

# The Representation of Trustcorp (Jersey) Ltd and The H and J Trusts and The Trusts (Jersey) Law 1984, as Amended and in the Inherent Jurisdiction of The Court

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	J. A. Clyde-Smith, Jurats Nicolle, Sparrow
<b>Judgment Date:</b>	20 December 2016
<b>Neutral Citation:</b>	[2016] JRC 237
<b>Reported In:</b>	[2016] JRC 237
<b>Court:</b>	Royal Court
<b>Date:</b>	20 December 2016

**vLex Document Id:** VLEX-792522625

**Link:** <https://justis.vlex.com/vid/the-representation-of-trustcorp-792522625>

## Text

[2016] JRC 237

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, Esq., and Jurats Nicolle and Sparrow

In The Matter of the Representation of Trustcorp (Jersey) Limited  
And In The Matter of the H and J Trusts And in the Matter of the Trusts (Jersey) Law 1984,  
as Amended and in the Inherent Jurisdiction of the Court

**Advocate** H. J. Heath for the Representors.

**Advocate** O. A. Blakeley for the unborn and minor beneficiaries.

## Authorities

Trusts (Jersey) Law 1984.

*In the matter of the R. E. Sesemann WT* [\[2005\] JLR 421](#) .

*Re Representation of PP Investors* [\[2008\] JRC 031](#) .

Trust — application to rectify two separate trusts.

## THE COMMISSIONER:

- 1 The Court has two applications to rectify two separate trusts which were declared by the same original trustee on the same day in identical terms save for the beneficiaries. Both were established through instructions given by the same accountant on behalf of two clients who wished to settle shares in the same company. Both are discretionary trusts in familiar form established under the law of Gibraltar and both have now changed the proper law to that of Jersey. The representor is the trustee of both. Indeed it was on the change in the proper law in April of this year that the issue which the representor and beneficiaries would like rectified came to light.
- 2 We are satisfied that the adult beneficiaries of both trusts have been notified of the application and indeed all have written in in support. There are no minor beneficiaries and Advocate Blakeley has been appointed to represent the unborn beneficiaries for both trusts.
- 3 The issue arises out of the wording of the third and fourth schedules, which are as follows:

*“The Third Schedule hereinbefore referred to:*

*(The Beneficiaries)*

1. *[The client],*
2. *The wife or widow of the [client], (whether or not for the time being remarried).*
3. *The children and remoter issue of [the client] (whether present or future).*

*The Fourth Schedule hereinbefore referred to:*

*(Excluded Persons)*

- 1 *The Settlor or its Directors, Shareholders or Officers for the time being.*

*2 Any person being a trustee or having the power of appointment of trustees in the Fifth Schedule hereto.*

*3 Any person, body or its Directors, Shareholders or Officers for the time being who has any legal power to direct the Trustees in the exercise of their power.*

*4 Any Gibraltar or Resident of Gibraltar within the meaning of the Companies (Taxation and Concessions) Ordinance 1983.”*

- 4 The term “Settlor” used in clause 1 of the Fourth Schedule is not defined in the trusts (both having been created by declaration by the original trustee) and as in both cases the client settled assets upon their respective trusts, it is arguable that notwithstanding the Third Schedule, they are excluded from benefit under the Fourth Schedule. The Trusts (Jersey) Law 1984 at Article 1 defines the term “**settlor**” as a person who provides trust property to a trust, which both clients have done in this case.
- 5 The original trustee had construed the reference in the Fourth Schedule to “the Settlor” to be a reference to itself. Its rationale for this construction was twofold. First, that clause 1 of the Fourth Schedule refers to “*the Settlor, or its Directors, Shareholders or Officers for the time being*” and the reference to the Settlor could not therefore intend to capture an individual person. Secondly, it was not possible for an individual to be expressly named as a Beneficiary and also at the same time fall within a class of “*Excluded Persons*”.
- 6 Whilst the Representor could see the strength of those arguments, it understandably would like the matter put beyond doubt.
- 7 Working from the confines of the trust deeds themselves, we would resolve the issue of construction in the same way and conclude that the clients are not excluded persons. The evidence we have seen puts it beyond doubt that the clients were intended to benefit and this was simply an error in the drafting.

