Representation of H1 Trust Company Ltd 19-Feb-2013 19-Feb-13

Jurisdiction:	Jersey
Judge:	Bailiff
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Text

[2013] JRC 39

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, Kt., Bailiff, **and**Jurats Kerley**and**Nicolle.

In The Matter of the Representation of H1 Trust Company Limited
And In The Matter of the Tamara Hetmanska Family Trust

Advocate M. P. Renouf **for the Representor.**

Authorities

Re R E Sesemann Will Trust [2005] JLR 421 .

Re Shinorvic Trust [2012] JRC 081 .

East -v- Pantiles (Plant Hire) Limited [1982] 2 EGLR 111 .

Nothing up my sleeve, Professor Paul Matthews. Jersey and Guernsey Law Review. October 2011.

Trust — application by the representor seeking confirmation that it has been validly appointed as a trustee.

Bailiff

THE

1 This is an application by the representor seeking confirmation that it has been validly appointed as a trustee of the Tamara Hetmanska Family Trust ("the Trust"). The application originally sought rectification of the relevant deed of appointment but, following discussion at the convening hearing to the effect that rectification was a remedy of last resort and that there might be alternative methods of achieving the desired result, the nature of the application was widened.

2 The beneficiaries of the Trust were originally not convened to the application but a convening hearing was held. There is a history of litigation in relation to the Trust and the Court felt that, in the circumstances, the beneficiaries ought to be given the opportunity of being heard should they so wish. The matter was therefore adjourned and the beneficiaries were notified of the application. As it transpires, they have all either consented or indicated that they have no objection and see no need to appear.

3 At the conclusion of the hearing, the Court granted a declaration that the representor had been duly appointed as a trustee of the Trust by the relevant deed of appointment. We now give our reasons.

Background

4 The Trust was established by declaration of trust dated 19th July, 1995, made by Warren Trustees Limited (now called Warren (1992) Limited and referred to hereafter as "Warren") and Bank of Wales Trust Company (Jersey) Limited ("BoW") as co-trustees. The Trust is a discretionary trust governed by Jersey law. There are a number of individuals falling within the class of beneficiaries. As already indicated, there is a background of litigation between various parties concerning the Trust but that is not relevant for the purposes of this particular application and therefore we do not propose to give any details of that litigation.

5 The power of appointing a new trustee is set out at clause 25 of the Trust in the following terms:–

> *"(1) The persons in whom the power of appointment of new Trustees is vested by sub-clause (2) hereof shall have power by instrument in writing and subject to any limits for the time being imposed by the law of the Trust Domicile on the number of Trustees:–*
>
> > *(a) to appoint any new Trustee or Trustees (wherever resident or domiciled) in place of any Trustee who wishes to retire or who refuses or is unfit to act or is incapable of acting or who is a minor or who dies or being a company which is dissolved (otherwise than for the purpose of amalgamation or reconstruction);*
> >
> > *(b) to appoint any additional Trustee or Trustees (wherever resident of domiciled);*
> >
> > *(c) …*
>
> *(2) The power of appointment of new Trustees shall be vested in the Protector or if there is no Protector for the time being or no Protector who is willing and able to act then the surviving or continuing Trustees (including an outgoing Trustee if willing and able to act in the exercise of the power conferred by sub-clause (1) hereof) or the personal representatives for the time being of the last surviving Trustee or the liquidator of the last surviving Trustee.*
>
> *(3) A Trustee who wishes to retire may by notice in writing served upon the Protector (if any) and his co-Trustees retire from office PROVIDED that:–*
>
> > *(a) …*
> >
> > *(b) save where there is only one Original Trustee hereof such notice shall not take effect unless or until there shall be at least two Trustees immediately following the retirement to be effected thereby …"*

6 Warren has remained as trustee throughout the existence of the Trust. However, there have been changes in the identity of the co-trustee. On 20th August, 1999, BoW retired in favour of New England Trust Company Limited ("New England") and on 8th December, 1999, New England retired in favour of Elysium Trustees Limited ("Elysium"). No protector was ever appointed of the Trust with the result that, under clause 25(2), the power of appointing a replacement trustee vested in the continuing trustee and the outgoing trustee.

