A Ltd v HM Attorney General

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	14 February 2017
Neutral Citation:	[2017] JRC 24
Reported In:	[2017] JRC 24
Court:	Royal Court
Date:	14 February 2017

vLex Document Id: VLEX-793881925

Link: https://justis.vlex.com/vid/ltd-v-hm-attorney-793881925

Text

[2017] JRC 024

ROYAL COURT

(Samedi)

Before:

W. J. Bailhache, Esq., Bailiff, and Jurats Nicolle and Blampied

IN THE MATTER OF THE REPRESENTATION OF A LIMITED AND IN THE MATTER OF THE B TRUST

AND IN THE MATTER OF ARTICLE 51 OF THE TRUSTS (JERSEY) LAW 1984

Between
A Limited
Representor
and
HM Attorney General

Respondent

Advocate K. L. Hooper **for the Representor**.

The Attorney General appeared in person.

Authorities

In the matter of the R E Sesemann Will Trust [2005] JLR 421 .

Trust — application by the representor seeking rectification by the Court that a genuine mistake has occurred relating to the intention of the wishes of the Settlor.

Bailiff

THE

1 The Representor is the trustee of the B Trust, established by a declaration of trust dated 5 th September, 2000, under the laws of the British Virgin Islands. The Settlor was Mr C, who had three children with his first wife, D, E and F. Unfortunately F pre-deceased his father in 1993. D has two children both of whom are of age. E is without issue. In 2007, the Settlor married his long-term partner, Mrs C and in 2008 he died.

2 The Representor became trustee of the Trust in 2006, the governing law having been changed to Jersey by an instrument in writing dated 5 th August, 2004.

3 The structure of the trust deed was that, subject to any deed of revocation by the Settlor during his lifetime, the trustees would pay to him all or such part of the income of the trust fund as he directed, and subject thereto, would hold the capital and income of the fund in equal shares for those beneficiaries specified in clause 1.2.2 of the trust deed, namely D and E. The full class of beneficiaries named in clause 1.2 of the trust deed included the Settlor, his children D and E, his grandchildren G and H and such other persons who might be appointed as a beneficiary using the power to add which is contained in the deed. In our view there is a typographical error in the clause enabling the addition of beneficiaries, and that power vested in the trustee can only be exercised with the consent (and not *"consult"* as set out in the deed) in writing of the Settlor. As the Settlor has died, the power to add is no longer effective. The same conclusions arise in relation to the power vested in the trustees to exclude beneficiaries.

4 The dispositive arrangements are at Clause 7.1:–

"Subject as provided in this clause the Trustees shall have power at any time or

times before the end of the Trust Period by instrument or instruments in writing revocable before the end of the Trust Period or irrevocable to appoint any trusts of the whole or any part or parts of the Trust Fund and its income for the benefit of any one or more of the Beneficiaries exclusive of the other or others in any shares and proportions whether revocable or irrevocable and in any manner generally as they shall in their absolute discretion think fit.

7.2 The power given to the Trustees by this Clause may be exercised only during the lifetime and with the prior written consent of the Original Settlor."

5 In default of any appointment under Clause 7, the Trustees are to hold the capital and income of the trust fund upon trust equally for D and E absolutely. There are long stop trusts in favour of charities determined by the Trustees in their absolute discretion in the event of the failure of the trusts contained in the deed, effective upon the expiration of the Trust Period, which for practical purposes means the 5th September 2080 — the ability to bring the trust to an end at an earlier date required the prior written consent of the Settlor.

6 The problem now before us arises out of a deed of addition and exclusion of beneficiaries dated 1 st August, 2007, executed by the Representor. The recitals indicate that the Representor received written consent from the Settlor to exclude beneficiaries and to appoint any person to the class of beneficiaries. The Representor by this deed irrevocably declared that D and E, G and H should all be treated as excluded beneficiaries and that Mrs C should be added to the class of beneficiaries. We have seen a copy of a letter dated 19 th July signed by the Settlor requesting the trustee to act in this way. Attached to this letter was a letter signed by his two children and two grandchildren waiving all interest in the Trust. The difficulty which this deed causes is that the over-riding power of appointment in Clause 7 of the deed has not been used and accordingly the express terms of the settlement are that, whatever the class of beneficiaries, the trust fund is to be held for D and E. As they are now excluded beneficiaries, there are no beneficiaries who can take the Trust Fund, and unless the 2007 deed is subject to rectification by the Court, the default provisions become effective and the trust fund is held for charitable purposes.

