Trust - appeal against the decision of the Royal Court on 11th June, 2018.

[2018]JCA219

COURT OF APPEAL

29 November 2018

Before : James W. McNeill, Q.C., President
John V. Martin, Q.C., and
Sir Richard Collas Kt

Between

(1) B

(2) C

Appellants

And

(1) Virtue Trustees (Switzerland) AG

(2) Vantage Capital Management AG

(3) E

And

(4) Her Majesty's Attorney General

(5) Advocate Damian Evans (as Guardian ad litem for the minor beneficiaries descending from B and C

(6) Advocate Craig Swart (as Guardian ad litem for the minor beneficiaries descending from E)

Respondents

Advocate W. A. F. Redgrave for the Appellants.

Advocate J. Harvey-Hills for the First and Second Respondents.

Advocate N. H. MacDonald for the Fifth Respondent.

Advocate C. J. Swart for the Sixth Respondent.

JUDGMENT

MARTIN JA:

1. This is an appeal from an order dated 11 June 2018 of the Royal Court (the Deputy Bailiff and Jurats Nicolle and Sparrow) rectifying the terms of a voluntary settlement made in 1998 and known as The C Trust ("the Settlement") (reported at Representation of Virtue Trustees (Switzerland) AG and Anor re The C Trust [2018] JRC 100). The rectification took the form of an amendment to the definition of the term "Excluded Person"; and the principal effect was to validate an appointment made in 2003 adding persons to the beneficial class who otherwise fell within the class of Excluded Persons.

2. The economic settlor of the Settlement was A. When the Settlement was established, he was married (and had been since 1976) to D. Both of them had been married before. There were no children of their marriage; but A had two sons from his first marriage, B and C, and D had a daughter – E – from her first marriage.

3. The Settlement was established by a Declaration of Trust dated 8 April 1998 made by Virtue Trustees Limited, a Jersey trust company which became the first trustee of the Settlement ("Virtue Jersey"). The Settlement was governed by Jersey law. It took the form of a discretionary trust, the beneficiaries being defined as follows:

> *""the Beneficiaries" shall subject as provided by Clauses 2 and 3 mean the objects or persons (whether such objects or persons are now in existence or come into existence during the Trust Period) as shown in the First Schedule and such other objects or persons as are added under Clause 2".*

The First Schedule named the following persons as beneficiaries: A; D; B; C; any wife, widow, child or remoter issue of B or C; and A's mother, F. E and her issue were not named as beneficiaries.

4. Clause 2 of the Settlement contained a power for the Trustees with the consent of the Protector to add to the class of Beneficiaries; but subclause (c) provided that the power should not be exercised so as to add an Excluded Person to the Beneficiaries.

5. The term "Excluded Person" was defined to mean "*those persons shown in the Second Schedule and any person constituted an Excluded Person under Clause 3*". The Second Schedule defined as Excluded Persons "*Any Trustee Protector Appointor or former Trustee Protector or Appointor of this Trust or any person related to any such person by marriage or any issue or parent of such person or any company in which any such person is interested*".

6. Clause 3 (a) was so far as material in the following terms:

> *"THE Trustees may at any time or times before the end of the Trust Period with the written consent of the Protector (if any) declare by instrument that the object or persons named or specified (whether or not ascertained) in such instrument who are would or might but for this clause be or become one of the Beneficiaries or otherwise able to benefit as the case may be*
>
> *(i) shall be wholly or partially excluded from future benefit or*
>
> *(ii) shall be an Excluded Person or Persons".*

7. As originally drafted, the Settlement named KPMG Fides as Protector; but shortly before the Settlement was executed A struck out the name of KPMG Fides as Protector and substituted D's name instead, and the Fourth Schedule of the Settlement as executed named D as Protector. She remained as Protector until her resignation on 10 November 2003.

8. The consequence of the naming of D as Protector was that, under the terms of the Second Schedule, arguably she, A (as a person related to her by marriage), B and C and their issue (again, as persons related to her by marriage), and E and her issue (as issue of D) became Excluded Persons. In consequence of that, as the Royal Court recognised, E and her issue could not be added to the class of Beneficiaries under Clause 2.

9. Shortly before his death, A wrote to the trustee on 16 July 2003 asking it to "*issue a supplemental Declaration of Trust naming my wife's daughter, E, and any child or remoter issue of E as additional beneficiaries to the Settlement*".

