In the matter of the Shinorvic Trust [2012] JRC081

Insights - 03/07/2012

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Application by trustees for declaration as to whether a person had been validly appointed as co-trustee and whether a person in fact added as a beneficiary.

Background

By a deed executed in 1990 (the 1990 Deed) the settlor purported to exercise his power under the trust deed to add Mrs B as a beneficiary. In 1998, the settlor executed a declaration adding a further beneficiary (the 1998 Deed). The recitals of the 1998 Deed included reference to the 1990 Deed "in terms of which [Mrs B] was added to the class of Beneficiaries". In 2002, the settlor signed a letter of wishes which inter alia expressed the wish that Mrs B's welfare should be the trustees' "paramount concern". The settlor died in 2005, leaving substantial provision for Mrs B in his will. However, by then the settlor's assets had largely been placed in the trust and Mrs B received only a small amount under the pecuniary legacy. Regular distributions were made to Mrs B from the trust. In 2007 the settlor's sister, MF, and Mr G, entered into a deed by which MF purportedly appointed Mr G as co-trustee to act with the corporate trustee (the 2007 Deed).
Subsequently, it came to light that:

(a) the 1990 Deed had not been witnessed and therefore, given that the trust deed required the power to add a beneficiary to be by "instrument in writing signed by the parties thereto and witnessed and dated...", there was an issue over whether Mrs B was in fact a beneficiary; and

(b) in the 2007 Deed, the parties were incorrectly defined together as "the trustees"; there was no definition of "New Trustees" and references to the latter and to "Trustees" were in the plural, not singular. Therefore, there was no specific definition of Mr G as the new trustee.
Two issues arose for the Court to decide - was the co-trustee validly appointed as such by the 2007 Deed and was Mrs B a beneficiary?

Decisions

1 Was the co-trustee validly appointed by the 2007 Deed?

From the operative provisions of the 2007 Deed, it was clear that MF intended to exercise her power to appoint an additional trustee. The Court cited East v Pantiles (Plant Hire Limited) [1982] EGLR 111 at 112 in which it was confirmed that a mistake in a written instrument can in limited circumstances be corrected as a matter of construction without an order for rectification. Two conditions must be met:

(a) There must be a clear mistake on the face of the instrument;

(b) It must be clear what correction ought to be made to cure the mistake.

The principle essentially applied where a reader with sufficient experience of the relevant document would inevitably say "Of course x is a mistake for y".

The Court agreed that this was the situation here. It was obvious that the intention had been to appoint the additional trustee and that he should have been defined as the "New Trustee" and the singular instead of the plural should have been used in the operative provisions of the 2007 Deed. Therefore, the 2007 Deed was a valid and effective appointment of the co-trustee.

2 Was Mrs B a beneficiary?

(a) Aiding the defective execution of a power

The sole problem with the 1990 Deed was that there was a defect in the exercise by the settlor of his power under the trust deed to add Mrs B as a beneficiary, in that his signature was not witnessed so as to make the 1990 Deed an "instrument", in accordance with the definition in the trust deed. It was a long-standing principle of English law that equity will aid the defective execution of a power. Citing leading text books (Halsbury's Laws of England 4th Edition, Vol 13 Deeds para 48; Vol 16(2) Equity para 448 and Vol 36(2) Powers paras 359-363; Snell's Equity (32nd Edition) paras 11-003, 11-006, 11-007; Lewin on Trusts (18th Edition) paras 29-184 to 29-195 and Thomas on Powers (1st Edition) 1003-1041)), the necessary conditions for the principle to apply are:

(i) An intention by the person with the power to exercise it;

(ii) There must have been an attempted execution of the power - there is no jurisdiction to remedy a failure to exercise the power at all or to exercise it in time;

(iii) The defect must be formal rather than going to the substance of the power;

(iv) The purported exercise must have been a proper exercise of the power - the court will not assist where there would be a fraud on the power or a breach of trust;

(v) The doctrine will only operate in favour of certain categories of persons. These were summarised in Halsbury as being purchasers for value, creditors, charities and persons for whom the appointor is under a natural or moral obligation to provide.