7 When this matter first came before the Court on 23rd August, 2016, HM Attorney General had been notified of the representation, but did not appear. He had not been provided initially with the full affidavit and exhibits, but these were sent to him on 14 th July. The Representor took the view that he intervened at his own risk as to costs and did not agree that he should be paid out of the Trust Fund any costs for the purposes of instructing counsel to advise. Having given further consideration to the matter at that time, the Court reached the view that the Attorney General should be formally convened representing the charitable interest so that he would have the opportunity of advancing the argument that the Trust was held for charitable purposes, the exclusion of beneficiaries being effective and thus the default provisions in favour of charity becoming the dispositive provisions in relation to the Trust Fund.

8 Accordingly, the Attorney was served and appeared in person at the hearing of the representation on 28 th November. He also filed a detailed skeleton argument. He made it plain that he neither supported nor opposed the application for rectification, but his submissions were valuable and we are most grateful to him for them.

9 As the Attorney summarised in his skeleton argument the 1 st August, 2007, deed of exclusion and appointment did two things — it excluded D, E and the two grandchildren from the class of beneficiaries and, secondly it added Mrs C to that class. Both steps required the prior written consent of the Settlor. There is on the face of it a timing issue. The Settlor purportedly gave consent to the appointment of Mrs C as the sole beneficiary by letter dated 19 th July, 2007. That letter does not expressly indicate that there is to be an exclusion of the other beneficiaries but the introduction of the word “sole” does in our view take one to the point of accepting that this letter amounted to a consent to both the exclusion and the addition.

10 However, the affidavit of Mr Brian Padgett of 12 th April, 2016, comments that the Settlor's letter appears to have been dated too early, as it mentions that the children and grandchildren had already waived their interest in the Trust. The formal waiver is however dated 31 st July, 2007, some 12 days later. Exhibited by the Representor is a letter from D dated 15 th August, 2007, in which he says this:–

> *“My spies tell me that completion of the transfer of the apartment into the name of E and myself is about to happen, in which event I enclose a letter from my father changing the beneficiaries in the Trust together with a letter from the existing beneficiaries waiving all interest in the Trust.*
>
> *From our conversation (some time ago), I understand that this will now mean that upon Mrs C becoming the sole beneficiary the Trust will escape inheritance tax …”*

11 The copy of that letter provided to us shows that it was received by fax on 15 th August. However, the deed of exclusion and addition appears to have been executed on 1 st August. The timing point might potentially be relevant because Trust Deed requires that for a deed of exclusion and addition, the trustees must have received the prior written consent of the Settlor. Nonetheless, as the Attorney pointed out, if the deed were held invalid for want of a prior consent from the Settlor, that would not assist the charitable interests, because D and E would simply be reinstated as beneficiaries. They might be left with a tax problem, but there would be no charitable benefit. In her submissions, Advocate Hooper said that she did not know if the deed had been backdated, or indeed if anyone would be in a position to help on that particular point. In her submission, it was clear that the letter had indicated the appropriate consent of the Settlor, and we should simply have regard to the dates which appeared on the paperwork. She also submitted that the paperwork included a written resolution of the board of directors dated 1 st August, 2007, signed by two directors on behalf of the Representor. That written resolution expressly refers to the trustees having

received the Settlor's written consent. In those circumstances, she invited the Court to accept that the documentation was sufficiently in order, especially so given that no one was in effect challenging it. After consideration, we have agreed to proceed on that basis and accordingly we treat the 2007 deed of exclusion and addition as *prima facie valid*.

12 The Attorney also points to an oddity in the drafting of the Trust Deed in the sense that the default provisions at clause 10.1 of the deed in favour of charities only take effect at the expiration of the trust period. In other words, although the Trust may have failed for want of beneficiaries at a considerably earlier time, the charitable interests must wait until 2080 for any benefit. There is no obvious purpose in such a provision.

13 Finally the Attorney points out that there is a very wide power of amendment of the Trust Deed during the trust period. With the exception of certain provisions dealing with excluded persons, the trustees have the power to amend any of the Trust's powers or other provisions of the Deed at any time during the trust period — with the Settlor's consent during his lifetime, but thereafter on the trustee's discretion alone. This appears to extend to dispositive provisions as well as administrative provisions. The result is strange — on the face of it even though the power of appointment contained in clause 7 is spent on the Settlor's death, clause 29 appears to enable the trustees to ignore that fact.

14 The test for rectification in Jersey is settled. *In the matter of the R E Sesemann Will Trust* [2005] JLR 421, the Court reaffirmed the test in these terms:–

> ***"The test for rectification in Jersey is well-established.*** There are three requirements:–
>
> > ***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 party(ies)*** .
> >
> > ***ii) There must be full and frank disclosure*** .
> >
> > ***iii) There should be no other practical remedy.*** The remedy of rectification remains a discretionary remedy."

