The Shinorvic Trust

Jurisdiction:	Jersey
Judge:	The Bailiff
Judgment Date:	20 April 2012
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Text

Between
Bas Trust Corporation Limited
Jean Gabriel Goyet
Representors
and
MF and others
Respondents

[2012] JRC 81

Before:

M. C. St. J. Birt, **Esq**., Bailiff, **and** Jurats Le Breton **and** Liston.

ROYAL COURT

(Samedi)

Trust — application for declaration regarding trustee and beneficiary.

Authorities

East -v- Pantiles (Plant Hire Limited) [1982] EGLR 111.

Halsbury's Laws of England 4th Edition.

Snell's Equity 32nd Edition.

Lewin on Trusts 18th Edition.

Thomas on Powers 1st Edition.

Tollet -v- Tollet (1728) 2 Peere Wms 489.

Kennard -v- Kennard (1872) LR 8 Ch App 227.

Chapman -v- Gibson [1791] 3 Bro CC 229.

Moodie -v- Reid (1816) 1 Maddock 516 at 521.

Alison -v- Alison (1934) 51 CLR 653.

Kain -v- Hutton [2005] WTLR 996.

Breadner -v- Granville-Grossman [2000] 4 All ER 705.

Re The T 1998 Discretionary Settlement [2008] JRC 062.

2011 Jersey and Guernsey Law Review.

Davis -v- Richards and Wallington Industries Limited [1990] 1 WLR 1511.

Lees -v- Lees (1871) IR 5 Eq 549.

Re Farnell's Settled Estates [1886] 33 Ch. D 599.

Bailey -v- Hughes [1854] 19 Beav 169, 52 ER 313.

Advocate L. J. Springate **for the Representors**.

Advocate R. J. MacRae **for MF**.

The Bailiff

1 This is an application by the Representors as trustees of the Shinorvic trust (“the trust”) for a declaration as to whether the second representor is a trustee of the trust and whether a particular individual has or has not been added as a beneficiary of the trust. The second matter raises, *inter alia*, interesting issues as to the circumstances in which equity can

assist following the defective execution of a power.

The history of the Trust

2 Before turning to consider the applicable legal principles, we must describe the relevant factual background.

3 The trust was established by trust deed dated 19th July, 1988, made between VB as settlor ("the settlor") and Radcliffes Trustee Company SA ("Radcliffe") as trustee. The trust is a discretionary trust expressed to be governed by the law of Jersey.

4 The beneficiaries are defined in the trust deed as being the settlor, the settlor's sister MF and the children and remoter issue of MF. Clause 2(3) conferred a power on the settlor"… *by instrument executed at any time during the Trust Period or by Will or Codicil [to] declare that any person … named or described in such instrument Will or Codicil shall be added to the class of Beneficiaries and any such instrument Will or Codicil shall take effect according to its tenor…"*.

5 On 21st February, 1990, the settlor purported to exercise his power to add a beneficiary under clause 2(3) and signed a deed of declaration ("the 1990 deed") to add Mrs B to the class of beneficiaries. The 1990 deed is key to the second issue which the Court has to decide and it is therefore appropriate to describe it in some detail. The deed is made between the settlor and Radcliffe. Recital (1) describes the deed as being supplemental to the trust, recital (2) sets out the provisions of clause 2(3) of the trust deed and recital (3) states that the settlor is desirous of adding Mrs B to the class of beneficiaries pursuant to the power conferred on him by clause 2(3) of the trust. The effective provision of the deed then reads as follows:-

> " *In exercise of the powers conferred on the Settlor by the said clause 2(3) of the Settlement and of every or any other power in that behalf enabling him the Settlor HEREBY DECLARES that as from the date hereof the said [Mrs B] shall be added to the class of Beneficiaries and that the Settlement shall henceforth be read construed and take effect in all respects as if the said [Mrs B] was named as a Beneficiary thereof."*

The deed is then signed by the settlor and duly executed by Radcliffe.

6 On 24th April, 1998, the settlor executed a further deed of declaration ("the 1998 deed") by which he added his brother Levon to the class of beneficiaries. The deed is in similar terms to the 1990 deed except that, in the first recital, the deed is described as not only being supplemental to the trust but also " *(ii) to a Deed of Declaration dated the twenty-first day of February nineteen ninety in terms of which [Mrs B] was added to the class of Beneficiaries"*. The 1998 deed was signed by the parties to it and duly witnessed.

7 On 15th June, 1999, the settlor executed a further deed of declaration whereby he added his brother Hagop and Hagop's two sons to the class of beneficiaries. On this occasion the recital did not make any reference to the 1990 deed or the 1998 deed.

8 Finally, on 25th October, 2002, the settlor executed a further deed of declaration adding the children and remoter issue of the two sons to the class of beneficiaries.

9 On 18th October, 2002, the settlor signed a letter of wishes and his signature was attested to by one witness. The letter of wishes was quite detailed. It referred to a number of properties which were held in the trust at the time and requested that the income from the majority of these properties be held for the benefit of MF and Mrs B. The letter of wishes contained the following passage:-

> " *I should like you to use capital for the benefit of income beneficiaries only if this is absolutely necessary.* As far as possible, I should like you to preserve the capital of the Trust.
>
> *Above all, however, I should like [Mrs B's] welfare to be your paramount concern.* Please use the trust income as necessary to ensure that she continues to enjoy the same standard of living as she did during my lifetime, and that all her medical needs are met. I expect the trust income to be sufficient for these purposes. However, you should also use capital if, in your discretion, you consider that this is reasonable and necessary for her benefit."

