THE CHANNEL ISLANDS LAW FIRM
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In re the Exeter Settlement 2010 JRC012

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Introduction

This is the latest in a line of rectification of trust applications granted by the Royal Court. In this case the Court allowed the remedy in circumstances where there were no beneficiaries recorded in the trust instrument when it was executed.

The Background

The Exeter Settlement is a Jersey law discretionary trust which was established in June 1983, with Jersey trustees. It was one of three trusts in a similar format which were to be established by non-domiciled and non-resident individuals to subscribe for shares in a new insurance broking company. The trusts were drafted in standard form with the particular information relevant to each trust inserted in a number of schedules to the trust instrument. Each trust was to be established initially with a charity as a named default beneficiary at schedule 7 and family members were to be added at a later date in exercise of the Trustee's power of addition under the trust.

When the Trust was executed, schedule 4 of the trust instrument which named the individual beneficiaries of the Trust was therefore intentionally left blank. The initial trust property was £390.00 which was duly paid by the settlor. It was intended for the RNLI was to be named as the charitable beneficiary in schedule 7. However, when the settlor signed the trust instrument, the advisor omitted in error to fill in schedule 7 naming the RNLI as a default beneficiary and left it blank. As a result of the error the trust instrument was executed by the settlor without any named beneficiaries.

By a letter of wishes, signed on the same day that the Exeter Settlement was executed, the settlor expressed the wish that members of her brother's family be added as beneficiaries of the Trust. In June 1984 an instrument of addition adding these individuals as beneficiaries was executed by the trustees and various distributions were made to them over subsequent years. Following various changes of trustee, the Representor in this application was appointed as trustee of the Trust in 1989.

In 2008 it became clear that an application to Court would be necessary in view of the possibility that the Trust could be invalid for uncertainty of beneficiaries. The Representor applied to the Court for either a declaration that the Trust was valid from the outset or from the date that the instrument of addition of beneficiaries was executed, or for an order rectifying the trust instrument. The settlor and the adult beneficiaries were convened to the hearing of the application. HMRC were notified of the application and asked to be kept informed of the result.

Discussion

The Court considered various arguments in support of the application to declare the Trust valid. It rejected the argument that the existence of a power to add beneficiaries gave sufficient certainty as to the beneficiaries. It accepted that a power to add anyone in the world save for certain excluded persons was a valid power to add beneficiaries.

It found however there was a difference between a discretionary power to distribute exercisable in favour of anyone in the world and a discretionary power to add anyone in the world. The Court said it was necessary to return to first principles; a beneficiary of a discretionary trust is a person in whole favour a power may be exercised. A power to add beneficiaries is different. The object of a power to add beneficiaries is not a beneficiary.

The Decision

The Court concluded that it was impossible on the face of the trust instrument to ascertain with any certainty whether any particular person was or was not a beneficiary of the Trust. Therefore it found that the trust instrument failed the test for establishing the necessary certainty of objects. The Court went on to state -

> *"It is hard to imagine a clearer case of failure as to certainty of objects. It would be impossible to say in the case of any given person whether he was or was not a beneficiary because there was simply no list or guidance as to what constituted a beneficiary. In the absence of rectification, the Trust was therefore void from the outset".*

The settlor was old and infirm and unable to give evidence. There was no evidence available from the first trustees. However, the Court saw and heard evidence from the advisor who prepared the trust instrument. He was able to describe in detail the circumstances surrounding the execution of the trust which had lead to the error. The advisor produced a redacted version of the trust deed which he had used to set up one of the two other trusts. This showed that schedule 7 had been completed with the name of the relevant charitable beneficiary in that case. The adult beneficiaries all supported the application.

Having seen and heard the evidence, the Court had no hesitation in accepting that a genuine mistake had been made when the trust was executed and held that the facts of the case presented a "*clear and obvious case for rectification*". It was satisfied that full and frank disclosure had been made. As the arguments in favour of validity had not succeeded it was also satisfied that there was no other practical remedy available.

Comment

This case shows the Court's willingness to rectify significant errors in trust instruments. Had it not allowed rectification of the trust instrument in this case, the Trust would have been invalid and the assets would have resulted to the settlor.

Contact us

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