

Application to rectify a deed of appointment in relation to the Trust pursuant to section 69 of the Trusts (Guernsey) law, 2007.

[2022]GRC002

IN THE ROYAL COURT OF GUERNSEY
ORDINARY DIVISION
IN THE MATTER OF THE X TRUST AND
IN THE MATTER OF
SECTION 69 OF THE TRUSTS (GUERNSEY) LAW, 2007

Between:

Y Trust Company Limited
(in its capacity as Trustee of the X Trust)

Applicant

and

Z
(in his capacity as the Protector of the X Trust)

Respondent

Judgment handed down: 14 January 2022

Before: Jessica E Roland, Deputy Bailiff

Advocate for the Applicant: Advocate B B D Manchak

Advocate for the settlor and adult beneficiaries: Advocate A M Davidson

Cases, Texts and Materials referred to in Judgment:

The Trusts (Guernsey) Law, 2007

The Finance Act 2006

B and C v Virtue Trustees (Switzerland) AG [2018] JCA 219

Re the Colour Trusts [2012] GRC 24

Re the OSM Provident Fund [2018] GRC 33

Re the B Trust [2019] GRC 074

Allnutt v Wilding [2007] EWCA Civ 412

Introduction

1. This is a Trustee's application (the "Application") dated 2 September 2020 pursuant to Section 69 of The Trusts (Guernsey) Law 2007, as amended, (the "Trusts Law") to rectify a deed of appointment in relation to the X Trust.
2. At a preliminary hearing on 4 September 2020, I granted leave to the Applicant to serve the Application out of the jurisdiction by email on the Respondent who is the Protector of the X Trust. I further ordered that the Applicant notify HMRC of the Application by way of a letter in a prescribed form enclosing the Application to establish whether or not HMRC wished to be joined to the Application or to make any representations. The response from HMRC was such that the Applicant proceeded on the basis that HMRC did not want to take an active role in the

Application however, in any event, 7 days prior to the hearing in June, the Applicant's English solicitors sent all the evidence filed in support of the Application to HMRC who confirmed in response that they did not wish to make any further comments on the application but requesting a copy of any court order.

3. I also made clear in the September hearing that I wanted evidence that the beneficiaries of the X Trust had been notified and of their views on the application. At the time of the September hearing, Advocate Manchak had not been advised that in addition to the adult beneficiaries, there was a minor beneficiary. I had the benefit of the affidavit of the Settlor dated 10 September 2020 confirming his own, his wife's and his adult children's understanding and support of the application. It was of great assistance in the consideration of this matter that Advocate Davidson appeared at the hearing in June and was able to confirm the support of the adult beneficiaries but also the support in relation to the minor beneficiary through their parent. I did not consider it necessary to join the Beneficiaries to the Application.
4. On 4 September 2020, I also made orders relating to the redaction of the written judgment on the basis that no identifying personal or financial information of the Applicant, the beneficiaries, the underlying companies, or the X Trust be published in any written judgment to be delivered by the Court.
5. In considering this Application I had before me affidavits from a number of current and former officers of the Applicant setting out the background of this matter. In addition to the affidavit of the Settlor which I have mentioned above, I also had the benefit of the affidavit of the Protector who explained the background of the matter from his perspective and his support and understanding of the rectification application. I also had two affidavits of Advocate Manchak dated 2 September 2020 and 16 June 2021 in relation to various procedural matters and an affidavit of service dated 11 September 2020 of Sophie Williams a lawyer at Mourant Ozannes. On 23 June 2021, I made the order granting the rectification and said I would hand down the anonymised judgment separately. I apologise for the amount of time it has taken me to do this.

Background

6. The Settlor established the X Trust by deed dated 15 March 2004 (the "Trust Deed"). The Beneficiaries of the X Trust were the Settlor, his wife, his children and remoter issue, the spouses of his children and remoter issue, and any other person added as a beneficiary. The Trust was intended to be a generational trust from which the Settlor's children and remoter issue would benefit. The Applicant is the Trustee of the X Trust.
7. As Beneficiaries, the Settlor and his wife had life interests or interests in possession ("IIP"). By clause 3 of the Trust Deed and subject to the Trustee's overriding powers contained in the Trust Deed (the "Overriding Powers"), the Settlor's wife was the Principal Beneficiary during her life. Subject to his wife's life interest, the Settlor had a life interest as the Successive Principal Beneficiary. Subject to these life interests, the Trustee held the Trust Fund on trust for the other Beneficiaries.
8. The Protector was instrumental in recommending the settlement of the X Trust which was in a form which was a common financial planning vehicle around the time the Trust was created and yielded certain tax advantages specifically in relation to IHT liability on the deaths of the economic settlors.
9. The Finance Act 2006 brought in changes to eliminate the IHT tax planning benefits of trusts like the X Trust but provided for transitional provisions in order to permit restructuring in

anticipation of the changes prior to 6 April 2008 (the “Cut Off Date”). After some discussion (which is set out in detail in the affidavits), with the assistance of the Protector and the agreement of the Settlor and his wife, the Trustees agreed to restructure the X Trust terminating the Settlor and his wife’s life interests in 75% of the X Trust and creating life interests in favour of the Settlor’s children (the “75% Appointed Fund”) but with the Settlor and his wife continuing to benefit from the remaining 25% (the “25% Remainder Fund”). It was accepted that under the new regime after the Cut Off Date, the 25% Remainder Fund would be liable to IHT.