10 The settlor died on 18th December, 2005. There is no power other than that contained in clause 2(3) to add beneficiaries and accordingly the beneficiaries at the date of the settlor's death were believed to comprise MF, her three children, Mrs B, the settlor's brothers Levon and Hagop, Hagop's sons, the remoter issue of MF and the remoter issue of the two sons.

11 The settlor left a Will which he had executed on 18th October, 2002, of which the executors were Mr Paul Christou and the second representor Mr Goyet. Clause 3 of the Will bequeathed to Mrs B the proceeds of an insurance policy and a pecuniary legacy of £250,000 free of tax. The Will also gave her a life interest in the income of the residuary estate. Unfortunately, the settlor had failed to pay the premiums on the insurance policy with the result that it did not take effect. Essentially, all of the settlor's assets had been placed in the trust and accordingly Mrs B received only some £10,000 pursuant to the pecuniary legacy.

12 The trust fund would appear to be worth approximately £1.5 million. Distributions were made to Mrs B beginning with a payment of £3,000 in July 2005. In October 2005 the trustees started making regular monthly distributions of £3,000 per month to Mrs B out of the trust in order to cover her living expenses. In February 2007 the payments were increased to £6,000 per month. Subsequently, they were reduced to £4,750 per month in the light of information which Mrs B provided concerning her financial position and because of

concerns about the trust's financial position. Mrs B has also received occasional lump sum distributions from the trust to pay her tax, BUPA, dental treatment, legal fees and for a new car. In total, she has received approximately £400,806 from the trust since July 2005 and other beneficiaries have received a total of approximately £735,000 together with loans to certain beneficiaries of some £315,000.

13 Radcliffe remained the trustee until 6th January, 2009, although it changed its name to Investec Trust (Switzerland) SA ("Investec") on 30th May, 2005. A further company was appointed as co-trustee for a time from 7th April, 1999, to 2002 but nothing turns on that.

14 Mr Goyet joined Radcliffe in April 1998 and was thereafter responsible for the administration of the trust on behalf of Radcliffe. He got to know the settlor comparatively well. He left Radcliffe in April 2004 and joined BasTrust Corporation Limited ("BasTrust").

15 On 27th March, 2007, by means of a deed to which we shall refer shortly, Mr Goyet was purportedly appointed as a co-trustee with Radcliffe. On 6th January, 2009, Radcliffe (under its then name of Investec) retired as trustee and BasTrust was appointed in its place.

16 In May 2011, the trustees decided to take tax advice. In the course of preparing instructions to tax counsel, all the deeds of declaration executed by the settlor were reviewed and it was discovered that the 1990 deed had not been witnessed. This was highly significant for the following reason. Clause 2(3) of the trust deed states that the power to add a beneficiary is to be exercised by " *instrument"*. That is defined in clause 2(1)(f) of the trust deed as:-

> " *Any instrument in writing signed by the parties thereto and witnessed and dated or in the case of a party or parties thereto which shall be a body or bodies corporate then executed in accordance with the Articles of Association or Statutes of such corporate body or bodies."*

17 Although there is no doubt that the settlor executed the 1990 deed and that Radcliffe executed it appropriately under its articles of association, the signature of the settlor was not witnessed, even though there was provision for the signature of a witness as the attestation clause states " *signed sealed and delivered by [the Settlor] in the presence of:— …"*. This appears to have been overlooked at the time of the execution of the 1990 deed and thereafter.

18 The trustees have been advised that, because the 1990 deed did not constitute an "instrument" for the purposes of the trust deed by reasons of the lack of a witness signature, there is an issue over whether Mrs B was ever added as a beneficiary of the trust. Accordingly payments to her have ceased pending resolution of this issue.

The relationship between the Settlor and Mrs B

19 For reasons which will become apparent, we must describe briefly the nature of the relationship between the settlor and Mrs B. On this aspect we have received affidavits from Mr Goyet; Mr Cecil Lyddon Simon, a partner of Radcliffe and Co, who was the legal adviser to the settlor during his life; Mrs B; Paul Christou, a friend of the settlor and one of the executors of his Will; MF; one of MF's daughters; the settlor's brother Hagop; and one of Hagop's sons.

20 From this, it is clear that the settlor led an unconventional life. Mrs B states that she is now 67. She says that she met the settlor in 1965 when she was about 21 and they maintained a relationship for the next 40 years until his death in 2005. They lived together from 1965 to 1977 and she helped him in the various businesses which he established or bought in those years. She says that, although he proposed on various occasions, she always said no as she did not personally believe in marriage. Despite that, in 1977 she briefly married another man but it was disastrous and lasted only six months. Thereafter she resumed her relationship with the settlor.

21 They continued living in London until 1984 when the settlor decided to sell his house in London. Mrs B decided to return to live in Poole which was near to where she had been brought up. Thereafter the nature of their relationship changed in that they were no longer living permanently together. Nevertheless, the settlor bought her a house in Poole and he would visit her at weekends. She would sometimes visit him in London. They would holiday together. She was entirely financially dependent on the settlor. He paid for all her living expenses, holidays and clothes as well as the maintenance of her house. This carried on throughout the late 1980's and early 1990's. At the time, the settlor was living next to a lady who was apparently in her late 80's or early 90's. In 1996 the settlor married this lady although he continued to pay for all Mrs B's living expenses and they still saw each other from time to time. The settlor was in his 50's at the time.

22 The settlor's wife died in 1999. A year or two later, the settlor bought Mrs B her current three bedroomed house where she has lived ever since. He did not visit Poole as much as in the past but she would often spend weekends with him in London (at least once a month). He continued to pay for everything. About a year before his death the settlor proposed once again but Mrs B declined. In February 2005, a tumour was diagnosed when he was in Cyprus. When he returned to England he stayed with Mrs B in Poole for some two months but MF then took him to her house in London. In due course he was hospitalised and Mrs B visited him at least three times a week in hospital.