10. By a supplemental Declaration of Trust dated 22 September 2003 (which was 8 days after A's death) E and her children and remoter issue were added as beneficiaries of the Settlement. E has four children (all born before the date of the supplemental Declaration of Trust adding her and her issue) and two grandchildren.

11. On 23 November 2017 the current trustee of the Settlement, Virtue Trustees (Switzerland) AG, and the current Protector, Vantage Capital Management AG, filed a Representation seeking rectification of the Settlement and validation of all past distributions made under it. The Representation was opposed by B and C, who with E were the principal respondents to it.

12. The evidence supporting the application was principally an affidavit from Adrian Escher, who (among other things) was a director of Virtue Jersey at and prior to the creation of the Settlement. He was not cross-examined on his evidence. He deposed that he had had the closest involvement of anyone with A in relation to the establishment of the Settlement, and with the affairs of the Settlement until and after A's death. The Royal Court's judgment summarised large parts of his evidence; but for present purposes it is necessary to mention only two passages. First, in paragraphs 45 and 46 of his affidavit, Mr Escher speaks of meetings held on 16 and 19 March 1998 between himself and A. The purpose of those meetings was to deal primarily with the setting-up of the Settlement. On both occasions, they went through the documents in some detail. A gave instructions to proceed with the establishment of the Settlement. He made amendments in manuscript to, and approved, a draft of the trust instrument. He made three principal amendments: the removal of his sister from the list of beneficiaries; the alteration of the ultimate charitable beneficiary from the Red Cross to the Yemen Red Crescent; and the changing of the Protector from KPMG Fides to D. In relation to the last of those alterations, Mr Escher said this:

> *"I believe the reason he changed the protector was both because of the deep bond between him and D, and also to try to protect her to the maximum degree possible. I do not believe that he had any appreciation that making D protector would potentially have the collateral effect of excluding her from benefit. D's potential exclusion was not something that occurred to me either. If it had, I would have raised it with A immediately as this would certainly not have been something that he intended".*

Secondly, in paragraph 37 of his affidavit, Mr Escher said that: "*it is my clear and unwavering recollection that providing for D, and subsequently her family (including E), was at the forefront of A's mind when he was conceiving how he should manage his affairs*".

13. The Royal Court rectified the Settlement by amending the definition of Excluded Person so that it read "*Any Trustee Protector or Appointor holding office at the time of any appointment*". It declined to validate distributions, on the grounds that to do so was unnecessary since rectification dated back to the inception of the Settlement.

14. B and C appeal against the decision to rectify the Settlement. Their essential contentions are that there was no basis for the Royal Court's conclusion that the Settlement failed to give effect to A's then intention; that the addition of E and her issue was the product of a change of mind by A and was contrary to his intention (evidenced by the fact that E and her issue were not named as beneficiaries, and could not be added as beneficiaries because they were Excluded Persons) at the time the Settlement was created that she and her issue should not benefit; and that 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 a need for rectification in order to confirm the status of the original beneficiaries.

15. Although there is no dispute between the parties as to the relevant law, we are told that this is the first time the Jersey law of rectification of voluntary settlements has been considered by the Court of Appeal. It has, however, frequently been considered in the Royal Court, and it is necessary to refer to some of the more significant cases.

16. I start with Détente re Smouha Family Trust [1998] 236A, unreported, 26 November 1998, (Hamon DB). The judgment is a restricted judgment, but I see no objection to citation of the following passage:

> ***"Rectification of Trusts is now well established by these Courts. If a settlement or other instrument is properly made but by mistake it does not necessarily record the intention of the maker, the Court in those circumstances may rectify it to make it reflect the true intention. There are a whole line of early cases in this jurisdiction that reflect that view: Re Williams (1975) 262 Ex 261; Re McCreary (1978) 265 Ex 87; Re Baxley (1979) 266 Ex 360; Re Seale (22nd July,1983) Jersey Unreported; Re Coleman (12th July, 1985) Jersey Unreported; Re GJ Saunders Children's Jersey Settlement (4th April, 1991) Jersey Unreported and the list goes on as the Trust Law came into force and as this Trust jurisdiction has expanded.***
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> ***As Mr. Speck has said to us we have several criteria to follow. I think that we can summarise these criteria as follows: there must be sufficient evidence of the error - we are satisfied in that regard. There must be full and frank disclosure - we are satisfied in that regard. Rectification will not generally be granted if another remedy is available which will serve the same purpose and we refer in that instance to Whiteside v Whiteside (1950) Ch.D. 65. We are satisfied that, in this case, there is no other remedy. As Mr. Speck has pointed out, the remedy is discretionary but there is no rule that the Court will refuse to rectify a deed where the effect of the rectification would be to save tax (In the Matter of Moody Jersey "A" Settlement (1990) JLR 264).***
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> ***In accordance with the letter of the Inland Revenue which was received by his English instructing solicitors Mr Speck has referred us to the three English cases that the Revenue asked in the circumstances to be referred to us but really, with deep respect, they do not advance the matter because we now***

