of value having

been transferred to the ZVM Trust. It was clear from the Judge's reasoning that he considered that he needed to find some evidence on the part of Mr R of an intention to transfer assets into the ZVM Trust, and in the absence of finding any such evidence he must conclude that no transfers to the trust took place. His reasoning on this was based on the so-called presumption of 'resulting trust' which arises where someone makes a gratuitous transfer of property to another. It is presumed that they intend to retain the beneficial interest in the property unless there is evidence to the contrary.

The matter was then referred to the Court of Appeal in the British Virgin Islands. The Court of Appeal held that the Judge had erred in his approach because of a different principle of law that he had overlooked and which was summarised in a paragraph of a leading practitioner's work on the law of trusts, and was based on a decision of the English Court of Appeal in the nineteenth century called *In Re Curteis' Trusts*. The Court of Appeal, relying on this practitioner work, stated that this old English case established a presumption of a gratuitous transfer where the settlor, Mr R, had made a transfer of assets to a trustee of a trust that was already in existence. As Mr R had allegedly transferred assets to Gany once the ZVM Trust was established then this presumption would operate, said the Court of Appeal, to validate the transfer of assets to the trust.

The Privy Council's decision

The Privy Council held that not only did the Judge at first instance get it wrong but so did the Court of Appeal in relying on the decision *in Re Curteis' Trusts* and the commentary on it in the relevant practitioner's work. Instead, the Privy Council held that the correct approach was a common sense look at the evidence that was available. It therefore fell to the Privy Council to assess the evidence for the first time on this basis, free of any presumptions that lent one way or the other. The Court held that the correct approach to analysing these matters is as follows:

- First, if the settlor/transferor makes a written or oral declaration as to their intentions that will be generally be decisive.
- Secondly, in the absence of the above, then the court has to consider what evidence is available from which intentions can be inferred.
- Thirdly, if there is no relevant evidence then, as a matter of last resort, the court can have regard to the legal presumptions that can arise in these situations, including the one adopted by the Judge in the first instance decision.

As is usual in appeal cases, the Privy Council did not hear from any of the witnesses in person but as the only person who had provided substantive witness evidence had been Asif, the Privy Council felt uninhibited in according relatively little weight to his evidence due to the contradictory positions and statements of fact he had made over the years.

The Privy Council held that in relation to the main question of whether assets were in the ZVM Trust or not, the evidence that was available was sufficient to establish that Mr R had intended to take steps to divest himself of personal ownership and control of his businesses over a period of time from 1989 to 1995 after the ZVM Trust was established. The Privy Council held that on balance they were satisfied that Mr R did so with the intention of those assets becoming assets of the ZVM Trust.

This meant the secondary issue needed to be considered, namely whether the trustee, Gany, in failing to appreciate that Mr R had settled all his business assets in the ZVM Trust made a flawed decision in 1998 to distribute the entire fund to Asif. One of the arguments put forward to defend the 1998 distribution was that even if there were further assets comprised in the ZVM Trust at the time, there was no evidence before the court to confirm if they were of significant value or not. The Privy Council held this did not matter. In failing to know about, and investigate whether there was value in, the shares of any other companies owned by the trustee, Gany had been in breach of its fiduciary duty and therefore its decision to make the 1998 distribution could not stand.

In a further blow for Asif, the Privy Council upheld an order that he should provide a full account of any assets distributed to him in 1998.

Lessons from the case

Had professional advice and appropriate documentation been prepared confirming Mr R's intention to put further assets into the ZVM Trust a large part of this dispute could have been avoided. **Trustees, settlors and beneficiaries alike should ensure that proper records and documentation exist to confirm the transfers of assets into a trust.** We frequently see these issues arise where trustees or other corporate entities (for example a family office) are holding and managing assets for family members personally as well as handling matters on behalf of family trusts and businesses.

The Gany case is also an important warning to trustees to ensure that they ascertain the nature and value of the trust assets they are holding before making any distributions to beneficiaries. If they fail to do so, the distributions can be challenged by interested parties in the future, and this could have serious consequences for the trustees and their beneficiaries. **If trustees have any concerns about past distributions they have made, it may be worth reviewing the decision-making that was carried out now to identify if there may be an issue and if necessary to collate relevant evidence to rebut future challenges whilst it is still available.**