23 Mrs B attended the funeral in Cyprus in company with a Mrs Barsikian and she exhibits a letter from Mrs Barsikan in which Mrs Barsikian states:-

> " *[The Settlor's] sister promised me that [Mrs B's] life will continue to be as when [the Settlor] supported her.* Mary said [Mrs B] is one of our family after 40 years together with [the Settlor], the least we can do for her".

24 In relation to her finances, Mrs B states that she is entirely financially dependent on her income from the trust, just as she used to be entirely financially dependent on the settlor. She receives a state pension but has no other income. The trust distributions were stopped in May 2011 following the discovery of the potential problem over whether she was a beneficiary. Since then she has had to spend her savings and has taken out a mortgage on her property in order to fund her living expenses.

25 She states that she was well aware that the settlor had a number of other lady friends and he used to talk to her about them.

26 Mr Simon states in his affidavit that Mrs B was the settlor's partner for as long as he knew the settlor. The relationship with Mrs B was not entirely conventional; he had affairs with other women, she was briefly married and divorced and he married an elderly widow in the late 1990's. However, he always went back to Mrs B; he treated her like his wife and he provided for her financially for years and years. Mr Simon asserts that the settlor wished for Mrs B to be well provided for in the event of his death. The letter of wishes, which refers to Mrs B's welfare being the trustees' paramount concern, was entirely consistent with his (Mr Simon's) recollection of the settlor's wishes and intentions.

27 Mr Goyet was responsible for drafting the letter of wishes in conjunction with the settlor and he confirms that the settlor wished to ensure that Mrs B was provided for after his death, enjoying the same standard of living as she did during his lifetime.

28 Mr Christou is now aged 75 but was previously an accountant. He knew the settlor well from the mid 1960's onward. He says that throughout the period he knew the settlor, Mrs B was a constant part of the settlor's life and he treated her like his wife, although they did not marry. At times she helped to support him financially when various business ventures were struggling. He recalled the settlor showing him the 1990 deed and explaining that it was to appoint Mrs B as a beneficiary of the trust so that she would not have anything to worry about. He said that there was no doubt in his mind that the settlor wished for Mrs B to be a beneficiary of the trust and that he would be devastated about the current situation. The settlor's number one wish was that Mrs B should be happy, secure and provided for. Indeed, he says that he visited the settlor in hospital two weeks before his death during which the settlor said to him " *Please make sure that they look after [Mrs B]*".

29 MF provided an affidavit which confirms much of the information about the nature of the relationship between Mrs B and the settlor, but it emphasises that the settlor had relationships with a number of other ladies and that he was very generous towards them whilst he was alive and treated them in certain respects in a similar fashion to the manner in which he treated Mrs B. He treated all his women quite extravagantly taking them on holidays, dining in the best restaurants, paying their rent etc. She also asserts that, following the diagnosis of a tumour, it was Mrs B who arranged for the settlor to return to London after his stay with her for a couple of months in Poole rather than MF. She stated that she believes Mrs B enjoyed a higher standard of living as a result of the income

distributions from the trust after the settlor's death than she had whilst he was alive. She did not think that the settlor would have intended that.

30 The other affidavits filed on behalf of the settlor's family are broadly to like effect, namely that the settlor had other lady friends as well as Mrs B.

31 The Court's finding of fact is that, despite the unconventional nature of their relationship and the fact that the settlor had a number of other lady friends, he had a long standing and very close relationship with Mrs B and considered himself under a moral obligation to provide for her after his death as well as during his life. This obligation manifested itself in the terms of the letter of wishes to which we have referred earlier at paragraph 9 where he says that her welfare should be the trustees' paramount concern. We are satisfied from the affidavits of Mr Simon and Mr Christou that the contents of the letter of wishes are entirely consistent with his wishes in relation to the maintenance of Mrs B after his death and that these remained his wishes right up until his death. We are satisfied that he regarded her in a completely different light from his other lady friends, as there is no suggestion in the letter of wishes or his Will that he at any stage contemplated providing for any of these other lady friends after his death, unlike in the case of Mrs B.

Issues for decision

32 Two issues arise for the Court's decision:-

(i) Is Mr Goyet a trustee of the Trust?

(i) Was Mr Goyet validly appointed as a trustee of the trust in 2007?

(ii) Is Mrs B a beneficiary of the trust?

33 The first issue arises in this way. Pursuant to clause 11(d) of the trust deed, the power of appointing new or additional trustees was vested in the settlor during his life, and after his death in any person appointed by him by will, codicil or instrument and subject thereto, on MF during her life. The settlor died on 18th December, 2005, and it is agreed that he did not nominate anyone to exercise the power of appointing new or additional trustees under clause 11(d). Accordingly, the power to appoint new or additional trustees was vested in MF after his death.

34 In 2007, the sole trustee was Radcliffe (under its new name of Investec). MF decided that she wished to appoint Mr Goyet as an additional trustee and Mr Goyet agreed to accept such appointment. An instrument of appointment was drawn up by MF's solicitor. The instrument was expressed to be between MF on the one part and Mr Goyet on the other. There were no other parties to the instrument. They are (incorrectly) defined together as “the trustees”. The instrument recites clause 11(d) of the trust deed and the fact that the settlor has died without appointing anyone to exercise the power in clause 11(d). The

operative part of the instrument provides as follows:-

> " *In exercise of the power conferred on her by clause 11(d) of the Settlement and all other power which she has [MF] appoints the New Trustees to be additional Trustees"*.

35 It is abundantly clear from this that MF intended to exercise her power under clause 11(d) to appoint an additional trustee. The difficulty is that there is no definition of "New Trustees" and the references to "New Trustees" and "Trustees" are in the plural rather than the singular. Because there is no definition of or other reference to "the New Trustees", there is no explicit identification of Mr Goyet as the person appointed to be the additional trustee.