have an established line of cases in Jersey and those English cases were cited to the court and incorporated in the judgment re Moody Jersey "A" Settlement.

We must, of course, also remind ourselves that the highest possible degree of probability is needed to show that, due to a genuine mistake, the trust deed does not represent the intention of the parties and we remind ourselves that that burden becomes harder to satisfy as time progresses and that is found in In re Madge's Settlement (17th May, 1994) Jersey Unreported."

I make further reference to Re Madge's Settlement below.

17. The relevant considerations were stated much more summarily in In the matter of the Westbury Settlement, 2001/72 an unreported decision dated 26 March 2001. There, Crill C said the following:

"The tests which that Court laid down and which this Court has followed in the past, and no doubt will wish to follow in the future, are fourfold: (1) There must be sufficient evidence of the error; (2) it must be established to the highest degree of civil probability that a genuine mistake has been made; (3) there must be full and frank disclosure; and (4) there should be no other remedy, that is to say no other practical remedy. Finally I should add… that the longer it takes to come to the Court the greater the risk or the greater the burden that is on the Representor".

18. That case was considered by the Royal Court in Walbrook Trustees re Amethyste Trust [2002] JRC 186 (unreported, 10 October 2002). Birt DB said this:

"The principles upon which the Court will grant rectification of a settlement are well established. The Court has to be satisfied that there has been a mistake such that the document does not carry out the true intention of the parties to the document. We were referred to the case of In re Westbury Settlement… which set out a 4 stage test which the Representor must satisfy before rectification may be ordered namely:

(1) There must be sufficient evidence of the error;

(2) it must be established to the highest degree of civil probability that a genuine mistake has been made;

(3) there must be full and frank disclosure; and

(4) there should be no other remedy, that is to say no other practical remedy.

We must confess that we do not see a great difference between 1 and 2 of that four-stage test, as they seem to us to say much the same thing. We would prefer to combine them so that the test becomes a three-stage test with the first stage being that the Court must be satisfied to the civil standard that a mistake has been made so that the Settlement does not carry out the true intention of the parties (and the Settlor in particular)."

19. The suggested three-stage test was adopted by the Royal Court In Re Sesemann Will Trust [2005] JLR 421 (Birt, Deputy Bailiff), in a passage which is frequently cited and which the Royal Court quoted:-

"12. The test for rectification in Jersey is well established. There are three requirements:-

(i) The Court must be satisfied by sufficient evidence that a genuine mistake has been made so that the document does not carry out the true intention of the party(ies).

(ii) There must be full and frank disclosure.

(iii) There should be no other practical remedy. The remedy for rectification remains a discretionary remedy.

13. The important aspect in this case is whether the first requirement is met. There is a clear distinction to be drawn between the transaction itself and the objective behind the transaction. The court can rectify a deed which does not reflect the transaction which the parties intended to achieve but the court cannot use rectification as a method of allowing the parties to achieve some other transaction which, in hindsight, would have been more desirable."