10. Documentation was prepared on this basis, primarily a Deed of Appointment dealing with the 75% Appointed Fund (the “2008 Deed of Appointment”). In the drafting of the 2008 Deed of Appointment, the Settlor and his wife were not included within the definition of beneficiaries and a life interest in the 75% Appointed Fund was thought to have been created in favour of the Settlor’s children. It was considered at the time this was enough to insulate the 75% Appointed Fund from IHT liability under the new regime post the Cut Off Date. The documentation was executed by the Applicant on that basis on the 4 April 2008 with the written consent of the Protector. Although it was a point of some discussion leading up to the execution of the 2008 Deed of Appointment, it was decided that it was not necessary for a Deed of Exclusion to be executed and that this would be otherwise incompatible with intention behind the 25% Remainder Fund.
11. However, in October 2019 the Settlor’s English solicitors identified issues in the drafting of the 2008 Deed of Appointment. The Trustee’s Overriding Powers set out in clause 4 of the Trust Deed and the provision in Schedule 3 to the Trust Deed including the Settlor and his wife as Beneficiaries continued to apply after the execution of the 2008 Deed of Appointment. Thus, despite the 2008 Deed of Appointment, the Trustee could exercise its Overriding Powers in favour of the Settlor and his wife causing the 75% Appointed Fund to remain liable to IHT and undermining the purpose of the restructuring.
12. Additionally, the introduction of the Trusts Law which occurred in March 2008 just before the 2008 Deed of Appointment was executed, should have been taken into account in the drafting. The changes to the statutory regime meant that there should have been a provision requiring the Trustee to pay the income to the Settlor’s children. The effect of not having this requirement means that the Settlor’s children are not deemed to have a right to income under the 2008 Deed of Appointment and thus they do not have a valid life interest in the 75% Appointed Fund which means that IHT would be payable.
13. The proposed rectified 2008 Deed of Appointment was annexed to the Application showing the amendments necessary to achieve the IHT planning originally intended by the 2008 Deed of Appointment.

The Law

14. The legal principles that govern the remedy of rectification under Guernsey law are well settled and derive from principles that have been established as a matter of English law and are similar to the principles applied in Jersey. In the matter of *The OSM Provident Fund [2018] GRC 33* at paragraph 6, the Deputy Bailiff, as he was then, held that:

“accordingly, in order to succeed in the claim for rectification of a Trust Instrument arising from mistake, an applicant must demonstrate that:

- (a) there is sufficient evidence that an error has been made so that the document does not carry out the true intention of those involved;*

- (b) *to the highest degree of civil probability, a genuine error has been made;*
- (c) *there has been full and frank disclosure;*
- (d) *there is no other practical remedies; and*
- (e) *there has been no undue delay in seeking relief.”*

15. Sir Richard Collas considered the test for rectification again in *In the matter of the B Trust [2019] GRC 074* and in particular the principles applicable to rectification set out by the Jersey Court of Appeal at paragraph 21 of *B and C v Virtue Trustees (Switzerland) AG [2018] JCA 219* which he called an elaboration of the test in *The OSM Provident Fund (ibid)* expressed above:

“The conditions which must be satisfied in order for the Court to order rectification of a voluntary settlement are as follows:

- 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; and*
- 4. There must be an issue capable of being contested between the parties affected by the mistake notwithstanding that all relevant parties’ consent.*

To these requirements I would add that there must be full and frank disclosure; that no other remedy is available to achieve the same ends; and that even when the requirements for rectification are satisfied the Court retains a discretion whether or not to rectify.”

Discussion

16. Considering the intention behind the 2008 Deed of Appointment, the objective of the Settlor, the Protector and the Applicant in the execution of this deed is clear. The affidavits set out that the very purpose of the 2008 Deed of Appointment was to take advantage of the transitional provisions leading into the changes in the Finance Act 2006. The Applicant and the Protector with the agreement of the Settlor intended by the appointment of 75% of the Trust Fund for this to be held on separate trust for Settlor’s children and to insulate this part of the Trust from IHT liability prior to the Cut Off Date. Further, that the Settlor, the Protector and the Applicant considered that by the execution of the 2008 Deed of Appointment that the intention had been fulfilled. Unfortunately, the drafting failed to take into account the wording of the Trust Deed: namely the Overriding Power to appoint at clause 4 and the definition of Beneficiaries which included the Settlor and his wife. The changes in the Trusts Law further thwarted the intention of the Settlor, the Protector and the Applicant by not creating a valid IIP Trust in the 75% Appointed Fund. Thus the 2008 Deed of Appointment did not reflect the true intention of those involved. Both of the elements identified were points of failure which undermined the true intention of those involved in the execution of the deed.