36 We were referred to the observation of Brightman LJ in *East -v- Pantiles (Plant Hire Limited)* [1982] EGLR 111 at 112 where he said:-

> " ***It is clear on the authorities that a mistake in a written instrument can, in certain limited circumstances, be corrected as a matter of construction without obtaining a decree in an action for rectification.*** Two conditions must be satisfied: first, there must be a clear mistake on the face of the instrument; secondly, it must be clear what correction ought to be made in order to cure the mistake. If those conditions are satisfied, then the correction is made as matter of construction. If they are not satisfied then either the claimant must pursue an action for rectification or he must leave it to a court of construction to reach what answer it can on the basis that the uncorrected wording represents the manner in which the parties decided to express their intention. In Snell's Principles of Equity 27th Edition page 611 the principle of rectification by construction is said to apply only to obvious clerical blunders or grammatical mistakes. I agree with that approach. Perhaps it might be summarised by saying that the principle applies where a reader with sufficient experience of the sort of document in issue would inevitably say to himself, "Of course x is a mistake for y'."

37 In our judgment that is the situation here. It is obvious that the intention here was to appoint Mr Goyet as the additional trustee. That is the only reason for him to have been named as the second party to the instrument and to have executed it. What has happened is that he should have been defined as the "New Trustee" in the heading and the singular should have been used instead of the plural in the operative part of the instrument.

38 Accordingly the Court has no difficulty in declaring that, on its true construction, the instrument of appointment dated 27th March, 2007, was a valid and effective appointment of Mr Goyet as an additional trustee of the trust

(ii) Is Mrs B a beneficiary?

(a) Aiding the defective execution of a power

39 There is no doubt on the evidence that the settlor had power under clause 2(3) of the trust deed to add Mrs B as a beneficiary, that he intended to exercise that power by the 1990 deed, that he executed the 1990 deed by signing it along with the trustee, and that he thought he had successfully exercised the power so as to add her as a beneficiary (as is shown by the recital to the 1998 deed and his letter of wishes). The sole problem is that there was a defect in the formality of his exercise of the power in that his signature to the 1990 deed was not witnessed so as to make it an "instrument" as defined in clause 2(1)(f) of the trust deed.

40 There is also no doubt that there is a long-standing principle of English law that, in certain circumstances, equity will aid the defective execution of a power. The trustees and MF have each obtained an opinion from chancery counsel as to whether, under English law, the principle would be applicable to cure the formal defect in the execution of the 1990 deed. The trustees have consulted Miss Elizabeth Weaver and MF has consulted Mr Nicholas Le Poidevin QC. Both counsel are agreed on the law as it stands but they disagree on whether an English court would develop the principle so as to apply it to the circumstance of this case. Miss Weaver believes that it would whereas Mr Poidevin argues that it would not. Because they are agreed on the law itself, we do not think it necessary to quote from the many cases to which we were helpfully referred.

41 The existence of the principle is recognised by modern leading text books, such as Halsbury's Laws of England 4th Edition, Vol 13 Deeds para 48; Vol 16 (2) Equity para 448 and Vol 36 (2) Powers paras 359 – 363; Snell's Equity (32nd Edition) paras 11 – 003, 11 – 006, 11 – 007; Lewin on Trusts (18th Edition) paras 29 – 184 to 29 – 195; and Thomas on Powers (1st Edition) 1003 – 1041.

42 The principle is stated in these books as follows:-

> (i) " ***The principle is that whenever a person who has the power over an estate, whether or not a power of ownership, shows an intention to execute the power in discharge of some moral or natural obligation, equity will act on the conscience of those entitled in default of appointment and compel them to perfect the intention."*** Halsburys Laws of England Vol 36(2) para 359.
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> (ii) " ***While equity will not provide relief for the complete failure to exercise a power of appointment by executing the relevant instrument, where by reason of mistake or accident there is a formal defect in the execution of the power, equity will grant relief against formal defects in favour of certain individuals who are regarded as having provided good consideration.*** Equity looks to substance not form." Snell's Equity para 11 – 006.
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> (iii) " ***One group [of authorities], mostly elderly, establishes a jurisdiction in equity to aid a defective execution of a power in favour of classes of persons for whose benefit the power has been purportedly exercised."*** Lewin on Trusts para

29 – 181.

(iv) Thomas expresses the principle in similar terms to Halsbury.

43 The text books and counsel are agreed that the necessary conditions for the principle to apply are:-

" ***362. Persons who may claim relief***

Equity aids the defective execution of a power only in favour of persons who stand in a particular relationship to the donee, and not the creator, of the power. … Relief will be granted where the following persons claim:-

(i) Purchasers for value …

(ii) Creditors …

(iii) Charities

(iv) Persons for whom the appointor is under a natural or moral obligation to provide. Relief may be granted in favour of persons under this head unless the appointor is under an equal obligation to provide for the persons entitled in default of appointment who are unprovided for. Under this head, relief may be granted for the defective exercise of a power intended as a provision for a wife and child, even in favour of volunteers, and the court will not enquire into the quantum of the provision for the wife or child. However, equity will not grant relief in favour of persons for whom the appointor is under no obligation to provide, such as a husband, grandchild, natural child or cousin, nephew or niece or mere volunteer, even if he is the creator of the power."