Whilst the cases giving rise to the principle were concerned with a power of appointment (ie rather than a power to add beneficiaries), the Court could see no valid reason for distinguishing the application of the principle on that basis. It was accepted that the first four conditions were satisfied as regards the 1990 Deed. But, was Mrs B a person for whom the settlor was under a natural or moral obligation to provide?

In the Court's view, the underlying philosophy of the principle was that it applies for the benefit of persons towards whom the donee of the power has some moral or natural obligation. Historically, this was restricted to a wife and child because of the social conventions of the time and the fiction that they had provided consideration and were not therefore volunteers. The Court doubted that the restriction would apply today. The Court therefore held that under Jersey law, the principle may operate in favour of any person for whom the donee of the power has a natural or moral obligation to provide, which will be a matter of fact to be decided in each case. In this case, the settlor and Mrs B had had a long standing albeit unconventional relationship. It was clear from the letter of wishes and his intention to provide for her from the trust and under the will that he considered himself to be under a moral obligation to provide for Mrs B. Applying the principle, the Court held that Mrs B had been validly added as a beneficiary from the date of the 1990 Deed.

(b) Imputed intention

In light of the above decision, the Court did not necessarily need to consider the alternative way to uphold the addition of Mrs B as a beneficiary. However, if the decision were wrong, then could the statement by the settlor in the recitals of the 1998 Deed that he had exercised his power to add Mrs B as a beneficiary in the 1990 Deed of itself be treated as a valid exercise of that power, ie could the intention to add Mrs B as a beneficiary by means of the 1998 Deed be imputed to the settlor.

The textbooks and case law suggested the principle applies where the exercise of the power is necessary for the transaction to be effective. This was not the case here, as the 1998 Deed (adding another beneficiary) did not depend on the addition of Mrs B by the 1990 Deed. However, there was another line of authority that an indirect or oblique reference to a power will be sufficient evidence of the intention to exercise it, even where the exercise of the power is not necessary for the validity of the subsequent transaction. In accordance with this principle as stated in Farwell on Powers at 222/223 citing Lees v Lees (1871) IR 5 Eq 549 the Jersey Court held that the erroneous statement by the settlor that he had previously exercised the power to add Mrs B as a beneficiary was sufficient for the Court to find that the power was exercised in the 1998 Deed, which otherwise complied with the requirements for execution of the power (ie it met the requirements for execution of an "instrument" under the trust deed), albeit that the addition of Mrs B would be effective from the date of the 1998 Deed, rather than the 1990 Deed. Although the authority for

the extended principle was "slender", nevertheless it was appropriate and in the interests of justice to treat it as applicable under Jersey law. It did not seem an objectionable extension of the principle to apply it to the present case as there was an express reference to the power in the recital of the 1998 Deed and positive evidence that the settlor had intended to exercise the power in the 1990 Deed, as referred to in the recital. The Court was merely treating as done what was clearly intended by the settlor to have been done by the 1990 Deed, as confirmed by him in the 1998 Deed. If it was acceptable for equity to impute an intention in the "necessity" cases, then it seemed equally and if not more acceptable to impute a similar intention in a case such as this.

Conclusion and comment

This case makes it clear that a mistake in a written instrument may be corrected in certain circumstances as a matter of construction of the document, without an order for rectification and therefore that there may potentially be an alternative cure for defective documents with "obvious" errors.

The case also extended and applied to modern times the principle that equity will aid the defective execution of a power such that the principle could apply not just in favour of a wife and child, provided the donee of the power has some moral or natural obligation to the person, and this will be a matter of fact on a case by case basis. Although the Court found that the principle applied and therefore did not need to rely on alternative arguments, nonetheless the Court also considered the doctrine of imputed intention and held that it was applicable under Jersey law, and indeed, applied not just in cases of necessity but also cases such as this, where a recital referenced the exercise of the power in a previous document.

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