

Fenchurch Trust Ltd and Hawtrey Discretionary Tru

Jurisdiction:	Jersey
Judge:	The Deputy Bailiff
Judgment Date:	04 October 2007
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Text

[2007] JRC 191

ROYAL COURT

(Samedi Division)

Before:

M. C. St. J. Birt, **Esq.**, Deputy Bailiff, **and** Jurats de Veulle **and** King.

In the Matter of the Representation of Fenchurch Trust Limited as Trustee of the Hawtrey
Discretionary Trust

Advocate L. J. L. Buckley **for the Representor.**

Authorities

Trusts (Jersey) Law 1984.

The Deputy Bailiff

- 1 This is an application by Fenchurch Trust Limited for rectification of a deed of retirement and appointment of trustee of a settlement of which it is currently the trustee.
- 2 The Court has jurisdiction pursuant to Articles 5 (b) and (d) of the Trusts (Jersey) Law 1984 because Fenchurch is a Jersey company and carries on the administration of the settlement in Jersey.
- 3 The background is as follows. The settlement was created by deed dated 1st December, 1999, between the settlor NP and Lindmar Trust Company Limited as original trustee. Lindmar was and is a Guernsey company. The settlement is governed by English law. It is a conventional discretionary trust and the class of beneficiaries includes the settlor, her husband, and any children or remoter issue of the settlor.
- 4 By virtue of Clause 8 of the settlement the power to appoint new trustees is vested in the settlor during her life.
- 5 In 2001 the settlor decided that she wished to change the trustee from Lindmar to Fenchurch, which as we have said is a Jersey company. A deed of retirement and appointment of new trustees was executed on 14th September, 2001. The parties to that deed were the settlor, as appointor, Lindmar as retiring trustee, and Fenchurch as the new trustee.
- 6 Unfortunately, the deed was drafted on the basis that the settlor was a co-trustee of the settlement along with Lindmar and would remain as co-trustee with Fenchurch. This was not spotted until recently when the settlor indicated that she wished Fenchurch to retire as trustee in favour of VTL Trust Limited. If the settlor has in fact been a co-trustee we are told that this could have adverse UK tax consequences. Accordingly it is now desired to rectify the deed of 14th September, 2001, by removing all references to the settlor being a co-trustee. The exact wording to be deleted is set out in the representation, which also annexes a draft deed in what would be the rectified form.
- 7 So how did this happen? The Court has received evidence from the settlor, from Mr Douglas of Walbrook Group Limited, which is the parent company of Lindmar, and from Mr John Wood on behalf of Fenchurch. From this it is clear that following receipt of a letter dated 21st September, 2000, from the settlor indicating that she wished Lindmar to retire in favour of Fenchurch, Lindmar instructed the firm of Dechert, English solicitors in London, to draft the necessary deed.
- 8 Dechert sent a draft to Lindmar on 6th November, 2000. The Dechert draft was mistakenly

drafted on the basis that the settlor, rather than just being the person with the power to appoint new trustees was in fact a co-trustee. So for example recital 1.2 stated “the Settlor and Retiring Trustees are the present trustees of the Settlement”. Clause 2.1 of the draft provided “the Settlor in exercise of the power given to her by Clause 8 of the Settlement and of every and any other power enabling her appoints the New Trustees to be trustees of the Settlement in place of the Retiring Trustees and jointly with the Settlor”.

- 9 We are quite satisfied from the evidence that the last five words of clause 2.1 were incorrect and were included erroneously. The settlor has never been a trustee of the settlement and there was no intention that she should be appointed.
- 10 Lindmar sent on the draft deed to the settlor and there then followed prolonged discussions between Lindmar, the settlor's husband and Fenchurch concerning the appropriate indemnity to be given to Lindmar. The firm of Withers also appears to have become involved in place of the firm of Dechert.
- 11 Unfortunately the negotiations about the indemnities seem to have distracted everyone and no one seems to have noticed the error in the Dechert draft concerning the settlor's position.
- 12 It would seem that in a telephone conversation on 31st May, 2001, between someone at Lindmar and Mr Marsh of Withers, Mr Marsh did spot the error but he seems to have only mentioned it in passing and nothing further seems to have come of it. Certainly Fenchurch was not told of the error by Lindmar but as against that Fenchurch accept that they were shown the original trust deed from which it was apparent that the settlor was not a trustee. Eventually it was agreed that Fenchurch would engross the deed of appointment. They based their engrossed deed on the Dechert draft but with alterations to the indemnities so as to incorporate those they wished to see. This deed was then executed.
- 13 The deed carried forward the error in the Dechert draft in that the settlor was still stated to be a co-trustee. The deed was executed by all the parties and dated 14th September, 2001, and it is clear that no one noticed the error concerning the settlor's position. It only came to light recently when VTL looked at the various documents.
- 14 The test for rectification is well established:
 - (i) The Court must be satisfied by sufficient evidence that a genuine mistake has been made so that the document does not carry out the true intention of the parties.
 - (ii) There must be full and frank disclosure.
 - (iii) There must be no other practical remedy. The remedy of rectification remains a discretionary remedy.

- 15 We are quite satisfied from the evidence that the references in the deed of 14th September, 2001, to the settlor being a co-trustee were made in error. The sole trustee since the creation of the settlement had been Lindmar and there was no intention that the settlor should be appointed as a co-trustee. On the contrary the intention was simply that Fenchurch should be appointed as sole trustee in place of Lindmar. The error arose in the original draft of the Dechert draft and we accept that the parties simply failed to spot the error, partly perhaps because of the fact that everyone was concentrating on the terms of the indemnity to be given, about which there were prolonged negotiations.
- 16 We are satisfied therefore that the deed as executed did not carry out the true intention of the parties. We are also satisfied that there has been full and frank disclosure and that there is no other practical remedy. We are satisfied that, in our discretion, we should grant the remedy of rectification. We therefore grant the prayer and rectify the deed such rectification as usual to be effective as from the date of the deed, namely 14th September, 2001.
- 17 As to the question of the costs, both Fenchurch and Lindmar have very properly agreed that they will not ask for their costs to be repaid out of the trust fund.