(i) an intention by the person with the power to exercise it;

(ii) there must have been an attempted execution of the power – there is no jurisdiction to remedy a failure to exercise the power at all or to exercise it in time;

(iii) the defect must be formal rather than going to the substance of the power;

(iv) the purported exercise must have been a proper exercise of the power – the court will not assist where there would be a fraud on the power or a breach of trust;

(v) the doctrine will only operate in favour of certain categories of persons. These are summarised in Halsbury Vol 36 (2) para 362 as follows:-

44 *Lewin* expresses this aspect of the principle as follows at 29 – 189:-

" ***Persons for whom the donee is legally or morally bound to provide may invoke the jurisdiction.*** They comprise children and a wife. They do not

comprise, so it has been held, a husband or an illegitimate child; but it may be that nowadays a different view would be taken; they also do not comprise a grandchild, a nephew or niece or other kin."

45 The first point to dispose of is that the cases giving rise to the principle were all concerned with a power of appointment. We are not concerned with a power of appointment but with a power to add to the class of beneficiaries. However we see no valid reason for distinguishing the application of the principle on that basis and Mr MacRae did not seek to argue that we should.

46 It is accepted by all parties that the first four conditions set out at para 43 above are satisfied in the present case. It follows that the only point at issue is whether the principle may be applied in favour of a person such as Mrs B. Advocate Springate (supported by the opinion of Miss Weaver) argues that the principle may be operated for the benefit of any person for whom the appointor is under a natural or moral obligation to provide, that in modern days this must be extended beyond the limited class recognised in the old cases, and that Mrs B is a person for whom the settlor was under a natural or moral obligation to provide.

47 Advocate MacRae on the other hand, (supported by the opinion of Mr Le Poidevin) argues that the only persons from whom the cases have recognised an appointor as being under a natural or moral obligation to provide are a wife and child and that accordingly the principle may not be operated to benefit Mrs B.

48 All the cases which established the principle date from the 18th and 19th centuries. The basis of the principle appears to have been the wish of the courts that obligations either to transfer property to pay creditors or to support a wife or child should not fail because of a defect in the formalities necessary to transfer the property intended to meet the debts or provide the maintenance. For example in *Tollet -v- Tollet* (1728) 2 Peere Wms 489 a husband had power to convey property to his wife by deed. He attempted to do so by a will under his hand and seal. The court gave effect to the will as a conveyance on the ground that a defective execution would be aided in equity. The Master of the Rolls said:-

"… ***where there is a defective execution of the power, be it either for payment of debts or provision for a wife or children unprovided for, I shall equally (1) supply any defect of this nature; the difference is betwixt a non-execution and a defective execution of a power; the latter will always be aided in equity under the circumstances mentioned, it being the duty of every man to pay his debts, and a husband or father to provide for his wife or child."***

49 By the end of the 19th century, the courts readily accepted and applied a general principle that the court would aid defective execution of a deed exercising a power in favour of children. For example in *Kennard -v- Kennard* (1872) LR 8 Ch App 227 a mother, having a

power of appointment over property by deed purported to exercise it in favour of her son by a memorandum which was signed but not witnessed. The Court assisted the defective exercise so that the son took the property.

50 In *Chapman -v- Gibson* [1791] 3 Bro CC 229 Sir Richard Arden MR, although considering the application of the principle to a wife, expressed the matter in more general terms as follows:-

> " ***Whenever a man, having power over an estate, whether ownership or not, in discharge of moral or natural obligations, shews an intention to execute such power, the Court will operate upon the conscience of the heir, to make perfect this intention."***

Later on the Master of the Rolls said that he did not see why the principle should not apply equally to a grandchild, although the matter did not arise for decision. However, presumably in recognition of the principle that equity will not generally assist a volunteer, the operation of the principle was confined to those who could be treated as having provided good consideration, such as a wife or child. Thus, as stated in the passage from Halsbury referred to above, the courts refused to apply the principle to a husband, a grandchild or an illegitimate child. An example of the approach of the courts in those days is to be found in the following observation of Sir Thomas Plumer V-C in *Moodie -v- Reid* (1816) 1 Maddock 516 at 521 where the judge refused to extend the category of persons who may benefit from the principle to a husband in the following language:-

> " ***The Court has already gone a great way in these cases, and I am not disposed to go beyond the decisions.*** The Court has supplied a defective execution of a power in favour of a wife, a child, a purchaser, and creditors; but not beyond that. It is too late to consider whether the Court was justified in going so far, but, certainly, it goes no farther; it does not extend to other persons, and if the court were to go farther, it would not know where to stop.
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> … ***I remember no case, nor do the counsel appear to be aware of any, where a husband, merely as such, has set up such an equity, and if there is no such case, I am not at all disposed to make a precedent."***

51 The principle was considered in the High Court of Australia in *Alison -v- Alison* (1934) 51 CLR 653. The court held that the document in question did not evidence an intention to execute the power and accordingly it was a case of non-execution rather than defective execution. Accordingly the principle could not be applied. But, in passing, the court acknowledged the existence of the ability of a court of equity to aid the defective execution of a power (quoting *Tollet)* and Dixon J expressed the principle in these terms:-

> " ***When a donee of a power exhibits an immediate intention to exercise it, but fails to take the formal steps necessary to do so, an equity arises against those who take in default of appointment, in favour of those who would have taken under the attempted exercise of the power, but for its irregularity, if they afford a good or valuable consideration, or are persons***

for whom the donee of the power is under a greater obligation to provide than for the persons taking in default of its exercise."

