Trust - application by the Representors for the rectification of a declaration of trust and the Court's blessing for past distributions.

[2018]JRC100

ROYAL COURT
(Samedi)

11 June 2018

Before : T. J. Le Cocq, Esq., Deputy Bailiff, and Jurats Nicolle and Sparrow

IN THE MATTER OF THE REPRESENTATION OF VIRTUE TRUSTEES (SWITZERLAND) AG AND VANTAGE CAPITAL MANAGEMENT AG

AND IN THE MATTER OF THE C TRUST

AND IN THE MATTER OF ARTICLE 51 OF THE TRUSTS (JERSEY) LAW 1984 (AS AMENDED)

Advocate J. Harvey-Hills for the Representors.

Advocate M. L. A. Pallot for B.

Advocate N. H. MacDonald for B and C minors.

Advocate C. J. Swart for the D minors.

G appeared in person.

JUDGMENT

THE DEPUTY BAILIFF:

1. This is an application by Virtue Trustees (Switzerland) AG ("the Trustee") and Vantage Capital Management AG (as the current protector) (jointly referred to as "the Representors") seeking an order firstly, for the rectification of a declaration of trust dated 8th April, 1998, ("the Trust Instrument") establishing the C Trust ("the Trust") and, secondly, the Court's blessing for all the past distributions made by Virtue Trustees Limited ("the Former Trustee") and the Trustee to B, C, D and E.

2. When the Representation was first presented before the Court on 24th November, 2017 the Court ordered service on B, C, E and, in the light of the charitable interest, Her Majesty's Attorney General. It further appointed Advocate Damian Evans as guardian-ad-litem for the minor and unborn beneficiaries of the Trust descending from B and C ("the B and C minors") and appointed Advocate Craig Swart as guardian-ad-litem for the minor and unborn beneficiaries of the Trust descending from E ("the E minors").

3. The economic settlor of the Trust was A who died in 2003. B and C are A's sons; D was A's wife. E is D's daughter from a previous marriage.

4. The Trust itself is governed by Jersey law and is a discretionary trust established by way of a declaration by the Former Trustee. The assets of the Trust are substantial, being primarily the ownership of the entire share capital in a BVI registered holding company with assets in 2017 of a little under US$19 million.

5. Under the first schedule of the Trust Instrument the beneficiaries of the Trust were stated to be:-

   (i) A;

   (ii) D;

   (iii) B;

   (iv) C;

   (v) B and C's wives, widows, children and remoter issue; and

   (vi) F who is A's mother. She died prior to March 2003.

6. The second schedule of the Trust Instrument set out the excluded persons as being:-

> *"Any trustee, protector, appointer or former trustee, protector, appointer 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 such person is interested."*

7. Before A approved the Trust Instrument in April 1998 he crossed out the protector identified in it (a Swiss company) and inserted D's name instead. She thus became protector of the Trust when it was approved and executed.

8. On 14th April, 1998 A executed a Letter of Wishes (the "First Letter of Wishes") making it clear that he wished to be regarded as the primary beneficiary and that the Former Trustee was to confer benefit on himself, F, D, B and C and B and C's respective families.

9. Before A died in September 2003 he asked the Former Trustee to add E and her issue as beneficiaries. He also executed a second Letter of Wishes (the "Second Letter of Wishes") which confirmed that he wished to confer a benefit additionally on E and her issue. There is a dispute as to whether the request to add E and the Second Letter of Wishes should be treated as valid. In accordance with those wishes on 22nd September, 2003, the Former Trustee added E and any child or issue of E to the beneficial class and together with D (in her capacity as protector) executed an instrument to that effect.

10. Under the provisions of the second schedule of the Trust Instrument E and her issue were excluded persons given her relationship to D. It would also appear, *prima facie*, that A and D were also excluded persons and it is possible, given their relationship to D, that B and C and their families may also have been excluded.

11. It is necessary to consider the effect of being an excluded person. In the event, no benefit was conferred on A before his death. Considerable benefit has, however, been received by D until her death and has been and is continuing to be received by B and C. Some benefit has been conferred on E and on B's daughter, G.

12. It is apparent from the above, therefore, that as D was named as the original protector under the terms of the second schedule of the Trust Instrument she and any person related to her fall within the definition of excluded persons under the Trust. The Representors expressed the concern that E and her issue, A, D, B and his issue and C and his issue all fall within the definition of excluded persons. The effect of E and her issue being excluded persons would, of course, mean that the deed by the Former Trustee of 22nd September, 2003 adding them to the class of beneficiaries would not be valid.

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.

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 of 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.

15. In the circumstances, the Representors seek rectification so that the Trust Instrument reflects what they identify as the true intention of A (as settlor). They wish to achieve the end that none of A, D, B, C or E or their issue are or were excluded persons and that they can benefit from the Trust.

16. There are at least two ways of achieving this and the Representors suggest either that the second schedule of the Trust Instrument be rectified to read:-

> *"Any trustee, protector or appointor holding office at the time of any appointment …".*

Or that the word "protector" be removed from the second schedule altogether so that neither the protector nor former protector would be an excluded person. Either of these ways would achieve the result the Representors wish as D, although protector until October 2003, received no benefit as such and only after she resigned as protector did she receive any benefit under the Trust.

