



Trusts and Fiduciary Group

In the Matter of the Representation of BB,
A and C [2011] JRC148

Before Commissioner Clyde-Smith and
Jurats Clapham and Milner



Summary

The Royal Court has decided to ratify the actions taken by invalidly appointed trustees, acting in good faith as trustees *de son tort*, from the date of the ineffective appointments to the date of the Court Order, which validly appointed them. This is the first Jersey judgment which offers guidance as to when, and in what circumstances, it might be appropriate for the Royal Court to exercise its discretion to ratify the past actions of a trustee *de son tort*.

Facts

A Jersey retirement trust was established for the purpose of providing benefits to the employees of the settlor company (the "**Settlor**"), who also happened to be the only directors of the Settlor. The power to appoint new or additional trustees was vested in the Settlor, in its capacity as "*Principal Employer*", as defined in the Trust Instrument. The Trust Instrument provided that the "*Principal Employer*" ceased to participate in the Trust upon its dissolution.

Following the original trustee providing one month's written notice of its intention to retire, an instrument of retirement and appointment was entered into on 3 November 1997 between the Settlor, the original trustee and a new trustee (the "**first appointment**"). A further instrument of appointment was entered into between the Settlor, the new trustee and two additional trustees on 9 January 1998 (the "**second appointment**").

However, unbeknownst to either the original trustee, the new trustee or the additional trustees, the Settlor had been dissolved on 30 April 1996 and therefore, on that date, the Settlor ceased to participate in and therefore to be the "*Principal Employer*" under the Trust.

The new and additional trustees (the "**Representors**") applied under Article 51 of the Trusts (Jersey) Law 1984 (as amended) (the "**Trusts Law**") to be validly appointed as trustees and for the Court to ratify all of the actions taken by them from the date of their purported appointments to the present.

The Judgment

Ratification

The Court declared that both the first appointment and the second appointment were invalid, with the effect that the original trustee was never discharged from office and that the Representors had become trustees *de son tort* from the date of their respective purported appointments.

The Court acknowledged that serious adverse consequences could flow from the failure of both the first and the second appointments and said that in ratifying the past actions of the Representors, pursuant to either its inherent jurisdiction or its jurisdiction under Article 51 of the Trusts Law, the Court was guided by the general principle that is the "*welfare of the beneficiaries and the competent administration of the trust in their favour*". The Court said that:

"where, as here, a trustee de son tort has acted in good faith, unaware that he has not been duly appointed to office then, applying that general principle, it seems to us that we should save the Trust from the havoc that may ensue from any attempt to unscramble what was purportedly done by the trustee de son tort".

The Court accordingly confirmed and approved the Representors' actions (i.e. ratified them). However, this ratification was without prejudice to any claims that the beneficiaries might have against the Representors for actual breach of trust in respect of such actions.

Rectification

The advocates for the original trustee made an oral application at the hearing for the rectification of the first appointment.

The original trustee contended that (i) as there was no "*Principal Employer*" in existence at the date of the first appointment, then they could appoint a successor trustee under Article 13 (1) of the Trusts Law, as it then stood in 1997; and (ii) its true intention in entering into the first appointment was to divest itself of its trusteeship in favour of the new trustee, but that due to a mistaken belief that the "*Principal Employer*" still existed, it executed a deed which did not have that effect.

Article 13 (1) (as it then was) provided that:

"(1) *Where the terms of a trust contain no provision for the appointment of a new or additional trustee, the trustees for the time being or the last remaining trustee or the personal representative or the liquidator of the last remaining trustee may appoint a new or additional trustee*".

A narrow interpretation of Article 13 (1) suggests that the original trustee could not appoint a successor trustee as there was a provision in the Trust Instrument for the appointment of a "new or additional trustee", it was simply that the provision had failed due to the dissolution of the "Principal Employer".

The Court agreed that Article 13 (1) (as it then was) should be construed broadly so as to apply both where there are no provisions in the terms of the Trust for the appointment of trustees and where there are provisions which cannot in practice provide for or lead to the appointment of a new trustee.

However, the Court had difficulty reconciling the original trustee's application with the first limb of the well-known tripartite test for rectification (see **In the matter of the Exeter Settlement** [2010] JLR 169), namely that "as a result of a genuine mistake, the trust deed does not carry out the true intentions of the parties". The Court noted that, at the relevant time, the original trustee could not have intended to appoint a new trustee as it did not know that it had the power to do so. The original trustee provided the "Principal Employer" with one month's notice of its resignation thus leaving the obligation to appoint a new trustee upon the "Principal Employer".

The Court distinguished the present case from its decision in **In the Matter of A** [2011] JRC 008, which also concerned the ineffective appointment of a new trustee, on the grounds that it was not unreasonable to infer that the retiring trustee in **In the Matter of A** had the intention to exercise the power to appoint a new trustee, a power which it must have known that it had.