7 The appointments in August 1999 and December 1999 were validly affected under clause 25. Thus in August 1999, the deed of retirement and appointment was between Warren, BoW and New England and recorded that Warren and BoW appointed New England as trustee in place of BoW which retired. Similarly, the December 1999 deed of retirement and

appointment was between Warren, New England and Elysium and recorded that Warren and New England appointed Elysium as a co-trustee of the Trust in place of New England, which retired. There were in each case the usual ancillary provisions concerning trustee indemnities etc.

8 We now come to the deed of appointment and retirement which has caused the difficulty in this case. In 2005 Elysium wished to retire in favour of the representor, which was then named H & P Trust Company Limited ("H&P"). There was still no protector and therefore what was needed was a deed of retirement and appointment between Warren, Elysium and H&P whereby Warren and Elysium appointed H&P as a co-trustee, with Elysium retiring. The Court is quite satisfied from the evidence which has been produced to it that this was the intention of all three companies. As Mr Alan Evans, director of Warren, has explained in his affidavit, all three companies were at that time owned by the Warren Financial Services Group and the reason for replacing Elysium by H&P was simply that the Group were encountering difficulty with the Liberian companies registry and wished to let Elysium be struck off. All three companies had common directors at the material time, including Mr Evans.

9 Unfortunately, the parties took no legal advice and the relevant deed was prepared in-house.

10 The relevant provisions of the deed of appointment and retirement dated 1st December, 2005, ("the 2005 deed") are as follows:–

> *"THIS DEED OF RETIREMENT AND APPOINTMENT is made the 1st day of December 2005*
>
> *BETWEEN*
>
> *Warren Trustees Limited whose registered office is situated at Salisbury House, 1–9 Union Street, St Helier ("the Existing Joint Trustee")*
>
> And
>
> *Elysium Trustees Limited whose registered office is situated at Salisbury House, 1–9 Union Street, St Helier ("the Retiring Trustee")*
>
> And
>
> *H&P Trust Company Limited whose registered office is situated at ("the New Trustee") of the other parts (sic);*
>
> *WHEREAS*
>
> *(A) This Deed is supplemental to a Declaration of Trust ("the Settlement") dated 19th July 1995 made by Warren Trustees Limited and Bank of Wales Trust Company (Jersey) Limited and known as the Tamara Hetmanska Family Trust*

whereby the property specified in the second schedule of the Settlement was settled upon the trusts therein declared.

(B) By virtue of clause 25(2) of the Settlement the current Trustee is empowered to appoint new Trustees (as defined in the Settlement) of the Settlement.

(C) The current Trustee wishes to appoint the New Trustee as Trustee thereof in place of the Retiring Trustee and the New Trustee is willing to accept such appointment.

(D) …

(E) …

NOW THIS DEED WITNESSETH THAT:–

1. In exercise of the power given to it by clause 25(2) of the Settlement and of every other power (if any) him enabling, the Protector hereby appoints the New Trustee to be trustee of the Settlement and the New Trustee hereby accepts such appointment.

2. The Retiring Trustee hereby retires and is discharged from the trusts of the Settlement.

3. …

4. …

5. …

6. …"

11 The deed was executed under seal by the three companies with the execution clause again referring to Warren as the Existing Joint Trustee, Elysium as the Retiring Trustee and H&P as the New Trustee.

12 As can be seen, the document as executed is nonsensical. The recital describes the intention reasonably accurately, albeit that it refers to the power of appointment being vested in the current trustee in the singular. But the effective part of the deed at clause 1 purports to be an appointment by the Protector, who did not exist and was therefore (unsurprisingly) not a party to the deed.

13 The error was not noticed at the time by those (including Mr Evans) who executed the deed on behalf of the three companies; and since 2005, Warren and H&P have acted as co-trustees of the Trust. The problem only came to light recently when, during the course of the litigation referred to earlier, Hanson Renouf spotted the error in the 2005 Deed.