## The Law

- 8 Turning to the law on rectification in *Re Sesemann WT* [2005] JLR 421 and *Re Representation of PP Investors* [2008] JRC 031 the Royal Court stated the test for rectification in Jersey as follows:

*“The test for rectification in Jersey is well established. There are three requirements:—*

*a. 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.*

*b. There must be full and frank disclosure.*

*c. There should be no other practical remedy. The remedy of rectification remains a discretionary remedy.*

*Accordingly, rectification is a remedy of last resort, only to be used when there is no other method of achieving the desired result."*

- 9 We are satisfied that there is a genuine mistake here and that it was not the intention of the clients, or of the original trustee who declared the trusts, to exclude the clients as beneficiaries; on the contrary the intention was that they should be beneficiaries, but that has been thrown into doubt by an error in the drafting.
- 10 There has, in our view, been full and frank disclosure and rectification would put the matter beyond doubt. The good ongoing administration of the trusts requires that the issue should not be left open to one of construction and the possibility of future challenges by beneficiaries.
- 11 We do therefore rectify the trusts by amending the first line in the Fourth Schedule of each trust so that it will read:

*"The Trustee or its Directors, Shareholders or Officers for the time being".*

Such an amendment will of course be retrospective in effect.

- 12 The Representer goes on to seek further rectification of both deeds. Neither contains a power of amendment. It is said that the clients would reasonably have anticipated that the trusts would include such a power, so that the trustee could amend the dispositive and administrative provisions if it was satisfied it was in the interests of the beneficiaries to do so. This would, it is said, make the trusts *"fit for purpose"*, giving the trustees flexibility that may be required to enable the trusts to work for the benefit of future generations of the clients' family.
- 13 There is no sufficient evidence that the clients or the original trustee gave any consideration to this at the time. The instructions from the accountant only said this (apart from stating who the beneficiaries should be):—

*"The trust is to be fully discretionary with the trustees having wide powers including the power to amend the class of beneficiaries, and add to or subtract from them, and to move the trust to another jurisdiction."*

- 14 Giving the trustee power to amend the dispositive provisions of the trust is not something that in our view a settlor would ordinarily expect to see and although a power to amend the administrative provisions is more commonplace, it cannot be said that the absence of a

power to amend in these terms renders these trusts “*unfit for purpose*”. They are simply less flexible than might otherwise be the case, but amendments can always be made through an application to the Court for a variation under Article 47 of the Trusts (Jersey) Law 1984.

- 15 We cannot characterise the omission of such a power as a genuine mistake that does not carry out the true intentions of the clients and the original trustee at the time; and indeed both Advocate Heath and Advocate Blakeley have candidly accepted that there is insufficient evidence to support this part of the application. It would therefore be a misuse of the remedy of rectification for us to grant this application in order to improve upon the provisions originally prepared. We therefore decline to rectify the trusts in this respect.
- 16 Sur le champs Advocate Heath has asked that this part of the Representation proceed under Article 47 on the basis that all of the adult beneficiaries have consented to this amendment and Advocate Blakeley indicated that he would regard such an amendment to be beneficial to the unborns.
- 17 We heard brief evidence from Mr Michael Powell, a Director of the Representor, who gave us a much fuller explanation of why this amendment is being sought, namely to allow the Representor to make investments at the request of the clients which might not ordinarily be considered appropriate for a trustee to make and this using mechanisms such as, for example, settlor directed provisions. These changes to the deeds have been the subject of discussions with the clients but not with the other adult beneficiaries.
- 18 In our view the Court needs to have a far fuller explanation by way of further affidavit why this power to amend is required and in broad terms how the Representor envisages using that power. That affidavit should then be served on the other adult beneficiaries for their informed consent to be obtained and upon Advocate Blakeley so that he considers the issue more fully from the point of view of the unborns.
- 19 We therefore give the Representor leave to amend the Representations so that this part of the application can proceed under Article 47 and we adjourn the matter for a new date to be fixed with the Court sitting in private.