20. It is necessary to make two points about the first of the three requirements identified in that extract. The first point relates to the reference to "sufficient evidence". It is well settled that the

evidence required to support rectification must be sufficiently compelling to overcome the presumption that an executed document accurately represents the intentions of the parties to it. The requirement is traditionally expressed as a need for "strong, irrefragable evidence" (see Shelburne v Inchiquin (1784) 28 ER 1166), but is generally now stated as a requirement of "convincing proof": see Joscelyne v Nissen [1970] 2 QB 86 at 98D. The second of the four tests set out in Re Amethyste focuses on this requirement, albeit in terms that are not wholly satisfactory; but there is a danger that, in the transition to the three stage test set out in Re Sesemann Will Trust, the focus has been lost. In Re Madge's Settlement [1994] JLR Note 16b is reported only as a note which records the Royal Court as having stated that "***It must be shown to the highest possible degree of probability that due to a genuine mistake a trust deed does not represent the intention of the parties, before the court will order rectification."*** This goes too far: 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."***

It can be seen from this passage that the reported note summarises the reasoning too curtly. It is, however, the case that the passage fails to draw clearly the distinction between the standard of proof and the quality of evidence necessary to satisfy the burden of proof to the required standard. Later editions of Snell make that distinction clear.

21. The second point to be made in relation to the first requirement identified in Re Sesemann Will Trust is this. Although the requirement that the Court be satisfied that by mistake the document does not carry out the true intention of the parties is stated as a single requirement, it in fact requires the Court not merely to be satisfied that the parties did not intend what the document records but also to identify what they did in fact intend. The point is made clearly in paragraph 4-069 of Lewin on Trusts, 19th Edition:

"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."

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

23. It seems to me clear, both from the reference in Re Smouha to the English cases having been taken into account in the formulation of the Jersey requirements and from the equivalence in substance of the relevant requirements in Jersey and England, that there is no difference between the law of England and the law of Jersey relating to the rectification of voluntary settlements. In my judgment, the first requirement set out in Re Sesemann Will Trust is too summarily expressed; and I prefer, and would adopt, the formulation set out in paragraph 4-069 of Lewin, with the additions I have identified in paragraph 22 above.

24. We were asked to say that the same principles apply in the case of the rectification of wills. This does not seem to me to be a suitable case in which to come to a definitive conclusion on that matter, and I am not to be taken as having done so, although on the face of it I can see no reason why different principles should apply.

25. I turn now to the Royal Court's reasoning, which sufficiently appears from paragraphs 63 to 66 of the judgment. They are in the following terms:

"63. There does not appear to us to be a real dispute as to whether A intended to benefit D amongst other beneficiaries. It seems clear that he did. The overwhelming evidence from our perspective is that he was most concerned to ensure that she was properly provided for and it seems to us to be extraordinary to think that he might have knowingly and deliberately added her as a protector which would have as its effect that she could not enjoy the benefit that he had planned that she would.

64. In our view, we are satisfied that A added D as protector in manuscript without realising the interplay between the nomination and the definition of excluded persons. He did it to further protect D not realising that on the terms of the trust it could potentially have precisely the opposite effect. He did not in our view intend it to exclude D and accordingly her inclusion as a named protector was to our mind a manifest mistake.

65. It seems to us to be clear that A intended to benefit himself, D, B and C and their descendants as beneficiaries of the Trust and although he named D as protector, which has given rise to the current difficulties, we do not think that that was anything other than a genuine mistake and that he did not thereby seek to call into question the status of the individuals just named as beneficiaries of the Trust.

66. It is clear, therefore, that the Trust Instrument does not reflect A's true intentions. Accordingly in our view it is appropriate to exercise our discretion and to rectify it."

26. As I have indicated, the Appellants contend that this reasoning proceeds on a false basis. The Royal Court had clearly misunderstood what the expression "Excluded Person" meant in the Settlement, and incorrectly thought that rectification was necessary to confirm the status of the original beneficiaries (including the Appellants). It was, however, clear from clause 3 of the Settlement that an Excluded Person did not mean, as the Royal Court appears to have thought, a person who could not benefit from the trust. The Court's stated rationale for ordering rectification was its finding in paragraphs 64 and 65 that, when A named D as Protector, he made a "***manifest mistake***", as he did so "***without realising the interplay between the nomination and the definition of excluded persons***"; but there was no such interplay. The Court's conclusion that D was named as Protector by mistake derived from this flawed reasoning. It might have been reasonable to infer a mistake if naming D as Protector prevented her from benefiting from the Settlement; but it did not.