15 The evidence before us establishes clearly that:–

> (i) The Settlor and Mrs C had been happy together for a long time; she had cared for him very well later on in his life and improved its quality to the extent that without her he would not have been able to care for himself any longer; and that his marriage to Mrs C on 21 st April, 2007, reflected a genuine mutual commitment of each to the other.
>
> (ii) At the time the arrangements were made in the summer of 2007 to exclude the two children and the grandchildren, the Settlor procured a transfer by the trustee to his two

children of a Spanish property which was in the hands of the trustee.

(iii) He intended Mrs C to end up with all the trust assets when he died, and had no intention of anyone else benefitting from them, whether another member of the family, or a charity.

16 It was with these background established facts in mind that the Representor was asked to procure the achievement of those objectives.

17 Having regard to the deed of exclusion in 2007, the Court is satisfied that it reflects an intention that the Settlor's two children and his two grandchildren should not benefit from the Trust, because they are named as excluded persons. The failure to make any overriding appointment under Clause 7 means that there is a fundamental inconsistency in the Trust Deed — the dispositive provisions benefit his two children, and yet the deed of exclusion makes them excluded persons who cannot benefit under any circumstances. It is clear that unless there were an intention to benefit charity, there must have been a mistake in the 2007 deed.

18 We are satisfied there was no intention to benefit charity. This arises not only because of the provisions in the deed which introduced Mrs C as a beneficiary, but also the other evidence which makes it plain that she was intended to benefit from the Trust after the Settlor's death. Finally, if the Settlor had intended to benefit charity, he surely would have ensured that that charitable benefit would be conferred immediately and not held back until 2080. We are for these reasons satisfied that the deed of exclusion in 2007 did not achieve the intention of the parties and was made by mistake.

19 We have received affidavits both from the Representor and from D. There does not appear to have been any lack of full and frank disclosure in relation to what is proposed.

20 We have asked ourselves whether there is any other practical remedy. Clause 29 of the Declaration of Trust provides that the trustees have power to make such alterations, modifications and additions to the trusts, powers or other provisions of the deed (other than in relation to excluded persons) as they shall in their absolute discretion think fit. We asked to be addressed on this point because in the affidavit evidence, the trustees made it plain that they were prepared to exercise the power contained in Article 29. It is not clear why they have not done so.

21 The Representor notes that there is a power of amendment in the trust instrument which it would be prepared to utilise if necessary so as to ensure that Mrs C can at least benefit from the Trust Fund. However it is said that this would be a very poor substitute indeed for rectification, since it would provide a solution whereby the trustees would in effect be failing to implement the whole of the intentions of the Settlor and the trustees in entering into the 2007 deed. We understand the reluctance of the Representor in this respect and we do not think that we would be justified in refusing rectification solely on the grounds that there was

another practical remedy. The reality is that it would appear to be a remedy working in part but not in whole and we do not therefore withhold rectification by exercising a discretion against it on that ground.

22 We have noted much of the correspondence which has taken place with HM Revenue and Customs, who were given notice of the representation of the Representor but elected not to seek leave to intervene in the proceedings, that correspondence being under case reference CFS-795701, the HMRC reference being F101670/09Q. We mention this correspondence because in our view it is perfectly plain that HMRC raised some legitimate questions in relation to the documentation which had been sent to them. The tax consequences of the Court making the order which it now makes are not relevant for the purposes of the exercise of our discretion. That discretion is exercised on the basis that the Court is satisfied that a genuine mistake has been made so that the 2007 deed does not carry out the true intention of the parties, that there has been full and frank disclosure and that there is no other practical remedy. In those circumstances, in order to give effect to the wishes of the Settlor, the Court rectified the deed so as to reflect not only the exclusion of the children and grandchildren as beneficiaries and the addition of Mrs C to the class of beneficiaries, but also an irrevocable appointment under clause 7 of the Trust Deed that the trustees stand possessed of the Trust Fund and the income thereof upon the Trusts and subject to the powers and provisions identical to those declared and contained in the Trust as if clause 5 thereof were varied to read:–

> *"5.1 Subject to clause 6 below during the lifetime of the Original Settlor the Trustees shall pay to the original Settlor all or such part of the income of the Trust Fund as the Original Settlor may at any time in writing direct.*
>
> *5.2 Subject to clause 5.1, the Trustees shall hold the capital and income of the Trust Fund upon trust for Mrs C absolutely."*

23 In order to give effect to the wishes of the Settlor, the amendment to the Trust Deed will take effect as of 1 st August, 2007. The consequence is that the trustees hold, and have at all times since the date of the Settlor's death held, the property which would otherwise be subject to the B Trust on trust for Mrs C absolutely.

24 The costs of and incidental to the representation incurred by the trustees shall be recovered from the Trust Fund on the trustee basis, and the costs of the Attorney General of and incidental to the representation shall be payable out of the Trust Fund on an indemnity basis.