The Representation of Scarlett Investment Holdings Ltd

Jurisdiction:	Jersey
Judge:	Deputy Bailiff
Judgment Date:	25 October 2018
Neutral Citation:	[2018] JRC 198
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Text

[2018] JRC 198

ROYAL COURT

(Samedi)

Before:

T. J. Le Cocq, **Esq**., Deputy Bailiff, **and** Jurats Olsen **and** Pitman

In the Matter of the Representation of Scarlett Investment Holdings Limited
And in the Matter of J, K And L
And in the Matter of Article 51 of the Trusts (Jersey) Law 1984 (As Amended)

Advocate J-M. G. Renouf **for Representor**.

Authorities

Trusts (Jersey) Law 1984.

R E Sesemann Will Trust [2005] JLR 421.

Representation of H1 Trust Company Limited [2013] JRC 039.

Trust — application for rectification of certain documents and instruments pertaining to 3 trusts.

Deputy Bailiff

THE

1 This is an application by Scarlett Investment Holdings Limited ("the Representor") for declarations or orders of rectification of certain documents and instruments pertaining to three trusts known as the J, K and L (together "the Trusts").

2 The Representor is a private company and is registered in the British Virgin Islands and has acted as *de facto* trustee to each of the Trusts since May 1997.

3 The Trusts were settled by A ("the Settlor") by declarations of trust dated 23 rd February, 1982, ("the Declarations"). The Settlor is believed to have died some time ago.

4 The original trustee was a BVI private company called Three Island Trust Company Limited which is believed to have been struck off the BVI register of companies in or around 1997 or 1998.

5 The Declarations are in effect in identical terms and include a governing law provision specifying that the law of Jersey governs the Trusts. The beneficiaries are defined as being " *such person or persons or classes of persons … as the trustees may … with the consent in writing of the protector appoint as members of the class of beneficiaries*". The default beneficiary is stated to be the B.

6 There are also provisions providing that the protector has power to appoint new or additional trustees and to release any of the powers conferred upon them.

7 As far as the Representor is aware, no further beneficiaries have been validly appointed and accordingly the default beneficiary, B, has at all times been the only beneficiary of the Trusts.

8 The Declarations contain no identifying provisions specifying who the protectors of the

Trusts might be and there is no provision for the appointment of a first or successor protector. There is nothing in the records of the Trusts which disclose any appointments of protectors nor any release of protectors' powers.

9 The identity of the trustee of the Trusts (and at all times the Trusts have had the same trustee) has, it is understood, sought to be changed on two occasions. Three Island Trust Company Limited purportedly retired in favour of Athol Trust Company Limited (a BVI company understood to have been subsequently liquidated) ("Athol") by an instrument of appointment and retirement dated 13 th August 1982. The 1982 documentation suggests that the appointment of Athol was effected by the settlor who was a party to the instruments notwithstanding that he had no power to do so.

10 There is, accordingly, a substantial question mark over the validity of Athol's appointment.

11 Athol purportedly retired in favour of the Representor by instruments of appointment and retirement dated 1 st May, 1997, ("the 1997 Instruments"). These appointments were, so it appears, made by Athol although it had no power to do so. Athol was of course neither the protector of the Trusts nor indeed, it appears, had it been validly appointed as a trustee.

12 In the circumstances, it appears that there is also a substantial question mark over the validity of the appointment of the Representor leaving, in theory, Three Islands Trust Company Limited as the trustee.

13 The Representor, by deeds of addition of beneficiaries dated 1 st May 1997 purported to act as Trustee of the Trust in appointing the other Trusts as beneficiaries of each other. There was, of course, no consent in writing of the protector. Again, the addition of new beneficiaries would therefore appear to have failed but in any event the appointments would have been, for the reasons set out above, circular and at all times B would have been the only real beneficiary of the Trust.

14 By deeds of addition dated 30 th August 2001 the Representor purported to make an addition of property to each of the Trusts such being 33 $^{1}/_{3}$% of the issued shares for a Panamanian company called F Inc. As the Representor had in effect not been validly appointed those deeds themselves could not have been effective. F Inc holds an investment portfolio through a wealth management company holding approximately €1,660,751.

15 We have before us the affidavit of C, a director of the Representor of 30 th March 2017. In it he confirms the factual matters set out above.

16 In summary, from C's affidavit the position is as follows:-

(i) The settlor is believed to have died some time ago;

(ii) Three Island Trust Company Limited was struck off the BVI register of companies in 1997 or 1998. Athol is understood to have been liquidated although it is unclear when.

(iii) Accordingly neither of the previous entities purportedly functioning as trustees still exist or is able to provide any assistance in regulating the current administrative difficulties facing the Trust.

(iv) The Representor continues to hold the shares in F Inc on behalf of the trustee of the Trusts, or as bare trustee.

17 No one has claimed any ownership of or interest in relation to the Trusts or their assets. C confirms that there have been extensive researches through the trust records and that they have been unable to identify any beneficiaries save for the residuary beneficiary, B.

18 The matter is brought before us pursuant to Article 51 of the Trusts (Jersey) Law 1984 (as amended). The powers afforded to the Court are broad and include, in Article 51(2):-

"(2) The court may, if it thinks fit —

(a) make an order concerning —

(i) the execution or the administration of any trust ,

(ii) the trustee of any trust, including an order relating to the exercise of any power, discretion or duty of the trustee, the appointment or removal of a trustee, the remuneration of a trustee, the submission of accounts, the conduct of the trustee and payments, whether payments into court or otherwise ,

(iii) a beneficiary or any person having a connection with the trust, or

(iv) the appointment or removal of an enforcer in relation to any non-charitable purposes of the trust;

(b) make a declaration as to the validity or the enforceability of a trust;

(c) rescind or vary any order or declaration made under this Law, or make any new or further order or declaration."

