

# To the rescue

*Lisa Springate and Dina El-Gazzar examine the importance of the landmark decision in Re The Shinorvic Trust*



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**'With modern family relationships and changed social attitudes, obligations to support financially now extend to a much wider category of people. For example, illegitimate children, stepchildren, and same-sex partners.'**

The decision in the recent case of *Re The Shinorvic Trust* [2013] re-examined and tested the boundaries of the well-established principle that equity will aid the defective execution of a power in certain situations. Historically, the principle operated by allowing for equitable relief in order to perfect a defective execution of a power by a person who has the power over an estate (whether or not a power of ownership) and who shows an intention to execute the power in discharge of some moral or natural obligation.

Although the principle will not go so far as to provide relief in instances of a complete failure to exercise a power of appointment by executing the relevant instrument, if, by reason of mistake or accident, there is a formal defect in its execution, equity will grant relief against formal defects. However, the principle was limited in favour of certain individuals who were regarded as having provided good consideration, namely wives or children of the donee.

The limited class of people who could enjoy the benefit of this principle brought about *Re The Shinorvic Trust*, in which the Royal Court of Jersey had to consider whether the old principle of English equity applied in Jersey and, if so, whether it applied in a modern, unconventional scenario. The case related to whether a deed signed by the settlor, purporting to appoint his girlfriend (Mrs B) as a beneficiary but defective due to lack of a witness, could be remedied by the principle of equity aiding a defective power. The Royal Court held that it did, and in considering the principle updated its application to modern times, in particular when looking at the beneficial class. An alternative solution

of imputed intention, by way of a recital in a later deed, was also considered.

## Background

The Shinorvic Trust was established as a discretionary trust pursuant to a deed of settlement dated 19 July 1988 (the trust deed), originally for the benefit of the settlor, one of his sisters and her children and remoter issue. The trust deed provided that the settlor, or any person to whom he may delegate the power, may, during the trust period by an instrument in writing signed by the parties thereto and witnessed and dated, declare that any person shall be added to the class of beneficiaries.

On 21 February 1990, the settlor purported to exercise his power to add his girlfriend, Mrs B (with whom he had a close relationship since 1965), to the class of beneficiaries pursuant to a deed of declaration (the 1990 deed), which declared that:

... as from the date hereof the said [Mrs B] shall be added to the class of beneficiaries and the settlement shall henceforth be read construed and take effect in all respects as if [Mrs B] was named as a beneficiary thereof.

The 1990 deed was dated, signed by the settlor and the former trustee. However, although there was a printed attestation clause, unfortunately the settlor's signature was not witnessed. The 1990 deed therefore did not satisfy the requirement for the power to be exercised 'by instrument' and was ineffective in adding Mrs B to the class of beneficiaries.

The settlor clearly intended to add Mrs B as a beneficiary and believed that he had done so, and the trustee clearly considered that the 1990 deed was valid and effective. A later deed in 1998 (the

1998 deed), recited the 1990 deed and that its effect was to add Mrs B as a beneficiary. In addition, a series of letters of wishes written by the settlor showed a consistent intention to benefit Mrs B, including a description of Mrs B in the latest letter of wishes as his 'paramount concern'. Throughout his lifetime, the settlor had maintained Mrs B and he had provided for her in his will.

Later, the settlor added his brothers and their children and remoter issue as beneficiaries. The settlor died in 2005 and the present trustees took over as trustees of the trust in 2009.

In 2011, when seeking tax advice, all of the trust deeds executed by the settlor were reviewed and it was discovered that the settlor's signature on the 1990 deed relating to Mrs B had not been witnessed, as required by the terms of the trust deed.

Unless remedied by the court, the settlor's clear wish that Mrs B should benefit under the trust would not be given effect. This would have the unfortunate effect that the payments made over the years by the trustees, in good faith in the belief that she was a beneficiary, would have been made in breach of trust.

### **Equity will aid the defective execution of a power**

While equity will not provide relief for the complete failure to exercise a power of appointment, it will assist in circumstances where by reason of mistake or accident there is a formal defect in the execution of the power in favour of certain individuals deemed to have provided good consideration. Equity looks to substance not form.

It was argued on behalf of the trustees that, as the court has wide powers to correct substantive mistakes by trustees and others in documents and transactions (for example through the doctrines of rectification and setting aside for mistake, recently confirmed in *Re Representation of R and S Trust* [2011]), it would be surprising and unfortunate if the court did not have the power to remedy formal defects of the type in issue so that the clear substance of the transaction can take effect. It was therefore proposed that the court should apply the doctrine of equity in the present case.

The doctrine has the following requirements in order to apply:

- the person with the power must have intended to exercise it;
- there must be a positive (albeit defective) exercise of an existing power;
- the defect must be one of form only;
- the purported exercise must have been a proper exercise of the power; and
- the object of the power must be within one of the recognised

The evidence put before the court provided a consistent picture of a long, close relationship between the settlor and Mrs B throughout which he gave her substantial financial assistance. A letter of wishes dated 18 October 2002, stated:

Above all, however I should like [Mrs B]'s welfare to be your paramount concern. Please use the trust income as necessary to ensure that she continues to enjoy the same standard of living as she did during my lifetime and that all her medical needs are met. I expect the trust income to be sufficient for these

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categories in whose favour the doctrine operates.

