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Philip Ukert, v Interface Trustees Ltd

Jurisdiction:	Jersey
Judge:	Deputy Bailiff
Judgment Date:	28 August 2001
Neutral Citation:	[2001] JRC 187A
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Text

[2001] JRC 187A

ROYAL COURT

(Samedi Division)

Before:

M.C. St. J. Birt, Deputy Bailiff, **and** Jurats Rumfitt **and** Bullen.

In the matter of The Hare Trust

Between
Philip Ukert,
Representor
and
Interface Trustees Ltd
First Respondent

and

Beresford Trustees Ltd
Second Respondent

Advocate N. Pearmain for the Representor.

Advocate D.J. Benest for the First Party Convened.

Advocate D.J. Petit for the Second Party Convened.

No Authorities.

Application by the Representor for an Order declaring a Deed of Appointment of a new Trustee invalid.

Deputy Bailiff

THE

- 1 This is an application by the Representor, Philip Ukert, in his capacity as protector of a settlement known as the Hare Trust for an order that a Deed of Appointment of a new trustee dated 20th July, 2000, is invalid.
- 2 The Hare Trust (the Settlement) was created by a deed of settlement dated 5th January, 1998, made between Railer Helmut Muller as settlor and Beresford Trustees Limited ("Beresford") as trustee.
- 3 The Settlement is governed by Jersey law. It is a discretionary settlement in common form. The beneficiaries are persons related by blood and marriage to the Settlor together with the International Red Cross. The present living beneficiaries of the Settlement are the wife and two minor children of the Settlor. The Settlement contains provision for a protector. By clause 25(a) the Representor was appointed as the first protector and he remains as such.
- 4 This application is concerned with the power of appointing a new trustee and the relevant provisions are to be found in clause 21 of the Settlement. Paragraph (b) of clause 21 reads as follows:

"If any trustee hereof whether original additional or substituted shall die or being a corporation shall be dissolved or shall give notice of his or its desire to withdraw and be discharged from the trusts hereof under the provisions of sub-clause (c) of this Clause or shall refuse or become unfit to act then the Protector or failing the Protector a majority of the persons named in the Fourth Schedule

hereto may by deed appoint one or more other persons or corporations (whether resident within or without the Island of Jersey) to be a trustee or trustees hereof in place of the trustee or trustees so deceased dissolved desiring to withdraw and be discharged refusing or becoming unfit or unable to act."

5 Sub-paragraph (c) (ii) of Clause 21 reads as follows:

"If any trustee hereof being a sole trustee shall at any time desire to withdraw and be discharged from the trusts hereof he or it shall by notice in writing signed by himself or in the case of a corporate trustee by any of its directors or officers so inform the person or persons having for the time being power to appoint new or additional trustees hereof and in the event that the person or persons having for the time being power to appoint new or additional trustees fail to appoint new or additional trustees hereof within fourteen days of the posting by registered post or personal delivery of such notice then the existing sole trustee may by deed appoint any one or more new trustees hereof."

6 It can be seen therefore that the power of appointing a new trustee is vested in the Representor as protector and that if Beresford wished to retire as trustee it had to give written notice to the Representor. Only if the Representor failed to appoint a new trustee within fourteen days of Beresford's notice having been sent by registered post or personally delivered to the Representor did the power to appoint a new trustee then vest in Beresford as the Trustee wishing to retire.

7 By a Deed of Retirement and Appointment dated 20th July, 2000, Beresford purported to retire as Trustee and to appoint Interface Trustees Limited ("Interface") as sole Trustee in its place. There is no reference in the Deed of Appointment to the protector. The relevant recitals say only as follows:

"B. Pursuant to Clause 21 the power to appoint New Trustees of the Settlement is vested in the Retiring Trustees for the time being.

C. The Retiring Trustees are the present sole trustees of the Settlement.

D. The Retiring Trustees wish to be discharged from the trusts of the Settlement upon being indemnified as follows and to appoint the New Trustees to be the sole trustees of the Settlement in place of the Retiring Trustees."

8 The two effective provisions of the Deed were as follows:

"2. In exercise of the aforesaid power and of every and any other power enabling the Retiring Trustees they HEREBY APPOINT the New Trustees to be the sole Trustees of the Settlement in place of the Retiring Trustees and the New Trustees accept such appointment.

3. The Retiring Trustees hereby retire from the trusts of the Settlement and are

hereby discharged from the same.”