27. In his effective submissions to us, Advocate Redgrave correctly pointed out that the burden was on the Respondents to demonstrate by convincing evidence that the Settlement did not reflect A's true intentions, and what those intentions were. There was no direct evidence of those intentions, but the contemporaneous evidence – notably the terms of the Settlement itself, and of a letter of wishes signed by A at the time of the Settlement – demonstrated that A understood the effect of naming D as Protector and appreciated that the consequence was that E and her issue could never benefit under the Settlement. Mr Escher's evidence showed that A was a lawyer, partly trained in English law, who understood trusts. Consideration of the draft trust deed altered by A showed that he had gone through it meticulously, making manuscript alterations in the body of the text apart from the main ones identified by Mr Escher. When it came to his alteration of the name of the Protector in the Fourth Schedule, he could not have failed to see the Second Schedule immediately above, which identified the persons whose relationship to a Protector made them Excluded Persons. From his close study of the body of the text, he would have realised that the effect – but the only effect – of being an Excluded Person was that such a person could not be added as a beneficiary. He would have understood that the named Beneficiaries did not need to be added, so that it was of no significance that they were also Excluded Persons; and he would have understood, and intended, that E and her issue were not named beneficiaries, and could not be added subsequently because of their relationship to D and consequently their status as Excluded Persons. The letter of wishes was consistent with an intention to exclude E and her issue: it omitted any reference to her, and asked the trustees to deal with income and capital in ways that left no room for her inclusion. If paragraph 37 of Mr Escher's first affidavit was intended to mean that at the time of the creation of the Settlement A intended to benefit E and her issue, it was inconsistent with the observable facts. If it referred to A's subsequent desire to include her and her issue as beneficiaries, then – assuming that was A's genuine intention, which the Appellants did not accept and the Royal Court had declined to decide – it represented a change of mind and was consistent with A having forgotten what he understood and intended five years before.

28. For the first and second Respondents, Advocate Harvey-Hills contended that the key to resolution of the case was to identify the correct question. In paragraph 22 of the judgment, the Royal Court identified the question as being "***whether A intended to exclude those who clearly were or may be excluded by virtue of the appointment of D as protector***". The focus on exclusion, and in particular on the exclusion of E and her issue, was correct. It was artificial to suppose that A had understood and intended that the effect of naming D would be to exclude her issue from possible benefit, and to give rise to confusion about the status of all other named beneficiaries. Moreover, there was a provision in the Settlement capable of permitting provision to be made for E notwithstanding that she was an Excluded Person; and yet other provisions that showed that there was a possibility that named Beneficiaries would temporarily be excluded from benefit, but would then be incapable of being reinstated because they were Excluded Persons. A could not have intended that, and it cast doubt on the Appellants' thesis that he did intend to exclude D's

issue. In reality, the naming of D as Protector was for her protection, not in order to exclude her descendants from benefit. The fact that it did so was an unintended consequence, unnoticed by A or – according to his uncontested evidence – by Mr Escher.

29. In my judgment, there is some force in the criticisms made by the Appellants of the Royal Court's reasoning. I think it clear from the concluding words of paragraph 63 ("***it seems to us to be extraordinary to think that he might have knowingly and deliberately added her as a protector which would have as its effect that she could not enjoy the benefit that he had planned that she would***"), from the concluding words of paragraph 64 ("***He did it to further protect D not realising that on the terms of the trust it could potentially have precisely the opposite effect. He did not in our view intend it to exclude D***"), and from the concluding words of paragraph 65 ("***he did not thereby seek to call into question the status of the individuals just named as beneficiaries of the Trust***") that the Royal Court's reasoning is founded on an assumption that an excluded person could not also be a beneficiary.

30. It is notable that those paragraphs represent a hardening of the line taken earlier in the judgment. In paragraphs 13 and 14 the Royal Court had said the following:

> ***"13. It is not entirely clear, on the face of the Trust Instrument at least, what effect being an "excluded person" has. Clause 1 (a)(ix) defines excluded persons as those shown in the second schedule and any person constituted as such under Clause 3. Clause 2 (c) says that a trustee shall not exercise its power to add to the beneficiaries so as to add an excluded person. Save for these provisions, the Trust Instrument is silent as to the position of excluded persons.***
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> ***14. It is tolerably clear, therefore, that where E and her issue are concerned, as an excluded person, she could not be added to the class of beneficiaries and therefore the appointment in September 2003 is, as has been said, invalid. The position with regard to the other beneficiaries is, however, rather less clear as they were named as beneficiaries within the Trust Instrument at the same time that they were rendered excluded persons by the appointment of D as protector. The trust Instrument does not say that they cannot be beneficiaries, merely that they cannot be appointed as such by the Trustee in the exercise of a power of appointment. It might be argued, therefore, that they already had and therefore retained their position as beneficiaries but it is also fair to say, as the Representor put to us, that it is the common understanding of the term "excluded person" that such a person who is excluded cannot benefit."***

