

Court of Appeal puts the record straight: A new test for rectification of trusts in Jersey

Publication - 17/01/2019

In *B and C v Virtue Trustees (Switzerland) AG and Ors re The C Trust* [2018]JCA219 the Court of Appeal considered the rectification of the terms of a Jersey law declaration of trust known as the C Trust (the **Trust**).

This was the first occasion that the Court of Appeal had considered the rectification of trusts in Jersey and resulted in the Court of Appeal setting out a new seven stage test.

Background

Shortly before the draft declaration of trust was executed by the original trustee, A made a manuscript amendment by striking out the name of the proposed protector and substituting D's name as protector instead. A was the economic settlor of the Trust. A and D (who were married to each other) were among the named beneficiaries of the Trust, but D's issue were not.

The consequence of naming D as protector was that D, her issue and any person related to her by marriage (which arguably included A as her spouse) became Excluded Persons because the term "Excluded Person" included any protector of the Trust, any issue of the protector and person related to the protector by marriage.

Prior to A's death in 2003, he wrote to the then trustee asking it to add D's issue as beneficiaries of the Trust which the trustee purported to do in exercise of its power of addition. However, under the terms of the Trust the power of addition could not be exercised so as to add Excluded Persons as beneficiaries.

In 2017 the current trustee of the Trust recognised that D's issue could not be added to the class of beneficiaries and applied for rectification of the Trust and validation of all past distributions made under it. The representation was opposed by other beneficiaries of the Trust, B and C.

Evidence was given by a director of the original trustee who had the closest involvement with the Trust that he did not believe A had any appreciation that making D protector would potentially have the collateral effect of excluding her from benefit as providing for D and subsequently her family was at the forefront of A's mind when he was conceiving how he should manage his affairs.

The Royal Court rectified the Trust by amending the definition of Excluded Person so that it did not include issue of persons related to the protector, but declined to validate distributions on the grounds that it was unnecessary to do so as rectification dated back to the inception of the Trust. In coming to its decision, the Royal Court applied the well-established three stage test for rectification under Jersey law, as follows:

1. the court must be satisfied that there is sufficient evidence that a genuine mistake has been made so that the document does not carry out the true intentions of the parties;
2. there must be full and frank disclosure; and
3. there should be no other practical remedy and the remedy remains a discretionary

remedy.

B and C appealed against the decision of the Royal Court to rectify the Trust on the grounds that:

1. there was no basis for the Royal Court's conclusion that the Trust failed to give effect to A's then intention;
2. the addition of D's issue was the product of a change of mind by A and was contrary to his intention at the time the Trust was created; and
3. the basis of the Royal Court's decision was its erroneous view that an Excluded Person meant someone who could not benefit so that it wrongly perceived the need for rectification in order to confirm the status of the original beneficiaries.

New test for rectification

In considering the appeal, the Court of Appeal, referred to recent editions of Snell's Principles of Equity and Lewin on Trusts. It concluded that the first requirement of the three stage test was too summarily expressed and that it preferred the following seven stage test for rectification:

1. there must be convincing proof to counteract the evidence of a different intention represented by the document itself;
2. there must be a flaw (that is an operative mistake) in the written document such that it does not give effect to the settlor's intention;
3. the specific intention of the settlor must be shown; it is not sufficient to show that the settlor did not intend what was recorded; it must also be shown what he did intend;
4. there must be an issue capable of being contested between the parties affected by the mistake notwithstanding that all relevant parties consent;
5. there must be full and frank disclosure;
6. that no other remedy is available to achieve the same end; and
7. that even when the requirements for rectification are satisfied the court retains a discretion whether or not to rectify.

The Court of Appeal adopted the seven stage test and also said that there is no difference between the law of England and the law of Jersey relating to rectification.

Court of Appeal Decision

In making its decision, the critical question for the Court of Appeal was whether or not A intended to exclude D's issue from benefit. It concluded that A's only intention was to change the protector, not to change the effect of any other provision of the Trust and that limiting the power of the trustee to add the issue of D as beneficiaries of the Trust was unintended.

Whilst, the Court of Appeal upheld the Royal Court's decision it had three main criticisms of the route by which the Royal Court had come to its conclusion.

Firstly, that the Royal Court's reasoning was founded on an assumption that an Excluded Person could not also be a beneficiary. It was noted that there was nothing in the Trust to prevent a person being at the same time a beneficiary and an Excluded Person; save that the power of addition could not be exercised so as to add an Excluded Person. The inclusion of D as protector was therefore not the operative mistake as being an Excluded Person did not prevent her from benefitting as a beneficiary.

Secondly, the Royal Court's focus was on A's state of mind. However, A was not party to the

declaration of trust and the Royal Court made no reference to the need for evidence that the Trust did not represent the true intention of the original trustee as the only party to the declaration of trust.

Thirdly, the rectification ordered by the Royal Court went further than necessary. Rectification should be granted to the extent, but no further than to the extent, necessary to give effect to the true intention.

Comment

This is an important decision of the Court of Appeal as it expands the test for rectification. The new test places a greater focus on the evidence required to support rectification. There must be convincing proof, not merely that the parties did not intend what the document records, but also to identify what the parties did intend. The intention of all parties is relevant. Such evidence will be more readily available if applications are brought timeously.

It is also a reminder that seemingly minor amendments made during the drafting process may substantially impact other provisions of the trust deed. A thorough review of the trust as a whole as well as asking questions at the outset to ascertain and clarify the intention of the parties is essential.

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