17. The standard of proof required is that of the balance of probabilities. As the Jersey Court of Appeal in *In B and C v Virtue Trustees (Switzerland) AG [2018] JCA 219* held at paragraph 20:

“the standard of proof is no more than proof on the balance of probabilities, but because of the unlikelihood of the proposition that the concluded document did not represent the parties’ true intentions the evidence necessary to tip the balance in favour of rectification must amount to convincing proof. We were, however, provided with a copy of the full judgment, from which it is clear that the substance of the note is taken from a quotation from the then current edition (the 29th) of Snell’s Principles of Equity, in the following terms:

“Burden of proof. He who seeks rectification must establish his case by “strong irrefragable evidence” which means “something more than the highest degree of probability”. There must be evidence “of the clearest and most satisfactory description” that will establish the mistake with a “high degree of conviction” and “leave no fair and reasonable doubt upon the mind that the deed does not embody the final intention of the parties”. In the modern phrase, there must be “convincing proof” of the mistake on the part of all parties. This heavy burden of proof becomes even more difficult to discharge with the passage of the years.”

18. In this matter the extensive documentary and affidavit evidence before me proves convincingly that that the intention in the 2008 Deed of Appointment was to insulate the 75% Appointed Fund from IHT liability as permitted by the transitional provisions prior to the Cut Off Date but for the two reasons identified there are fundamental flaws in the document and it fails to do this. This specific intention was one shared by the Applicant, the Protector and the Settlor and indeed up until October 2019, it was thought that this had been achieved. Thus, the tests as to the true intention and the standard of proof are amply satisfied in this matter.
19. It does appear there is no other practical remedy available in this matter. I do not consider, for example, litigation against the Applicant will satisfactorily achieve a beneficial outcome even before consideration of the risks and costs of litigation. The very purpose of the 2008 Deed of Appointment was a legitimate variation of the Trust to avoid the consequences of the Finance Act 2006 and in the absence of rectification there will be ongoing substantial tax charges.
20. On the fourth part of the test identified in *In the matter of the B Trust (ibid)*, that there must be an issue capable of being contested between the parties affected by the mistake, the conclusions of Deputy Bailiff McMahon, as he then was, in *In the matter of the Colour Trusts 24/2012* is very helpful for my considerations in this case. At paragraph 47 he sets out:

*“The final matter from *Racal Group Services Ltd v Ashmore* that HMRC may have had in mind when requesting that it be drawn to the Court’s attention is the way in which the Court of Appeal commented on *Whiteside v Whiteside* [1950] Ch 65 and subsequent cases on the same issue. Peter Gibson LJ expressly accepted the summary given by Vinelott J at first instance ([1994] STC 416 at 425):*

“In my judgment the principle established by these cases is that the court will make an order for the rectification of a document if satisfied that it does not give effect to the true agreement or arrangement between the parties, or to the true intention of a grantor or covenantor and if satisfied that there is an issue, capable of being contested, between the parties or between the covenantor or a grantor and the person intended to be benefit, it being irrelevant first that rectification of the document is sought or consented to by them all, and second that rectification is desired because it has beneficial consequences. On the other hand, the court will not order rectification of a document as between the parties or as between a grantor or covenantor and an intended beneficiary, if their right

will be unaffected and if the only effect of the order will be to secure a fiscal benefit.”

Although no one is opposing the relief sought by the Applicant, the value of the property vested in the Trustees is significantly affected by the failure to gift to them the benefit of the loans made to the three companies. The beneficiaries are potentially disadvantaged by that failure. Accordingly, there exists an issue capable of being contested and, subject always to ascertaining the true intention of the Applicant, the beneficial consequences for her are irrelevant.”

21. Similarly, in this case, no one is opposing the relief sought by the Applicant, but the beneficiaries will be substantially disadvantaged by the failure of the 2008 Deed of Appointment to achieve what it was intended to do. Accordingly, there exists an issue capable of being contested.
22. Rectification is a discretionary remedy and any delay in applying for rectification is a factor for the Court to take into consideration in the exercise of its discretion. I do not consider that there has been undue delay in this matter. Once the Applicant had been alerted to the error, it has spent time identifying how the error had arisen, obtaining advice in both England and Guernsey and obtaining evidence in support of the application to rectify. The Applicant has conducted an admirable exercise in ensuring as far as it could, that the Court was provided with all relevant contemporaneous evidence including tracking down employees that have long since left the employ of the Applicant but were involved in the matter at the relevant time. This extensive and comprehensive exercise also fulfils the obligation upon the Applicant to give full and frank disclosure of all relevant facts.
23. It is my view that it is an appropriate exercise of the Court’s discretion to grant the rectification sought. I have no doubt that the granting of this application would be “*putting the record straight*” (see paragraph 41 of *Re The Colour Trusts* (*ibid*) applying the guidance of Mummery LJ in *Allnutt v Wilding* [2007] EWCA Civ 412). But for the genuine error, the Applicant and the Protector would have executed the 2008 Deed of Appointment with the appropriate exclusion clause, and additional language to create a valid IIP trust in favour of the Settlor’s children, in order to achieve the intended tax benefit expressly permitted at that time to avoid the changes in IHT treatment of IIP trusts. In these circumstances, having found all the elements of the tests have been satisfied, it would be unconscionable or unjust for me to refuse the relief.