31. As a matter of construction of the Settlement, and as the Royal Court itself remarked, the only provision in the Settlement which directly affects the position of an "Excluded Person" is clause 2, which provides that an Excluded Person cannot be added as a Beneficiary. There is nothing in the Settlement to prevent a person being at the same time a Beneficiary and an Excluded Person; and clause 3 (a) draws a clear distinction between a person who is wholly or partially excluded from future benefit and a person who is an Excluded Person. The assumption underlying paragraphs 63 to 66 of the judgment is accordingly on the face of it wrong.

32. As Advocate Harvey-Hills points out, however, there are other potentially relevant provisions of the Settlement which lead to a lack of clarity about the status of an Excluded Person. Clause 3(a) (which I have partially set out above) and 3(b) of the Settlement, which give to the trustees a power of exclusion and to an actual or potential beneficiary a power of renunciation, give rise to difficulties. It may be desirable for these powers to be exercised temporarily, perhaps while a beneficiary is resident in or a citizen of the United States of America (such circumstances debarring a person from being added as a Beneficiary under clause 2 of the Settlement); and, although the power may be exercised revocably, reinstatement of a Beneficiary who is also an Excluded Person will on the face of it not be possible. Moreover, clause 7, which deals with the trusts to take effect "*until and subject to and in default of appointment*" under clause 6, gives the trustee power with the consent of the Protector to

> *"pay or transfer any income or capital of the Trust Fund to the trustees of any other trust wherever established or existing under which all or any one or more of the Beneficiaries is or are interested (whether or not all or such one or more of the Beneficiaries is or are the only objects or persons interested or capable of benefitting under such other trust) if the Trustees shall in their absolute discretion consider such payment to be for the benefit of all or such one or more of the Beneficiaries".*

This means that an Excluded Person is capable of being benefitted from assets of the Settlement if to do so is for the benefit of one at least of the Beneficiaries. The power would, for example, have been capable of exercise during D's lifetime by appointment of assets to a trust under which not only she but also E and her issue were entitled to benefit.

33. Before I consider the effect on the Royal Court's conclusion of the apparently erroneous assumption on which it is based, it is necessary to refer to other aspects of the judgment which are, in my view, unsatisfactory.

34. First, the mistake identified by the Royal Court at the end of paragraph 64 – "***D's inclusion as a named protector was to our mind a manifest mistake***" – is plainly not the operative mistake. It

is entirely clear from Mr Escher's evidence that A did intend D to be the Protector. If there was a mistake, it lay in the fact that neither he nor Mr Escher understood that the consequence of naming D as Protector was that she became an Excluded Person, with whatever further consequence that might entail.

35. The second unsatisfactory aspect (although not one on which the Appellants place any reliance) is that the Royal Court's entire focus is on A's state of mind. However, A was not a party to the Settlement, which as I have said took the form of a declaration of trust by Virtue Jersey. If rectification were to be granted, therefore, it was necessary for the Royal Court to be satisfied by convincing evidence that the Settlement did not represent the true intention of Virtue Jersey as the only party to the declaration of trust. The Royal Court made no reference to this. In circumstances where A was the economic settlor, it is reasonable to start from the position that the intentions of Virtue Jersey as the intended trustee and A as the effective settlor would be likely to coincide; but it is still necessary to consider whether or not the facts supported that initial view. If, for example, Mr Escher had realised the consequences of the naming of D as Protector rectification would not be possible, even if A had not. In the event, however, there was evidence from Mr Escher that he had not appreciated that making D Protector also made her an Excluded Person ("D's potential exclusion was not something that occurred to me either"), so that the Royal Court's failure to address the point does not affect the outcome.