- 9 The Court has received no evidence from any officer of Beresford or Interface as to how or why this Deed of Appointment came to be executed. The sole evidence before the Court is an affidavit by the Representor. As it is uncontested the Court proceeds on the basis of the evidence contained in that affidavit.
- 10 Apparently, at the time of the creation of the Settlement in 1998, Interface and Beresford were part of the same group carrying on trust and company business. The point of contact with Beresford for the Settlor and the Representor was Mr. John Killmister, a principal of Beresford. For so long as Beresford was the trustee, the Settlor and the Representor were apparently content with the services provided.
- 11 It appears that, during the course of 2000, Interface and Beresford decided to go their own separate ways. Mr. Killmister remained a principal of Beresford whereas the relevant principal of Interface became Miss Julie Rosenthal. It appears that as part of the arrangement whereby Interface was separated from Beresford it was agreed between them that the Settlement should be allocated to Interface. Accordingly the Deed of Appointment was executed on 20th July, 2000, in order to effect this.
- 12 Despite the clear terms of Clause 21 of the Settlement, the Representor did not become aware of the purported change of trusteeship until December, 2000. In other words, Beresford and Interface both completely ignored the requirements of Clause 21 concerning the appointment of a new trustee.
- 13 We have been assured by counsel for both Respondents that this was done through inadvertence but we have to say that we do not have any evidence one way or the other because neither party has seen fit to assist the Court by producing any evidence on affidavit.
- 14 The evidence for the Representor is not specific as to exactly how he became aware of the purported change in trustee but he states that he and the Settlor were not satisfied with the level of service provided by Miss Rosenthal. In December, 2000, the Settlor contacted Mr. Killmister who informed him that Beresford could not act as trustee because of the contractual arrangements that had been agreed with Interface as part of the de-merger of the two companies.
- 15 It follows that, on the evidence produced to the Court, these two Jersey trust companies agreed between them who should have the Settlement's business without even consulting the person whose right it was to decide who should be trustee. Even if done inadvertently, this was unacceptable and unprofessional conduct.

- 16 Since then the Representor has sought to arrange for an amicable transfer of the trusteeship to a member of the Langtry Trust group. However this has foundered following discussions about indemnities for officers of Interface and other matters. Accordingly the Representor has brought this Representation seeking a declaration that the Deed of Appointment is void and of no effect and that Beresford remains as trustee.
- 17 In our judgment the position is clear beyond doubt. The power of appointing new trustees of the Settlement rests with the protector unless he fails to act within fourteen days of written notification of the outgoing trustee's wish to retire, in which event the power then rests with the retiring trustee. No such notification was ever given in this case. Accordingly no power of appointment ever vested in Beresford as outgoing trustee. The purported appointment by Beresford on 20th July, 2000, was therefore a nullity.
- 18 Neither Beresford nor Interface has sought to argue to the contrary today. Beresford has accepted that the Deed was invalid and Interface has rested on the wisdom of the Court. We therefore grant a declaration that the purported appointment of 20th July, 2000, of Interface as trustee of the Settlement was invalid and we further declare that Beresford is and has at all times been the sole trustee of the Settlement.
- 19 There is a second argument which was raised by the Representor in attacking the validity of the Deed of Appointment, namely that although the common seal of Interface appears to have been fixed to the Deed, no director, secretary, or other officer of Interface has in fact signed the Deed. The common seal is therefore unattested and, it is said, Interface has therefore never executed the Deed.
- 20 In the light of our conclusions on the first point we do not need to consider this argument but we cannot help but observe that the failure of any officer of Interface to sign the Deed seems typical of the general lack of professional care and attention that has been given to this matter.
- 21 The next point which arises relates to the accounts of the Settlement and of the underlying companies of the Settlement. We are told that accounts of the underlying companies were prepared by Beresford up to the financial year ending 31st July, 1999, although no accounts of the Settlement itself had been prepared. No accounts of either the Settlement or underlying companies have apparently been prepared since then. By agreement between the parties we order as follows in this respect:
- (1) Interface must hand all books, records and trust documents, including those in electronic form, to Beresford within fourteen days of today's date.
 - (2) Beresford must prepare accounts of the Settlement for all years to 31st July, 2001, and for the underlying companies for the years ended 31st July, 2000, and 31st July, 2001, as soon as reasonably practicable.

(3) Interface must give such assistance as may be required to enable Beresford to prepare such accounts in respect of the period that Interface was purportedly acting as trustee, namely the period from 20th July, 2000, to the date on which the books and records are handed back to Beresford as we have ordered above.

- 22 The final matter which comes before us is that of costs. It is quite clear to us that the costs of these proceedings have been incurred only because of the manifest error by Beresford and Interface in connection with this Deed of Appointment. Both parties accepted that in the light of that fact no costs should fall on the trust fund or on the protector personally. The parties therefore agreed that the Representor should be awarded his costs on an indemnity basis jointly and severally against both Respondents. Where the parties have disagreed is on the question of apportionment as between the Respondents. Beresford argues that it accepted the correct position somewhat sooner than Interface and adopted a helpful stance by suggesting an amicable solution with all parties being party to a deed of appointment whereby the Representor would as protector appoint a member of the Langtry group as new trustee. Conversely, says Beresford, Interface has not gone along with such a suggestion and has wished the matter to go to Court in order that the validity of the Deed could be adjudicated upon. Beresford argued that, apart from some nominal costs in respect of the Representation itself, all the costs should be borne by Interface.
- 23 I am not willing to accept that submission in full. The essential reason for these proceedings is that both Respondents made an error in connection with the Deed of Appointment. Indeed it could be argued that as retiring trustee the obligation was slightly heavier on Beresford. Nevertheless the correspondence does suggest that Beresford has been trying to resolve this matter without the need to go to Court whereas Interface has not.
- 24 In the circumstances, taking a broad view, I order that, as between the Respondents, the costs should be borne two-thirds by Interface and one-third by Beresford.