Re the Shinorvic Trust: equity develops with modern standards and mores

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Abstract

In the recent case of *Re the Shinorvic Trust* [2012] JRC 081, the Royal Court of Jersey had to consider whether an old principle of English equity applied in Jersey and, if so, whether it applied in a modern, unconventional scenario. The question was 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. An alternative solution of imputed intention, by way of a recital in a later deed, was also considered.

The facts—a problematic Deed of Appointment

The Shinorvic Trust was established by 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. On the 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 (the 1990 Deed). Later, the Settlor added his brothers and their children and remoter issue as beneficiaries. The Settlor died in 2005 and Bas Trust Corporation Limited, who brought the application (the 'Trustees'), took over as trustees in 2009.

In 2011, when seeking tax advice, all of the deeds of declaration 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.

The evidence showed that the Settlor intended to add Mrs B and believed that he had done so. A later deed in 1998 (the 1998 Deed), recited the 1990 Deed and that its effect was to add Mrs B as a beneficiary.[1] Further, a series of letters of wishes written by the Settlor showed a consistent intention to benefit Mrs B, culminating in the current letter of wishes, in which she is described as his 'paramount concern'. Throughout his lifetime, the Settlor had maintained Mrs B and he provided for her in his will.

Unless remedied by the Court, the Settlor's clear wish that Mrs B should benefit under the Trust would not be given effect and 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.

The law—an old equitable doctrine

There is a long-standing principle in English law that, in certain circumstances, 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 by executing the relevant instrument, where by reason of mistake or accident there is a

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1. Further, see imputed intention below.

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formal defect in the execution of the power, equity will grant relief against formal defects in favour of certain individuals who are regarded as having provided good consideration. Equity looks to substance not form.[2]

At the hearing, the application was challenged by another beneficiary, the sister of the Settlor. While both sides agreed that the equitable principle existed (at least under English law), the extent of its application was in dispute. The point of difference was whether Mrs B fell within one of the recognized categories in whose favour the doctrine operates.

The sister of the Settlor relied in particular on *Moodie v Reid and Others*,[3] in which the Court said this:

> 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 closed. A wife and child are included 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). Mrs B was not the wife of the Settlor and was not someone to whom he owed a natural or moral obligation (indeed, he had other girlfriends). Rather, she was and is a mere volunteer and not 'within the consideration'. Equity could not assist. Further, it was submitted that the courts had the opportunity to effect a conscious expansion of the doctrine in recent times, but declined to do so, and suggested that the doctrine was falling into disuse.[4]

The Trustees noted the roots of the doctrine in the 17th and 18th centuries, submitting that it appears to have two foundations. The first is the wish of the courts that obligations either to transfer property to pay creditors or to support a wife or children should not fail because of a defect in the formalities necessary to transfer the property intended to meet the debts or provide that maintenance: see *Tollet v Tollet*.[5] In that case, a husband had power to convey property to his wife by deed. He attempted to do so by a will under his hand and seal. The Court gave effect to the will as a conveyance on the ground that a defective execution would be aided in equity:

> it being the duty of every man to pay his debts and a husband or father to provide for his wife and child.

The second foundation is a line of cases concerning covenants to transfer or appoint property where the court would enforce the covenant and construe it as a transfer if the covenant was for consideration (including marriage): see, for example, *Bramhall v Hall*[6] where the claim by the widow of an illegitimate son failed. This line of cases appears to be the explanation for the reference to consideration (in Snell's Equity and other textbooks).

The Trustees submitted that the case of Mrs B fell within the first foundation, which was capable of development. 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 1970s from an 1821 decision[7] and the use of long-standing equitable principles to support an award of

2. The doctrine is recognized by the modern leading textbooks. See *Snell's Equity* (32nd edn) paras 11-003, 11-006 and 11-007, and *Lewin on Trusts* (18th edn) paras 29-184 to 29-195.

3. (1816) Maddock 516.

4. The sister of the Settlor relied on *Breadner v Granville-Grossman* [2001] Ch 523 and *Kain v Hutton* [2005] W.T.L.R. 977 (N.Z.H.C.). 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.

5. (1728) 2 Peere Wms 489.

6. (1764) 2 Eden 220.

7. *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 56 at 60.

restitutionary damages in *Attorney-General v Blake*[8] 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, step children, or same-sex partners.

The judgment—would equity assist?

The Court's finding of fact was that despite the unconventional nature of their relationship and the fact that the Settlor had a number of 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. 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:

> 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. (at para [55])
>
> 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. (at para [56]).

Comment—a modern take on an old classic

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

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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 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 argument in order to overcome the problem posed by the

8. [2001] Ch 268.

defective 1990 Deed. In light of *Re the T 1998 Discretionary Settlement*,[9] the question was whether in these circumstances, 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 (i) that the donee of the power has the capacity to exercise it (ii) that any formal requirements for its exercise are complied with and (iii) that there is sufficient indication of the intention to exercise it in the instrument alleged to exercise it.[10] This was considered in *Re Ackerley* where the judge said, 'its 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 which could only be achieved by means of an exercise of that power.

Thomas on Powers states at paragraph 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*,[11] 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 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.[12] Additionally, *Lees v Lees*[13] the court had to consider (among other issues) 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. The case is cited as authority for the proposition that a recital (even if of a past transaction) can amount to the exercise of a power. This is also mentioned in *Re the T 1998 Discretionary Settlement*.[14]

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.

9. [2008] JRC 062.
10. See *Thomas on Powers* (2nd edn) para 5-177; *Lewin on Trusts* (18th edn) paras 29-166 and 29-172.
11. 33 Ch D 599.
12. See *Mogridge v Clapp* [1892] 3 Ch 382; *Davis v Richards & Wallington Industries* [1990] 1 WLR 1511.
13. (1871) IR 5 Eq 549.
14. [2008] JRC 062.