36. The third unsatisfactory aspect of the Royal Court's decision is that the rectification ordered ("*Any Trustee Protector or Appointor holding office at the time of any appointment*") goes further than is necessary. In principle rectification should be granted to the extent, but no further than to the extent, necessary to give effect to the true intention. The problem was that D was not intended to be an Excluded Person: assuming rectification was appropriate, the way to do it was by amending the Settlement so that she was not an Excluded Person. The obvious way to do that was by adding the words "(other than D)" after the word Protector wherever it appears in the Second Schedule (including in the expression former Protector). Rectification in that way would ensure that none of the exclusionary consequences attaching to the status of Protector could apply to D; whereas the rectification ordered by the Royal Court, which substituted the words set out above for the entirety of the Second Schedule, removed protections against abuse of position by a Trustee, Protector or Appointor that A undoubtedly intended to apply as a matter of generality.

37. I now return to the key question, namely whether or not the Royal Court's apparently erroneous assumption or the deficiencies in the judgment I have identified affect the outcome. In my view, they do not. That is for the following reasons.

38. The critical issue is as to the state of mind of A and Virtue Jersey at the time when A amended the draft of the declaration of trust, in particular by substituting D's name for that of KPMG Fides as Protector. There is no reason to suppose that that intention did not continue to the time of execution of the Settlement, and (since the amendments were incorporated in the final version) every reason to suppose that it did. As the Royal Court went some distance to identifying, the question is whether or not A intended to exclude D's issue from benefit. Immediately prior to A's amendments, the draft contained in clause 2 a power to add beneficiaries that extended to D's issue. Following the amendment, the power could no longer be exercised in favour of D's issue, but remained exercisable in favour of anybody else. That is something which requires explanation. One possibility is that it was the product of a mistake; the other is that it was an intentional consequence of D's appointment as Protector.

39. As I have said, the Appellants contend for the latter possibility; but it seems to me that there are insuperable obstacles in the way of its acceptance. The appointment of D was designed to strengthen her position, not to disadvantage her or her issue. According to Mr Escher's uncontested evidence, a draft of the Settlement had been in existence since at the latest 13 June 1997, and by November 1997 A had considered its terms. Those terms were discussed by A and Mr Escher at meetings on 16 and 19 March 1998, and there is no suggestion that A mentioned that he intended to exclude E and her issue from benefit. Nor is there any suggestion that A explained to Mr Escher that he realised that the consequence of naming D as Protector would be that her issue would be Excluded Persons; even had he been wholly confident in his construction of the trusts, he would inevitably have said so to Mr Escher as the representative of the trustee at their meetings. It is true that he did not intend E and her issue to benefit initially; but it is a leap too far to say that that implied an intention that they alone should be incapable of being added as beneficiaries if circumstances warranted it. Had he wanted to achieve that effect, he could have done so by naming E and her issue directly as Excluded Persons in the Second Schedule.

40. Moreover, the Appellants' thesis proves too much. If it is assumed that A had understood the terms of the Settlement and had carried his understanding forward to his amendment of the Schedules, it must also be assumed that he understood that E and her issue were capable of being benefitted by an exercise of the clause 7 power – the only formal constraint being the requirement of the consent of D, who he had just decided should be the Protector. On that basis, he cannot have intended to exclude E and her issue from any possibility of benefit.

41. In my judgment, it is clear that A's only intention in amending the Fourth Schedule was to change the Protector, not to change the effect of any other provision in the draft declaration of trust. The circumstances I have described amount to convincing evidence that the Settlement as executed failed accurately to record the true intention of Virtue Jersey and A, in that the consequence of

naming D as Protector had the effect, unintended and unappreciated by either of them, of limiting the clause 2 power.

42. I should add that the Appellants complained that the trustee was in a position of conflict of interest. It was said that it was and is in the trustee's personal interest for rectification to take place, as otherwise it would be in breach of trust for having made a distribution to E and liable to reconstitute the trust fund in that respect. Further, it was said, the Court did not seem to have taken account of the long delay, of twenty years since the Settlement was established, in bringing the rectification application. Neither of these points has any merit: if rectification was otherwise justified, the fact that it might improve the trustee's position is irrelevant; and the delay has caused no prejudice, since there remains sufficient convincing evidence to justify rectification.

43. For these reasons, it seems to me that the Royal Court was justified in its decision that the Settlement should in principle be rectified, although the route by which it arrived at that conclusion is open to some criticism. As I have said, however, the extent of the rectification it ordered went further than was appropriate, and I would limit it in the way I have described. Subject to that, I would dismiss the appeal.

MCNEILL JA:

44. I agree.

COLLAS JA:

45. I agree.

Authorities

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Snell's Principles of Equity 29th Edition.

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