

A

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats de Veulle, Marett-Crosby
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Text

[2011] JRC 8

ROYAL COURT

(Samedi Division)

Before:

J. A. Clyde-Smith, **Commissioner.**, and Jurats de Veulle **and** Marett-Crosby.

IN THE MATTER OF A

Between

A

Representor

and

B

First Respondent

C

Second Respondent

D
Third Respondent
E (a minor to be represented by B)
Fourth Respondent

and

F
Fifth Respondent

Advocate G. S. Robinson for the Representor.

The Respondents were convened but not represented.

Authorities

In the Matter of the Exeter Settlement [\[2010\] JLR 169](#).

In the Matter of the Representation of Detente Limited 1998/236A.

THE COMMISSIONER:

- 1 On 21st December, 2010, the Court rectified an error in an instrument of appointment and retirement of trustees dated 1st November, 2000, ("the 2000 instrument") and we now set out our reasons.
- 2 The G Settlement was established by an instrument of settlement made by the late H as settlor and J as trustee, dated 5th April, 2000. J purported to retire as trustee by the 2000 instrument in favour of K. K retired as trustee on 2nd December, 2005, by instrument of appointment and retirement of trustees dated 2nd December, 2005, in favour of L. The business of L was taken over by the Representor on 18th May, 2007. Although there is provision for one, no protector was ever appointed to the G Settlement. K changed its name to F on 1st November, 2006.
- 3 The current beneficiaries of the G Settlement are the settlor's son, B ("the First Respondent" and his three daughters, C, D and E ("the Second to Fourth Respondents"). E is still a minor but she is represented by her father.
- 4 Clause 14(b) of the G Settlement provides that if the current trustee wished to resign, then the following persons have the power to appoint a new trustee in order of priority:-

"(1) the Protector or if there shall be no Protector or if the Protector shall be unable to

act.

(2) the Trustees or if there shall be no trustee in existence or able to act;

(3) the Royal Court of Jersey or the court of such other place which shall then be the forum for the administration of these trusts.”

Errors in the 2000 instrument

5 The 2000 instrument contains a number of errors, namely:-

(i) The first page refers to three parties', the first being defined as the Appointor, but the identity of the Appointor is blank and square brackets have been left. The other parties were named as J, the retiring trustee, and K, the new trustee.

(ii) The recitals refer to there being a protector and the power to appoint new trustees being vested in the Appointor as the protector, pursuant to clause 14 of the settlement.

(iii) Clause 1 provides that the Appointor appoints K as the new trustee, in favour of J, the retiring trustee.

6 As no protector had been appointed to the settlement, the power of appointment in fact vested in the retiring trustee, J, and there should have been no reference to the protector being the Appointor.

7 As a result of these errors, it would appear that K was not validly appointed by the 2000 instrument, L was not subsequently validly appointed in 2005 and the acts of the trustees from November 2000 onwards were not validly undertaken. This error has only recently come to light as the result of a routine review of the files undertaken by M, a director of the Representor.

8 The Court received affidavits from N, who was a director of J at the time of the 2000 instrument and from O, who was a director of K at the time of the 2000 instrument.

9 The evidence shows that in 2000 J was trustee of four settlements connected with the P family, which included the G Settlement. All four settlements would appear to have been in similar form. No protector was named in the instrument creating the settlements, but each gave the settlor the power to appoint a protector. A protector had been appointed to three of the settlements but not to the G Settlement.

10 A decision was taken to move the trusteeships from J to K because at the time there was some uncertainty as to J's future and a number of J directors had resigned. In fact at the date the 2000 instrument was signed, N was the sole director of J.

- 11 Mr David Banks of Crill Canavan was instructed by J to prepare the draft instruments of appointment and retirement for the four trusts and there is a letter from him to N dated 25th October, 2000, enclosing drafts. It can be seen from that letter that the instructions to Mr Banks were unclear as to whether a protector had been appointed to the G Settlement. Mr Banks not unreasonably assumed that, consistent with the other three settlements, a protector would have been appointed and he said this:-

“Please check that I have correctly identified the protector and his current address in each trust where a protector is appointed; I am not sure a protector has been appointed to the G Trust”.

- 12 Although neither N nor O can now remember signing the 2000 instrument, it is clear that N never responded to the letter from Mr Banks. Instead it would appear that all four instruments of appointment and retirement were executed together in the form sent by Mr Banks, the parties failing to notice that the instrument in relation to the G Settlement in error referred to the non-existent protector as the Appointor.

The Law

- 13 Rectification is a discretionary remedy and the test is well settled as follows:-

(See *In the Matter of the Exeter Settlement* [\[2010\] JLR 169](#)).

“i. The court must be satisfied that as a result of a genuine mistake the trust deed does not carry out the true intentions of the parties ... ;

ii. There must be full and frank disclosure ;

iii. There should be no other practical remedy.”

- 14 In the case of *In the Matter of the Representation of Detente Limited 1998/236A*, it was noted that:-

“Rectification will not generally be granted if another remedy is available which will serve the same purpose and we refer in that instance to Whiteside -v- Whiteside (1950) Ch D65. ” (our emphasis).

Decision

- 15 Applying that test, we were satisfied that there had been a genuine mistake. J intended to retire as trustee of the G Settlement in favour of K and it was J that had the power to appoint new trustees. The 2000 instrument was executed by the two relevant and necessary parties, namely J, which had the power to appoint new trustees and K, which had agreed to

be appointed. The reference to the protector in the draft should have been deleted and J described as the Appointor.

- 16 There has been full and frank disclosure, but as to other practical remedies, J was struck off the register of companies on 1st October, 2008. Even if it had continued as trustee from 1st November, 2000, to 1st October, 2008, the G Settlement would have been without a trustee from 1st October, 2008, to the present time.
- 17 The reinstatement of J is not now feasible. It would be unlicensed and without assets. It is doubtful if its former directors would wish to resume their positions. The Court could exercise its power under Clause 14(b)(iii) of the settlement to appoint the Representor as trustee, but that would not be retrospective in effect, leaving the acts of the trustees over some ten years to be ratified.
- 18 We agreed that rectification, which is retrospective in effect, was the only practical remedy, which should, in the exercise of our discretion, be granted.