It was contended that the above requirements were all satisfied in this case. The settlor clearly intended to exercise the power that he undoubtedly had under the trust deed to add Mrs B to the class of beneficiaries and believed that he had done so. The addition of Mrs B would have been an entirely proper exercise of that power, the defect being simply one of form. Insofar as the addition of a person as a beneficiary of a trust requires certainty and formality, those elements were satisfied by the instrument being in writing, signed by the settlor and executed by the trustee at the time.

### **The relationship in question**

The trustees contended that Mrs B was a person in whose favour the doctrine would operate whether the requirement is simply 'a close relationship' (which was the view taken by the English High Court in *Breadner v Granville-Grossman* [2001]) or the narrower one of 'persons for whom the appointer is under a natural or moral obligation to provide'.

purposes. However you should also use capital if, in your discretion, you consider that this is reasonable and necessary for her benefit.

Further, the settlor's will dated 18 October 2002 also provided for Mrs B. It gave her a life interest in the trust established by the will.

It was not disputed that the settlor had relationships with other women and had married another woman. However, what was significant was that he made provision for Mrs B both during his life and after his death, even though they had never married and he had had other relationships. The other women with whom he had relationships were not mentioned in the will nor made beneficiaries of the trust. He clearly considered that he had a moral obligation to provide for Mrs B.

The trustees stipulated that where there is an evident close relationship coupled with an obligation to provide, the doctrine should operate even if the beneficiary is not a wife or a child. The application of the doctrine had, up until that point in time, adopted a closed category of persons who would benefit under the doctrine. It was argued on behalf of the trustees that the court should develop the



doctrine and take account of and reflect the fact that, with modern family relationships and changed social attitudes, obligations to support financially now extend to a much wider category of people. For example, illegitimate children, stepchildren, and same-sex partners.

### The extent of the application of the equitable principle

At the hearing, the application was challenged by the sister of the settlor (who was a beneficiary of the trust). While both sides agreed that the equitable principle existed (at least under English law), the extent of its application was the issue in dispute. The point of difference was whether

therefore equity could not assist. Furthermore, it was submitted that the courts had had the opportunity to effect a conscious expansion of the doctrine in recent times, but had declined to do so, relying on *Breadner* and *Kain v Hutton* [2005].

The trustees submitted that the doctrine was only referred to in passing in *Kain* and distinguished *Breadner* (which involved a niece) on the grounds that it was a case of non-execution of a power rather than defective execution.

The fact that a doctrine is of ancient origin does not mean that it cannot regain vitality to meet problems which arise in later times: the development of search and seizure orders in the

The equitable doctrine was therefore applied and it was declared that Mrs B was validly added as a beneficiary from the date of the 1990 deed.

In reaching its decision the Royal Court stated at para [55]:

We think that the general principle is an entirely beneficial one and prevents errors in formality leading to real hardship for those to whom the donee of the power owes a moral or natural obligation and resulting in the clear intention of the donee being defeated for no good reason. We see every reason to develop the principle to take account of modern standards and mores. We hold therefore that, under Jersey law, the principle may operate in favour of any person for whom the donee of the power is under a natural or moral obligation to provide; and that will be a matter of fact to be decided in each case.

And also at para [56]:

Applying that principle to the facts of this case, we have no hesitation in concluding that the settlor was under a moral obligation to provide for Mrs B. He certainly considered himself to be under such an obligation as is clear from the wording of his letter of wishes and from the fact that he intended to provide for her both from the trust and under his will. That is not surprising. He had in fact been maintaining her completely for the best part of 40 years and they clearly had a close and strong relationship. Furthermore, this is not a case where those taking the default were dependants such as a wife or children; they were brothers and sisters, nephews and nieces etc.

The decision is significant in that it updates a doctrine that has, perhaps surprisingly, not had a wide application in modern times and, in doing so, provides a solution to a real problem that may occur from time to time in the administration of trusts.

However, although the doctrine has moved with the times, it is clear from the judgment that the Royal Court will be careful in monitoring its development and that the determination of any future cases

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Mrs B fell within one of the recognised categories in whose favour the doctrine operates.

The sister of the settlor relied in particular on *Moodie v Reid* [1816], in which the court said:

The Court has supplied a defective execution of a power in favour of a wife, a child, a purchaser, and creditors; but not beyond that. It is too late to consider whether the Court was justified in going so far, but, certainly, it goes no farther; it does not extend to any other persons, and if the Court were to go farther, it would not know where to stop.

The settlor's sister submitted that the list of categories was limited to a wife and children as they are favoured persons for whom the donee is under a natural or moral obligation to make provision (even if they are otherwise volunteers). It was argued that Mrs B was not the wife of the settlor and was not someone to whom he owed a natural or moral obligation (as was mentioned above, he had other girlfriends). Rather, she was and is a mere volunteer and not 'within the consideration' and

1970s from an 1821 decision (*Anton Piller KG v Manufacturing Processes Ltd* [1976]) and the use of longstanding equitable principles to support an award of restitutionary damages in *Attorney-General v Blake* [2000] are good examples.