Discussion

14 As stated earlier, it is perfectly apparent that the intention of the parties to the deed in December 2005 was that Elysium should retire as trustee and that H&P should be appointed as trustee in its place, with Warren remaining as a trustee. The correct wording of clause 1 should have been (with the amended wording underlined):–

> *"In exercise of the power given to them by clause 25(2) of the Settlement and of every other power (if any) them enabling, the Existing Joint Trustee and the Retiring Trustee hereby appoint the New Trustee to be trustee of the Settlement and the New Trustee hereby accepts such appointment."*

The only material mistake is that the word "Protector" is inserted instead of the words "Existing Joint Trustee and the Retiring Trustee". The other errors are merely consequential grammatical errors arising out of the use of the singular rather than the plural.

15 The Court is in no doubt that it would be appropriate to rectify the deed in such manner should this be necessary.

16 However, as is well established — see for example *Re R E Sesemann Will Trust* [2005] JLR 421 at para 12, — rectification remains a discretionary remedy and will only be allowed where there is no other practical remedy.

17 In our judgment, there is in this case. In *Re Shinorvic Trust* [2012] JRC 081 at paras 36–38, the Court held that, as in English law, certain obvious mistakes can be corrected as a matter of construction without the need to obtain an order for rectification. This Court adopted the principle as described by Brightman LJ in *East -v- Pantiles (Plant Hire) Limited* [1982] 2 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 a 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 Ed p 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'."

18 Advocate Renouf questioned whether Jersey law should relax the second requirement, namely that it must be clear what correction ought to be made in order to cure the mistake. We resolutely decline to agree to any such relaxation. That would be to open the door to the Court being asked effectively to rewrite a document when there was doubt as to what was intended. The remedy must, if it is not to be abused, be firmly confined to the situation envisaged by Brightman LJ.

19 The affidavit of Mr Evans makes clear that all three parties to the 2005 deed intended that the power conferred on the retiring trustee and the continuing trustee by clause 25(2) of the trust deed should be exercised so as to replace Elysium by H&P. We are satisfied that there was a clerical mistake in this case in that "Protector" was inserted in clause 1 of the deed in error. There was no protector of the Trust and the only parties to the deed were the continuing trustee, the retiring trustee and the new trustee, as envisaged in the recitals.

20 Turning to the second requirement identified by Brightman LJ, it is quite clear what correction ought to be made in order to cure the mistake. Asking ourselves the question posed at the end of the passage referred to above, we have no hesitation in holding that what was written in clause 1 of the deed was an obvious mistake for the wording set out at paragraph 14 above.

21 We accordingly rule that, as a matter of construction, the 2005 deed was effective to appoint H&P (now called H1 Trust Company Limited) as trustee from the date of the deed and we grant a declaration to that effect.

22 In view of our decision, it is not necessary to go on to consider alternative methods of correcting the error. However, as at present advised, it seems to us that the principle of ***"imputed intention"*** (as described at paragraphs 59 — 65 of *Re Shinorvic Trust* and in the article by Professor Paul Matthews entitled Nothing up my sleeve at [2011] Jersey and Guernsey Law Review 357), would be of assistance in this case. This is because all the parties with the power to appoint H&P as new trustee (namely Warren and Elysium) were parties to the 2005 deed and intended that H&P should be appointed as a new trustee, albeit that, because of the clerical error in clause 1, they failed to exercise that power on the face of the document. H&P and Warren have acted as joint trustees since 2005 and that can only be on the basis that Warren and Elysium should be treated as having in fact exercised the power of appointment by the 2005 deed to which they were party.

23 Finally, as stated in paragraph 14, had we been unable to correct the error by either of the two methods mentioned above, this would have been a suitable case for rectification, as all the requirements for making such an order as set out in *R E Sesemann Will Trust* are satisfied in this case.

24 We were not asked to make any order for the costs of the representor to be recovered out of the trust fund and that was clearly correct. The expense of this application has arisen

entirely because of an elementary error by Warren/H&P and should not therefore be borne by the Trust.