

Rectification and variation – full evidence still required

Insights - 01/02/2017

In the Matter of the H and J Trusts [2016] JRC237

The Jersey Court has a well-established jurisdiction to rectify trust documents whose terms do not carry out the true intentions of the parties. The test is also well-established and requires evidence of a genuine mistake so that the document does not carry out those intentions, full and frank disclosure and for there to be no other practical remedy. In its decision in *H and J Trusts* the Royal Court held that, where there is insufficient evidence of the relevant party having addressed its mind to include a particular clause (in that case a power of amendment), the omission could not be considered to be a genuine mistake – rectification cannot be used to improve upon the provisions originally included.

Facts

The application in the *H and J Trusts* was brought by the trustee of both trusts. They were discretionary trusts created by way of declarations of the original trustees. The application was primarily brought to address an issue of construction and to rectify the trusts' instruments to correct what on the face of the instruments was an error. In short, schedules to the instruments listing excluded persons, made reference to "*the Settlor or its Directors, Shareholders or Officers for the time being*". As the trusts were created as declarations by the original trustees, and given the reference to directors and shareholders being logically to a corporation, the trustees had construed the reference to "*Settlor*" as being to them even though the clients of the trust company had provided assets to be held on the trusts. Otherwise, adopting the statutory definition of *settlor* (a person who provides property to a trust) would have resulted in the clients who were intended to benefit, being excluded on the terms of the schedules.

Decision

The Court held that as a matter of construction the trustees' position was correct, and held that the clients who had provided the assets to the trusts were not excluded. The Court went on to

consider the application for rectification and concluded that the test had been met. The intention had been to benefit the clients who had settled the assets, a doubt had arisen on the drafting which evidenced a genuine mistake. On the basis that full and frank disclosure had been provided and there was a need for the ongoing administration of the trusts not to be open to doubt, the Court rectified the schedules to replace the reference to "*Settlor*" with "*Trustee*". The Court confirmed the retrospective effect of that amendment.

Whilst that application was relatively straightforward, the further rectification sought was rejected. The trustees sought to submit that the Court would have anticipated the trusts to include powers of amendment, so as to render the trusts "*unfit for purpose*" and provide flexibility. The Court had insufficient evidence to find that either the clients or the original trustees had considered including such a power. The Court found that the absence of a power to amend would not render the trusts *unfit* and accordingly in the absence of the power and any real evidence to support the contention that there had been a genuine mistake rectification was not available.

The Trustees' advocate sought to recast their application as one for a variation under Article 47 of the Trusts (Jersey) Law 1984 on the basis that the adult beneficiaries had consented and an advocate for the unborns was before the Court. However, the Court, having heard from a director of the trustee was not, concluded that the matter had not been discussed with the adult beneficiaries and directed that any application for a variation as suggested would require a full explanation by affidavit, with such affidavit served on the beneficiaries in order for them to consider the nature of the variation sought and how the trustee envisaged using the power they wished to be included, in order that informed consent could be given.

Comment

The decision provides reconfirmation of the care the Court will take when considering whether the terms of a trust instrument can be properly changed. Rectification is only available where the proper level of evidence can be provided and applications that are unsupported or which seek to use the Court's discretion to *improve upon the provisions originally prepared* will not be granted. Where a trust instrument does, however contain drafting that can be demonstrated not to carry out what the parties truly intended, and no other remedy is available, rectification will be considered. It is also a salutary reminder that an application to vary will also require full and detailed evidence for which the beneficiaries are to be given adequate opportunity to consider and give their informed consent. In short, the Court's jurisdiction in this area, remains one that will not lightly be exercised.

From pan Channel Islands perspective, it is our view that there would be no difference in approach (or outcome on the facts of the case) in Guernsey given that the Guernsey Court follows similar principles in rectification cases.

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