Accordingly, the trustees submitted that where there is a close relationship coupled with an obligation to provide, the doctrine should operate even if the beneficiary is not a wife or a child. The application of the doctrine should take account of and reflect the fact that, with modern family relationships and changed social attitudes, obligations to support financially now extend to a much wider category of people, for example illegitimate children, stepchildren or same-sex partners.

### The judgment

The court's finding of fact was that despite the unconventional nature of their relationship and the fact that the settlor had other lady friends, he had a long standing and very close relationship with Mrs B and considered himself under a moral obligation to provide for her after his death as well as during his life.



will entail a detailed analysis of the relevant relationship (including consideration of other beneficiaries), in order to determine whether there is a sufficient connection and moral obligation.

### Imputed intention – an alternative solution

The Royal Court also considered an alternative method with which to overcome the problem posed by the defective 1990 deed. In light of *Re the T 1998 Discretionary Settlement* [2008], the court considered whether Jersey law can impute an intention to exercise a power even in a situation where the donee of the power did not in fact have such an intention.

A power is not exercised unless there appears a sufficient intention to exercise it. The exercise of a power requires that:

- the donee of the power has the capacity to exercise it;
- any formal requirements for its exercise are complied with; and
- there is sufficient indication of the intention to exercise it in the instrument alleged to exercise it.

This was considered in *Re Ackerley* [1913] where the judge said:

... it is often said that in order to exercise a special power there must be either a reference to the power, a reference to the property subject to the power, or an intention otherwise expressed in the will to exercise the power.

The courts have always been prepared to hold that a power may have been exercised by implication, provided that it is clear that there was an intention to bring about a particular result or effect that could only be achieved by means of an exercise of that power.

*Thomas on Powers* states at paras 5-191 that:

... provided the requisite intention to exercise the power is manifested, the means by which this is achieved does not necessarily matter. Thus powers have been held to have exercised by the recital in a settlement, by a recital in a

petition and even by the presentation of a petition... by the appointment of a new trustee... by enumeration of parties to be benefited...

In *Re Farnell's Settled Estates* [1886], a will contained a power for the will trustees to appoint new trustees. The asset of the will trust was a renewable lease. A renewal of the lease was granted to four people who were not trustees. The surviving trustee was a party to the lease, which described

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the four lessees as the 'present trustees of the will'. This description was accepted as an appointment of them. There can be a good exercise of the power under English law even without any reference to the power or the property, which is the subject of it. If there is an intention to dispose of property or undertake some other transaction, the court will imply or impute an intention to exercise a power if the exercise of the power is necessary for the disposition or transaction to take effect (as demonstrated in *Mogridge v Clapp* [1892] and *Davis v Richards & Wallington Industries Ltd* [1990]). Additionally, in *Lees v Lees* [1871] the court had to consider whether a statement in a will that a sum of money had been transferred for the benefit of the testator's daughter constituted the exercise of a power of appointment. It was held that a recital (even if of a past transaction) can amount to the exercise of a power.

By the 1998 deed, the settlor added his brother as a beneficiary. The recitals to the 1998 deed stated that it was supplemental to the 1990 deed 'in terms of which [Mrs B] was added to the class of beneficiaries'. It also recited the power in the settlement to add to the class of beneficiaries and was validly executed. The question was whether the 1998 deed amounted to a valid exercise by the settlor of the power to add Mrs B as a beneficiary.

The Royal Court held that the principle applies in such a case where there is an express reference to the power in the recital and positive evidence that the settlor had intended to exercise that power in the document to which he refers in the recital. It was held that the court is merely treating as done that which was clearly intended by the settlor to have been done in 1990 and which has been confirmed as having been done by him by means of a duly executed

instrument in 1998. Accordingly, the Royal Court also held that, if it was wrong on the application of the equitable doctrine remedying the 1990 deed and adding Mrs B as at that date, then the 1998 deed was effective to add her as from this later date. ■

*Re Ackerley*  
[1913] 1 Ch 510  
*Anton Piller KG v Manufacturing Processes Ltd*  
[1976] Ch 55  
*Attorney-General v Blake*  
[2000] UKHL 45  
*Breadner & ors v Granville-Grossman*  
[2001] WTLR 377  
*Davis v Richards & Wallington Industries Ltd*  
[1990] 1 WLR 1511  
*Re Farnell's Settled Estates*  
(1886) 33 Ch D 599  
*Kain v Hutton*  
[2005] WTLR 977 (NZ HC)  
*Lees v Lees*  
(1871) IR 5 Eq 549  
*Mogridge v Clapp*  
[1892] 3 Ch 382  
*Moodie v Reid and Others*  
(1816) Maddock 516  
*Re R and S Trust*  
[2011] JRC117  
*Re the T 1998 Discretionary Settlement*  
[2008] JRC 062  
*Re The Shinorvic Trust*  
[2013] WTLR 337