19 Article 51(3) indicates that an application may be made "… by the trustee, the enforcer or a beneficiary or, with the leave of the court, by any other person."

20 As it is clearly the case that the Representor has acted *de facto* as trustee for a number of years and it is entirely appropriate that it be granted leave, if such is necessary, to bring this application.

21 Article 51(4) provides:-

> ***"Where the court makes an order for the appointment of a trustee it may impose such conditions as it thinks fit, including conditions as to the vesting of trust property."***

22 At, Article 51(5) it is provided that:-

> ***"Subject to any order of the court, a trustee appointed under this Article shall have the same powers, discretions and duties and may act as if the trustee had been originally appointed as a trustee."***

23 Articles 16 and 17 of the Law provide as follows:

> ***"16 Number of trustees***
>
> ***(1) Subject to the terms of the trust, a trust must have at least one trustee*** .
>
> ***(2) A trust shall not fail on grounds of having fewer trustees than required by this Law or the terms of the trust*** .
>
> ***(3) If the number of trustees falls below the minimum number required by paragraph (1) or, if greater, by the terms of the trust, the required number of new trustees must be appointed as soon as practicable*** .
>
> ***(4) While there are fewer trustees than are required by the terms of the trust, the existing trustees may only act for the purpose of preserving the trust property*** .
>
> ***17 Appointment out of court of new or additional trustee***
>
> ***(1) Paragraph (1A) applies if –***
>
> ***(a) the terms of a trust do not provide for the appointment of a new or additional trustee;***
>
> ***(b) any such terms providing for any such appointment have lapsed or failed; or***
>
> ***(c) the person who has the power to make any such appointment is not capable of exercising the power*** ,
>
> ***and there is no other power to make the appointment*** .

(1A) A new or additional trustee may be appointed by –

(a) the trustees for the time being;

(b) the last remaining trustee; or

(c) the personal representative or liquidator of the last remaining trustee .

(2) Subject to the terms of the trust, a trustee appointed under this Article shall have the same powers, discretions and duties and may act as if the trustee had been originally appointed a trustee .

(3) A trustee having power to appoint a new trustee who fails to exercise such power may be removed from office by the court .

(4) On the appointment of a new or additional trustee anything requisite for vesting the trust property in the trustees for the time being of the trust shall be done."

24 On 22 nd June, 2017 this Court appointed the Representor as trustee of the Trusts from that date, leaving over any application for retrospective appointment of the trustee of the Trusts, and releasing B, who had appeared having been convened to the hearing, from future appearance.

25 Since that date we have received an affidavit from D of 23 rd April 2018. D was, until 2017, a director of the Representor.

26 D set out for the Court the various investigations that have been taking place to try and identify what has happened within the Trusts. There is some reference in a letter dating back to 1982 suggesting that the Trusts may have been established for the benefit of "four brothers called E" but approaches made to individuals who were taken to be those identified in that letter and who together owned a fuel distribution business in Ireland, did not produce any results. They indicated that they were not involved in or interested in the trusts in question. A further letter dated 23 rd November 2017 was sent by D to the same three brothers setting out the reasons for contacting them but there was no response. This, so D says in his affidavit, will be consistent with the views that they had previously expressed.

27 There have been other enquiries made which have largely been met with no response or responses that were not of assistance.

28 In the conclusion to his affidavit, D says:-

"In all of the above circumstances I consider we have gathered as much information as can reasonably be discovered in relation to these historical and uncertain matters. I can identify no other realistic lines of enquiry or search which would cast any greater light that is already available. Whilst the picture is regrettably still not clear, it is as clear as I consider it is ever likely to be."

The Law

29 The test for rectification in Jersey is well established. In the matter of the *R E Sesemann Will Trust* [2005] JLR 421 the Court specified, at paragraph 12, three requirements:-

"(1) The Court must be satisfied by sufficient evidence that a genuine mistake has been made so the document does not carry out the true intention of the parties .

(2) There must be full and frank disclosure .

(3) There should be no other practical remedy. The remedy of rectification remains a discretionary remedy."

30 In the matter of the *Representation of H1 Trust Company Limited* [2013] JRC 039, the Court at paragraph 17 of the judgment said this:-

"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 27 th 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'.""

31 And, at paragraph 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 Shinovic 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."

32 In our view, this is an appropriate matter for rectification. It is entirely clear that the settlor would have intended the creation of valid trusts with suitably constituted trustees. The failure to appoint a protector, and the consequent invalid appointments of various successor trustees, must, it seems to us, to have been an error on the part of the settlor. We are satisfied that it is appropriate to amend the declarations of trust by the addition of the words sought in the prayer of the Representation and further to amend the instruments in 1982 and to make the declarations sought at paragraph 43 of the prayer of the Representation. Clearly there must be a protector going forward and we appoint C as such.

33 This is a highly unusual set of circumstances where a trust clearly exists but it has proved impossible to find anyone connected with it or who might be interested in it other than the default beneficiary. In the circumstances, the Court would wish to do what it can to assist and put in place a trust which clearly was the intention of the settlor when created, namely a properly constituted trust with a protector. There is no suggestion that what has been done in the intervening period from the creation of the trust, although not valid because of a want of validity of appointment, has been wrong or other than in the interests of the trust and should not be to the extent necessary validated.

34 For the reasons set out above, we order the rectification as requested and appoint C as protector.