52 The principle was also touched upon in the New Zealand case of *Kain -v- Hutton* [2005] WTLR 996. The facts of that case were complicated but turned in the end on the fact that the position was governed by statute. Accordingly it was not necessary to consider the principle. However, Panckhurst J did comment briefly on it in one paragraph where he said the following:-

" ***162. I note, however, that in certain circumstances equity may intervene to aid the defective exercise of a power. The doctrine is available where there exists an appointment considered to be good in substance, although defective in form. Intervention is only appropriate in favour of certain classes of people who have benefitted from the purported appointment, including of present relevance persons for whom the donee is under a natural or moral obligation to provide. However, the relevant case law indicates that a niece of the appointor is not within the class. It follows in my view that the present situation is not one in which equity would intervene in aid of defective execution."***

53 The most recent case is which the principle has been considered in England and Wales is *Breadner -v- Granville-Grossman* [2000] 4 All ER 705. This was a case where trustees executed a power of appointment in favour of the settlor's son a day after the last day for exercising the power in accordance with its terms. Accordingly the judge held that it was a case of non-execution rather than an execution which was defective in form. The principle was therefore of no application. He also said that, given that it was an ancient doctrine which appeared last to have been applied in 1908, he did not feel an inclination to expand the doctrine so as to include a moral obligation of the donor of the power (i.e. the settlor) rather than the donee of the power (the trustees), particularly where the trustees were professionals. He did however summarise the principle as follows:-

" ***76. The third point is that the doctrine does not apply to every possible exercise of a power vested in anyone and in favour of any object of the power. The passage from Halsbury's Laws which I quoted at para 69 above refers to an intention to exercise the power 'in discharge of some moral or natural obligation'. The cases show that this means that equity will only aid the defective execution of a power where there is some sort of close relationship between the holder of the power and the person in whose favour he intended to exercise it. The two foremost examples are a husband seeking to exercise a power in favour of his wife, and a parent seeking to exercise a power in favour of a child. The doctrine has been developed in cases where, although the property was trust property, the power was vested in someone having, in his or her personal capacity, a natural or moral obligation to the intended beneficiary. There has been no case where the power was exercisable by the trustees themselves."***

54 In our judgment, the underlying philosophy of the principle is that it applies for the benefit of persons towards whom the donee of the power has some moral or natural obligation. In the early 18th century, when the principle was developed, this was restricted to a wife and child because of the mores of the time and because of the fiction that they had provided consideration and were not therefore volunteers. However, we cannot believe that, even under English law, the principle would be restricted in this way today. Men and women are treated as equal under the law and we believe it to be inconceivable that the principle would be held nowadays to be applicable in favour of a wife but not in favour of a husband. Similarly, we regard it as highly unlikely that a blanket prohibition on an illegitimate child benefiting from the principle would be upheld. Take, for example, a power of appointment exercisable by a father in favour of his children where he has simply lived with the mother and children as a family and has brought up and supported the children throughout their lives. We cannot therefore accept the argument of Mr Le Poidevin that the category is fixed for all time at a wife or child and there is no possibility of an expansion of the category of persons in favour of whom the principle may operate. If some development of the principle to expand the class of persons who may benefit from it is permissible, the question immediately becomes merely one of degree as to how far the principle should be developed in the light of modern conditions.

55 In any event, regardless of the position under English law, we have to pronounce and apply the law of Jersey. We think that the general principle is an entirely beneficial one and prevents errors in formality leading to real hardship for those to whom the donee of the power owes a moral or natural obligation and resulting in the clear intention of the donee being defeated for no good reason. We see every reason to develop the principle to take account of modern standards and mores. We hold therefore that, under Jersey law, the principle may operate in favour of any person for whom the donee of the power is under a natural or moral obligation to provide; and that will be a matter of fact to be decided in each case.

56 Applying that principle to the facts of this case, we have no hesitation in concluding that the settlor was under a moral obligation to provide for Mrs B. He certainly considered himself to be under such an obligation as is clear from the wording of his letter of wishes and from the fact that he intended to provide for her both from the trust and under his Will. That is not surprising. He had in fact been maintaining her completely for the best part of 40 years and they clearly had a close and strong relationship. Furthermore, this is not a case where those taking the default were dependants such as a wife or children; they were brothers and sisters, nephews and nieces etc. Applying the observations of Dixon J in *Alison* at para 50 above, this is a case where, in our judgment, the settlor was under a greater obligation to provide for Mrs B than for the other beneficiaries. In any event, upholding the 1990 deed does not result in the application of the trust fund for Mrs B; it simply means that she is a beneficiary and is eligible to benefit at the discretion of the trustees in the same way as the other beneficiaries.

57 We have no doubt that the application of the principle in this case leads to a just result and it would offend the Court's sense of justice if the achievement by the settlor of his intention

to add Mrs B as a beneficiary —she being a person to whom he had and felt a moral obligation —was defeated by a pure matter of technicality, such as the absence of a witness to a document which everyone accepts he signed and intended to sign as the exercise of the power conferred on him by clause 2(3) to add her as a beneficiary.

58 We therefore apply the principle to declare that Mrs B was validly added as a beneficiary of the trust from the date of the 1990 deed. We should add that there was a brief discussion as to whether such addition should take effect from the date of the 1990 deed or from the date of the Court order itself. For the reasons advanced by Miss Weaver in her opinion, we are satisfied that the addition of Mrs B as a beneficiary should take effect from the date when it would have taken effect had the 1990 deed been correctly executed.

(b) Imputed intention

59 In view of this decision, it is not strictly necessary to go on to consider the alternative way in which the trustees seek to uphold the appointment of Mrs B as a beneficiary. However, we think we should do so as we have received detailed submissions on the point. It was in fact the Court which, towards the end of the hearing, raised the possibility of the principle described in *Re The T 1998 Discretionary Settlement* [2008] JRC 062 being of assistance in this case. It was agreed that the parties would file written submissions following the hearing and the Court has received a supplemental opinion from Miss Weaver, a supplemental opinion from Mr Le Poidevin, a reply note from Miss Weaver and a further letter of rejoinder from Advocate MacRae. The Court is most grateful for this written material. The Court has also derived assistance from the article by Professor Paul Matthews at 2011 Jersey and Guernsey Law Review page 357.

