



# EQUITY TO THE RESCUE

## LISA SPRINGATE AND TIM WRIGHT ON THE *SHINORVIC TRUST* CASE AND THE APPLICATION OF AN ENGLISH PRINCIPLE IN JERSEY: EQUITY AIDS THE DEFECTIVE EXECUTION OF A POWER

**T**here is a long-standing principle in English law that equity will aid the defective execution of a power in certain situations. Whenever a person who has the power over an estate, whether or not a power of ownership, shows an intention to execute the power in discharge of some moral or natural obligation, and that execution is defective, equity will provide relief to perfect the intention and carry out the intended result.

Equity will not provide relief in instances of a complete failure to exercise a power of appointment by executing the relevant instrument. However, if a mistake or accident creates a formal defect in the execution of the power, equity will grant relief against that formal defect in favour of certain individuals

who are regarded as having provided good consideration, for instance the spouse or children of the donee.

This principle is of significant commercial use, as issues could arise in professional trust companies with the many trusts that they administer. In light of this, it is perhaps surprising that the principle was not applied in Jersey until *In the Matter of the Shinorvic Trust* [2012] JRC 081.

In this case, the Royal Court of Jersey had to consider whether this principle applied in Jersey and, if so, whether it applied in a modern, unconventional scenario. The execution of the power in this instance was in favour of the settlor's girlfriend (Mrs B), who did not fall within one of the established and recognised categories of people in whose favour the principle usually applies.

### The Shinorvic Trust

The Shinorvic Trust (the trust) was established by a deed of settlement in 1988. Subsequently, the settlor purported to exercise his power to add Mrs B to the class of beneficiaries. The settlor died in 2005 and the present trustees (the trustees) took over the trust in 2009. It was later discovered that the settlor's signature on the deed purporting to add Mrs B as a beneficiary had not been witnessed, as required by the terms of the trust deed. Accordingly, there was a question over whether she was ever added as a beneficiary, despite having received distributions from the trust. The trustees applied to the Royal Court in Jersey for relief against the deed having not been witnessed.

## "The *Shinorvic Trust* case provides a solution to a **real and practical problem** in trust administration"

The trustees' application was challenged by the sister of the settlor, who was one of the other beneficiaries of the trust. While the existence of the equitable doctrine was not in issue, the extent of its application was in dispute. The trustees argued that the settlor had a sufficiently close relationship with Mrs B, having provided for her financially for many years. His letter of wishes described her as his 'paramount concern' and he had provided for her in his will. In the circumstances, it was argued that this was sufficient for equity to assist.

The contrary argument was that the class of people who may claim relief is closed, with only children and wives falling 'within the consideration'. Mrs B's relationship with the settlor was unconventional because they were unmarried and he had other girlfriends. As such, she did not fall into the recognised categories.

The trustees submitted that the roots of the doctrine (which emanate from the 17th and 18th centuries) appeared to have two foundations. The first was the wish of the courts that obligations to transfer property either 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. 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).

The trustees argued that this situation fell within the first foundation, which was capable of development. The fact that a doctrine is long-standing and established does not prohibit its adaptation to modern times. 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 wider category of people.

There was no doubt of the settlor's intention to add his girlfriend as a beneficiary. He had the power to do so under the terms of the trust deed and he believed that he had exercised that power. The sole problem was the failure to have his signature witnessed.

The Royal Court found that the settlor had had a long-standing and very close relationship with Mrs B and clearly considered himself under a moral obligation to provide for her after his death as well as during his life (as shown by his letter of wishes and his will). The equitable doctrine therefore applied and it was declared that Mrs B was validly added as a beneficiary from the date

of the supplementary deed purporting to add her. The Court commented that when the principle was originally developed, the category of people who could benefit was restricted 'because of the mores of the time and because of the fiction that they had provided consideration and were not therefore volunteers'. This was no longer the case today.

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 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.'

The decision reached by the Court acknowledging that the doctrine may be developed provides a solution to a real and practical problem that may occur in the administration of trusts. Although the

doctrine has moved with the times, it is clear that the Royal Court will be careful in monitoring its development and that the determination of future cases will entail a detailed analysis of the relevant relationship to determine whether there is a sufficient connection and moral obligation.

### Imputed intention - an alternative solution

The Royal Court also considered an alternative argument to overcome the problem posed by the defective deed. In light of *Re the T 1998 Discretionary Settlement* [2008] JRC 062, the Court in the *Shinorvic Trust* case discussed whether Jersey law can impute an intention to exercise a power where the donee of the power did not have an express intention to exercise the specific power, merely an intention as to the desired outcome.

In a later deed, the settlor added his brother as a beneficiary. The recitals to that deed stated that it was supplemental to the defective deed 'in terms of which [Mrs B] was added to the class of beneficiaries'. It also recited the power in the trust deed to add to the class of beneficiaries and was validly executed. The question was whether this 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 the recital refers. It was held that the Court is merely treating as done what was clearly intended by the settlor to have been done in the defective deed, and which the settlor confirmed as having been done in the duly executed instrument adding his brother as a beneficiary.

Accordingly, the Royal Court also held that if it was wrong on the application of the equitable doctrine remedying the defective deed and adding Mrs B as at that date, then the subsequent deed was effective to add her as from the later date, as a result of imputed intention.

ADVOCATE **LISA SPRINGATE** IS A PARTNER AND **TIM WRIGHT** IS AN ENGLISH SOLICITOR AT BEDELL CRISTIN. BEDELL CRISTIN REPRESENTED THE TRUSTEES IN THEIR APPLICATION

