

Jersey Royal Court concludes there is no substratum rule which applies to Jersey trusts

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Summary

The Royal Court has recently clarified the Jersey law position of whether a trust is able to lose its substratum. Following analysis of the recent decision of the Bermuda Court of Appeal in Grand View Private Trust Company Limited v Wong & Ors, the Royal Court concluded that there was no substratum rule which applied to Jersey trusts and that powers of addition or exclusion contained within Jersey trusts should be given their natural meaning.

Background

Rysaffe Fiduciaires SARL (the **Trustee**) acted as the trustee of two trusts, the G 2000 Trust and the G 2008 Settlement. Although these trusts were both settled by the same settlor, they had different beneficiaries.

A Letter of Wishes executed by the settlor stated that Trustee should treat him as the principal beneficiary of the G 2000 Trust during his lifetime, and then afterwards to treat his wife as the principal beneficiary during her lifetime. The settlor requested that following his wife's death, the G 2000 Trust should be held for the benefit of "*our children*", which the Trustee interpreted as the settlor's biological children and his current wife's child from a previous relationship.

A further Letter of Wishes with respect to the G 2008 Settlement executed by the settlor asked that he be treated as the principal beneficiary during his lifetime and then following his death, the G 2008 Settlement should be held for his children.

The settlor died unexpectedly in August 2015 without leaving a will. The G 2008 Settlement had made various loans, through its underlying companies, to the settlor in order for the settlor to meet various personal obligations and to pay part of the costs of purchasing the house which he and his wife shared. The Trustee wished to agree a global settlement with the various members of the settlor's family to ensure that no litigation arose regarding the assets of the two trusts. As

part of this global settlement, the Trustee proposed adding the settlor's widow as a beneficiary of the G 2008 Settlement for a limited time in order that she could receive the benefit of the Trustee waiving the loans which the settlor (and now the settlor's estate) owed to the G 2008 Settlement. The practical result of this would be that the settlor's widow would not need to repay these loans and she could continue living in the family home that she and the settlor shared while he was alive. Following the Trustee's waiver of the loans, the settlor's widow would be excluded as a beneficiary of the G 2008 Settlement and the remaining assets would be held in sub-trusts for the settlor's children.

The Trustee had the agreement of the various beneficiaries to this course of action. However, as the Letter of Wishes clearly did not envisage that the settlor's wife would be made a beneficiary of the G 2008 Settlement, the Trustee was concerned that in exercising the power to add the settlor's widow as a beneficiary of the G 2008 Settlement in order to provide her with a significant benefit from that trust, the Trustee would potentially be destroying the substratum of the G 2008 Settlement. The Trustee therefore sought the blessing of the Court to pursue its proposed course of action.

The so-called substratum rule

The Royal Court analysed the so-called 'substratum rule' for the first time in this context. The Court reviewed previous Jersey authority in a different context, and English authority on the issue of substratum. The position gleaned from the English authorities was that an amendment to the trust must not change the whole substratum of the trust or its basic purpose. However, importantly there had been a recent decision of the Bermudan Court of Appeal on the issue of the substratum rule and the Court examined this position in detail.

In Grand View Private Trust Company Limited v Wong & Ors, a trustee, on the direction of the settlor, had appointed a charitable trustee as beneficiary of what had previously been a private Bermuda discretionary trust, and the trustee had excluded the existing beneficiaries and terminated the trust. The previous beneficiaries had challenged this on the basis that the replacement of the discretionary beneficiaries combined with the resettlement of the trust assets for the benefit of a perpetual charitable trust were beyond the scope of the trustee's discretionary powers. The Court at first instance agreed with the beneficiaries but this was overturned on appeal.

The Bermudan Court of Appeal examined the scope of the power to add and exclude beneficiaries and found that the trustee's power to add or exclude any beneficiaries should be interpreted as just that – 'any' means 'any'. The Court held that if there was a substratum to the trust, then it is to benefit the beneficiaries of the trust as they may be from time to time; this should not be interpreted as being immutably the settlor's family, and could be a separate charitable trust.

Importantly for the present case, the Court also considered the weight which should be given to

Letters of Wishes. The Court considered that extrinsic evidence of the settlor's intentions as to how the trustee should exercise a power should be taken into account when the trustee is making a decision to exercise its powers.

The Royal Court considered that Grand View Private Trust Company Limited v Wong & Ors was a correct analysis of the law as it also applied to Jersey, and concluded that there was no substratum rule in Jersey law.

Powers of addition and exclusion are to be given their natural meaning when considered against the following principles:

- Has the way in which the power has been exercised within the express or implied terms of the power;
- Has the trustee given adequate deliberation as to whether it should exercise the power; and
- Has the trustee used the exercise of its power for an improper purpose?

The Court concluded that the powers of the Trustee to add and exclude beneficiaries from the G 2008 Settlement were wide and could be exercised in the Trustee's absolute discretion. In considering the principles above, which the Court preferred to identifying any substratum of the trust, the Court found that the proposed power to add the settlor's widow was permitted; and that the Trustee had given adequate consideration to the exercise of its power, having regard to the terms of the G 2008 Settlement and the settlor's wishes as expressed from time to time (including the Trustee's belief from conversations with the settlor that he would have wished for his wife to remain in the family home), and the exercise was not for an improper purpose.

Consequently, the Court approved the Trustee's decision regarding the future of the two trusts.

Conclusion

The Royal Court has made clear that when analysing potentially controversial amendments to a trust, it will not consider any so-called substratum rule. Instead, the Court will simply examine the trustee's exercise of a power under the trust with reference to the principles set out above, and from this examination it will determine whether it is prepared to bless a trustee's exercise of its power.

Damian Evans acted as guardian *ad-litem* for the minor and unborn beneficiaries in this matter.

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