60 The point at issue is whether the statement by the settlor in the 1998 deed (which was undoubtedly an “instrument” as defined in the trust deed) that he had exercised his power to add Mrs B as a beneficiary in the 1990 deed can itself be treated as the exercise of the power to add Mrs B (on the basis that, contrary to the settlor's belief, the 1990 deed was ineffective for that purpose).

61 Again, Miss Weaver and Mr Le Poidevin are agreed for the most part. It is clear that, in certain circumstances, English law will impute an intention to exercise a power even in circumstances where the donee of the power did not in fact have such an intention. The principle is conveniently summarised in the following three passages.

62 First, Thomas on Powers (1st edition) sums up the position in this way at page 243:-

> “ ***The courts have always been prepared to hold that a power may have been exercised by implication (even in cases where the existence of the particular power does not seem to have been in the donee's mind), provided that it is clear that there was an intention to bring about a particular result or effect which could only be achieved by means of an***

exercise of that power."

63 Secondly, in *Davis -v- Richards and Wallington Industries Limited* [1990] 1 WLR 1511, Scott J included a helpful explanation of the principle. In that case, an interim deed creating a pension fund had been executed and this was to be superseded in due course by a definitive deed. The interim deed contained a power for the company in question to remove a trustee. Before the execution of the definitive deed, one of the three individuals who were the original trustees of the scheme purported to retire by letter. In due course the definitive scheme was executed by the company and the two remaining trustees. One of the contentions advanced in the case was that the definitive deed was invalid on the grounds that the retiring trustee had not been effectively discharged as a trustee and that he was therefore a necessary party to the definitive deed. Scott J decided that, on its true construction, the interim deed conferred by implication the necessary power on a trustee to resign and accordingly the retiring trustee had effectively retired. However, he went on to consider the position on the footing that the retiring trustee had not been effectively discharged and remained a trustee at the time the definitive deed was executed. We would quote the following extract from his judgment at 1530:-

> " ***Mr Lloyd argued, on the footing that Mr Parsons remained a trustee, that the execution by Industries of the definitive deed represented, by implication, its exercise of its clause 8 power to remove him as a trustee.*** He relied on the principle that a disposition of property may be regarded as the implied exercise by the disponor of a power vested in him and the exercise of which would be necessary for the disposition to take effect…
>
> ***Counsel for the other defendants pointed out that the cases where this principle had been applied were all dealing with dispositions of property.*** The point in this present case does not arise out of a disposition of property; it arises out of an attempt to bring into effect rules of a pension scheme. The point taken is, factually speaking, correct. But I do not regard it as an answer to Mr Lloyd's argument. A disponor (A) purports to make a disposition of property. The disposition cannot be effective unless associated with the exercise of a power vested in A and that A could properly have exercised in order to make the disposition. The disposition makes no mention of the power and does not purport to be an exercise of it. The effect of the principle and cases to which I have referred is that A's intention to make the disposition justifies imputing to him an intention to exercise the power, provided always that an intention not to exercise the power cannot be inferred. If the requisite intention can be imputed, the Court will treat the disposition as an exercise of the power. …"

The judge went on to hold that the principle was applicable to powers other than powers of disposition of property. He also held that, even though the removal of Mr Parsons was simply not in anyone's mind at the time of the execution of the definitive deed, the Court should impute an intention to the company to exercise its power to remove Mr Parsons and treat that power as having been exercised by the company's execution of the definitive deed.

64 Thirdly, Lewin (18th edition) at para 29 – 176 summarises the position as follows:-

> " ***There may be a good exercise of a power without any reference to the power even in general terms, or to the property (if any) subject to it and without taking the least notice of it.*** When, in the case of a dispositive power, the intention to pass the property can be collected, then it will pass under the power, if the exercise of the power is necessary for the disposition to take effect; an intention to dispose of the property is enough and there is no need to show also an intention to dispose of it by means of the power. Similarly when, in the case of some other power, the intention to effect a given transaction can be collected then the power will be taken as having been exercised, if the exercise is necessary for that transaction to take effect. … Since the intention to exercise the power is inferred from the intention to effect the given transaction, it does not matter that an actual intention to exercise the power cannot be discerned, unless a positive intention not to exercise it is to be inferred."

65 It is the principle described in the foregoing extracts which was applied by this Court in *Re the T 1998 Discretionary Settlement*, although that was a matter governed by English law rather than Jersey law.

66 All of the above extracts suggest that the principle applies where the exercise of the power is necessary for the transaction in question to take effect. In this way, a previous ineffective exercise of a power may be validated later. Thus in *Davis*, the previous (on this assumption) invalid retirement of the former trustee was cured by imputing an intention to the company to exercise its power to remove that trustee simply by its execution of the definitive deed (even though this was not in fact intended and the definitive deed made no reference to the power) because the definitive deed could not take effect unless the former trustee had been removed.

67 Miss Weaver and Mr Le Poidevin are agreed that this particular principle does not cover the situation of Mrs B. The settlor was not actually intending to add her as a beneficiary in the 1998 deed because he thought, wrongly, that he had already done so by the 1990 deed. The addition of Levon as a beneficiary in the 1998 deed did not in any way depend on the validity of the addition of Mrs B in 1990. The addition of Levon was valid whether or not she had previously been added. Accordingly one could not impute an intention to exercise the power of addition in her favour by means of the 1998 deed because the addition of Levon under that deed did not require her to have been added previously.