The Court ultimately declined the application for rectification of the first appointment on the basis that (i) ratification of the Representors' actions and the original trustee's relief from liability provided a practical remedy for

the invalid appointments (the second limb of the test for rectification being that there should be no other practical remedy) and (ii) it was concerned as "to the propriety of rectifying an instrument in such a way as to give [the original trustee] an intention it did not have".

Costs

The Court ordered that both the original trustee and the Representors be indemnified out of the trust fund on the trustee basis, in respect of their costs and expenses incurred of and incidental to the Representation. Central to the Court's reasoning was that all parties had acted reasonably and in good faith and therefore it would be inequitable for either the original trustee or the Representors to pay for the costs of regularising the position of the Trust.

In deciding that the Representors were entitled to be indemnified out of the trust fund, the Court said that persons who have not been properly appointed as trustees but who have acted in good faith, believing themselves to be duly appointed, are entitled to indemnity in the same way as properly appointed trustees.

Commentary

This case suggests that the Court will ratify the actions taken by an invalidly appointed trustee, which has acted in good faith as a trustee *de son tort*, to prevent the unfortunate consequences that could arise as a result of such an invalid appointment. The judgment also highlights the reluctance of the Court to grant the remedy of rectification where there is a practical alternative remedy available.

For further information, please contact Robert MacRae, Victoria Connolly or Louise Woolrich (contact details on the next page).

Please note that this briefing is only intended to provide a very general overview of the matters to which it relates. It is not intended as legal advice and should not be relied on as such.

Contact us

For further information or professional advice please contact our lawyers below.

47 Esplanade St Helier Jersey JE1 0BD
Tel: +44 (0)1534 888900 Fax: +44 (0)1534 887744
www.careyolsen.com



Paul Matthams, Partner
paul.matthams@careyolsen.com
Telephone: +44 (0)1534 822225



Robert MacRae, Partner
robert.macrae@careyolsen.com
Telephone: +44 (0)1534 822226



William Grace, Partner
william.grace@careyolsen.com
Telephone: +44 (0)1534 822361



Siobhan Riley, Partner
siobhan.riley@careyolsen.com
Telephone: +44 (0)1534 822355



Keith Dixon, Senior Associate
keith.dixon@careyolsen.com
Telephone: +44 (0)1534 822380



Victoria Connolly, Senior Associate
victoria.connolly@careyolsen.com
Telephone: +44 (0)1534 822317



Andreas Kistler, Senior Associate
andreas.kistler@careyolsen.com
Telephone: +44 (0)1534 822362



Alexa Saunders, Associate
alexa.saunders@careyolsen.com
Telephone: +44 (0)1534 822410



Louise Woolrich, Legal Assistant
louise.woolrich@careyolsen.com
Telephone: +44 (0)1534 822218

Contact us

For further information or professional advice please contact our lawyers below.

PO Box 98 Carey House Les Banques
St Peter Port Guernsey GY1 4BZ

Tel: +44 (0)1481 727272 Fax: +44 (0)1481 711052
www.careyolsen.com



Russell Clark, Partner

russell.clark@careyolsen.com
Telephone: +44 (0)1481 732049



Konrad Friedlaender, Partner

konrad.friedlaender@careyolsen.com
Telephone: +44 (0)1481 741567



Karen Le Cras, Partner

karen.lecras@careyolsen.com
Telephone: +44 (0)1481 741524



John Greenfield, Managing Partner

john.greenfield@careyolsen.com
Telephone: +44 (0)1481 732026



Michael Eades, Consultant

michael.eades@careyolsen.com
Telephone: +44 (0)1481 732020



Laila Arstall, Senior Associate

laila.arstall@careyolsen.com
Telephone: +44 (0)1481 741544



Natasha Kapp, Senior Associate

natasha.kapp@careyolsen.com
Telephone: +44 (0)1481 741541



Alison MacKrill, Senior Associate

alison.mackrill@careyolsen.com
Telephone: +44 (0)1481 741500



Patricia Montgomery, Senior Associate

patricia.montgomery@careyolsen.com
Telephone: +44 (0)1481 732093



Iain Atchison, Associate

iain.atchison@careyolsen.com
Telephone: +44 (0)1481 741548



Vanessa Franklin, Associate

vanessa.franklin@careyolsen.com
Telephone: +44 (0)1481 741584



Gillian Kennedy-Smith, Associate

gillian.kennedy-smith@careyolsen.com
Telephone: +44 (0)1481 732013



Polly Lister, Associate

polly.lister@careyolsen.com
Telephone: +44 (0)1481 741551