68 However, Miss Weaver argues that there is another line of authority which establishes that an indirect or oblique reference to a power will be treated as sufficient evidence of the intention to exercise it even where the exercise of the power is not necessary for the validity of the subsequent transaction. She refers to Thomas on Powers which states at para 5 – 191:-

> " ***Provided the requisite intention to exercise the power is manifested, the***

> ***means by which this is achieved does not necessarily matter.*** Thus powers have been held to have been exercised by the recital in a settlement, by a recital in a petition …"

69 She also relies on an extract from Farwell on Powers at 222/223 which states:-

> " ***222. If the donee of a limited power of appointment erroneously recites that he has thereby appointed, this recital is evidence of an intention to execute the power***.
>
> ***If, however, he recites that an object of the power is entitled to the property subject to the power, this is evidence that he supposes that the person referred to possesses an independent title, and negatives any intention to exercise the power*** .
>
> …
>
> ***If, however, the donee of the power has himself done some act which in itself would not be sufficient to operate as an execution of the power, and then by an instrument capable of executing the power, recites or states that the donee is thereunder entitled, this will amount to an execution of the power."***

70 The case relied upon by Farwell in support of that statement is the Irish case of *Lees -v- Lees* (1871) IR 5 Eq 549, the headnote to which states:-

> " ***The recital, in an instrument capable of operating as an execution of a power, of a past transaction, which would by itself have been inadequate, is a sufficient execution of such power."***

71 The Court in that case had to consider (among other issues) whether a statement in a will that a sum of money had been transferred during his life for the benefit of the testator's daughter constituted the exercise of a power of appointment by the testator in her favour. The Vice-Chancellor said this at 556:-

> " ***First, as to the transfer of the £1,000 to Diana Lees, I think it did operate as an appointment.*** It is, of course, unnecessary that there should be actual words of appointment in order to bring that about; a statement or an expression of intention sufficiently clear is all that is required. The recital in an instrument capable of operating as an execution of a power of a past transaction, which transaction by itself would have been inadequate, has been held sufficient. The will here is an instrument capable of operating as an appointment, and therefore the question is whether it contains a statement of what had been already done of such a nature as to amount to a sufficient expression of intention that Diana Lees should take. … There is no doubt from the evidence in the case, that this [the statement in the will] refers to a sum of £1,000 of the trust funds vested in

> the trustees of the articles of 1811. There is, therefore, a clear reference to the fund, the subject of the power, and a statement of that former transaction as having actually conferred a right to so much of that fund upon Diana in the event of her surviving him and his wife. This could only be by an appointment, and therefore he must have intended to appoint. She could not bring it into hotchpot unless she had become entitled to it. I am therefore of the opinion that she is entitled to this £1,000."

72 Mr MacRae argues that the reference by the judge to the issue of hotchpot indicates that this was a "necessity" case because hotchpot could only take effect of the power of appointment referred to in the recital was taken to have been exercised. However, we do not agree with this submission. The reference to hotchpot was simply a passing reference to the consequence. It was not necessary for there to be an appointment to the daughter in order for the will to take effect. Rather, the statement in the will about hotchpot was relied on as showing that the testator believed that he had, by the previous transaction, conferred the right to the property on his daughter. In our judgment, the underlying reasoning of the case was that an erroneous recital by the donee of a power in a later document that he has previously exercised the power is sufficient for the Court to find that the power was exercised in the later document if the later document is otherwise sufficient to comply with the requirements for execution of the power.

73 That is undoubtedly the case here. The 1998 deed was a duly executed "instrument" in accordance with the trust deed. In that instrument, the settlor states (erroneously) that he has previously exercised the power to add Mrs B as a beneficiary. In accordance with the principle described in Farwel l and the Irish case of *Lees -v- Lees*, that is sufficient for the Court to treat the 1998 deed as a valid execution of the power, albeit of course with effect from 1998 rather than 1990.

74 The Court accepts that the authority for this extended principle is somewhat slender depending as it does on the extracts from Thomas and Farwell as well as the decision in *Lees -v- Lees*. Although Miss Weaver argued that *Re Farnell's Settled Estates* [1886] 33 Ch. D 599 and *Bailey -v- Hughes* [1854] 19 Beav 169, 52 ER 313 were further examples of the extended principle, we agree with Mr Le Poidevin that they are not. In our judgment *Farnell* was an example of the application of the necessity principle because the lease in question could only take effect if the persons described in the lease as the trustees had in fact been appointed as such; and *Bailey* was simply an example of there being no particular formality required for the execution of a power of appointment and the court holding that a letter was effective to exercise the power.

75 Nevertheless, it seems to us that it is appropriate and in the interests of justice to treat this extended principle as applicable under Jersey law. In *Davis*, Scott J described the " ***necessity"*** principle as an " ***ameliorating principle of equity"*** (page 1531). That principle goes so far as to impute an intention to exercise a power in circumstances where there is no reference to the power and in fact no intention to exercise it. It is a fiction on the part of the law which imputes an intention which did not exist at the time of the execution of the

document in question and where there has in fact never been an intention to exercise the power (as in *Davis* itself where there was simply an assumption that the trustee had validly retired and there was no intention on the part of the company ever to exercise its power to remove the trustee).

76 It hardly seems an objectionable extension of that principle to apply it to a case like the present where there is an express reference to the power in the recital and positive evidence that the settlor had intended to exercise that power in the document to which he refers in the recital. The Court is merely treating as done what was clearly intended by the settlor to have been done in 1990 and which has been confirmed as having been done by him by means of a duly executed instrument in 1998. If it is acceptable for equity to impute an intention in the necessity cases, it seems to us equally, if not more acceptable, to impute a similar intention in a case such as the present.

77 Accordingly, if we are wrong at para 58 of this judgment, where we held the 1990 deed to be effective to add Mrs B as a beneficiary from the date of that deed, we hold that the 1998 deed was effective to add her as a beneficiary from the date of that latter deed, namely 24th April, 1998.