The law

Rectification

17. The test for rectification has been stated in a number of judgments of this Court and is well established. In the case of R.E. Sesemann Will Trust [2005] JLR 421 Birt, Deputy Bailiff (as he then was) at paragraph 12 et seq of that judgment said this:-

"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."

18. Accordingly, if the evidence satisfies the Court that the Trust Instrument does not record the intention of the maker, in this case A, the Court in those circumstances may rectify it and ensure that it does in fact reflect the true intention.

19. In the English Court of Appeal case of Allnutt and another –v- Wilding and others [2007] EWCA Civ 412 Monery LJ, at paragraph 11, said this:-

"In other words rectification is about putting the record straight. In the case of voluntary settlement, rectification involves bringing the trust document into line with the true intentions of the settlor as held by him at the date when he executed the document. This can be done by the court when, owing to a mistake in the drafting of the document, it fails to record the settlor's true intentions. The mistake may, for example, consist of leaving out words that were intended to be put into the document; or putting in words that were not intended to be in the document; or through a misunderstanding by those involved about the meanings of the words or expression that were used in the document. Mistakes of this kind have the effect that the document, as executed, is not a true record of the settlor's intentions."

20. Rectification is clearly not something that the Courts do lightly and the Court must be satisfied that the evidence establishes that a genuine mistake has taken place. In Re Madge's Settlement [1994] JLR Note 16b it states:-

> ***"It must be shown to the highest possible degree of probability that due to a genuine mistake a trustee does not represent the intention of the parties, before the court will order rectification. The burden of proof becomes more difficult to satisfy with the passing of time."***

Blessing

21. The test for the grant of a blessing by the Court is also well understood. In the case of In Re The S Settlement 2001/154, Birt, Deputy Bailiff (as he then was) said this, at paragraph 11 of the judgment:-

> ***"…We think that we need to consider three issues when fulfilling our role under the second category:***
>
> ***Are we satisfied that the trustee has in fact formed the opinion in good faith, that the circumstances of the case render it desirable and proper for it to carry out each of the steps we have described earlier in this judgment?***
>
> ***Are we satisfied that the opinion which the trustee has formed is one in which a reasonable trustee properly instructed could have arrived?***
>
> ***Are we satisfied that the opinion at which the trustee has arrived has not been vitiated by any actual or potential conflict of interest which has or might have affected its decision?"***

The evidence for the Representors

22. In order to establish whether we are satisfied that a genuine mistake has been made we must seek to identify A's true intentions at the time that the Trust Instrument was executed. We think the correct approach is to ask ourselves whether or not the evidence suggests that A intended to exclude those who clearly were or may be excluded by virtue of the appointment of D as protector.

23. We had before us a number of affidavits although no-one gave live evidence and consequently none of the assertions in the affidavits have been tested by cross-examination. That being said, there appears to us to be a considerable amount of accord between the parties as to what A's original intentions were when the Trust Instrument was executed.

24. We have before us the affidavit of Mr Adrian Escher ("Mr Escher") dated 17th January 2018 who is a director of the Trustee. He exhibits a number of documents in support.

25. Mr Escher has had a long involvement with A and with the Trust. He was also a director of the Former Trustee and between 2003 to 2015 he acted as the protector of the Trust. He expresses the view that he has had the closest involvement of anyone in the matter since the Trust was established.

26. He confirmed that the Trust was established on A's instruction and that all of the assets of the Trust derived from A. He identifies the First Letter of Wishes and the Second Letter of Wishes and sets out much of the background material to which we have already made reference.

27. He makes the observation that the appointment of D as protector of the Trust had unintended consequences which were, as he puts it "*inadvertently inconsistent with both the First Letter of Wishes and the Second Letter of Wishes*".

28. Mr Escher was first introduced to A through a mutual contact. A was a lawyer and a businessman. The process of establishing the Trust was undertaken over a period of several years and Mr Escher describes that his professional dealings with A and his clients were periodically punctuated with meetings with A himself about how to deal with his personal wealth and provide for his family should he predecease them. Mr Escher confirms that A had two principal concerns. The first was that he wanted to ensure that, if he died before D (who he had married in 1976), she would be protected and would be financially secure. The second was that A was considering retiring to the UK with D and he was concerned to understand how he could manage his succession and planning in the most tax efficient way possible.

29. Mr Escher observes, although accepting it is not directly relevant to the application, that A had other interests outside the Trust in valuable property in the United Kingdom which was settled on a separate trust. He notes that D was also a primary beneficiary of that other trust.

30. Importantly Mr Escher says at paragraph 37 of his affidavit:-

"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."

31. A was the patriarch of his family and the settlement of the Trust was, so Mr Escher recalls, his own idea being a lawyer himself and was a thing that he understood. He was concerned that D might be in a vulnerable position if A were to predecease her whilst in the [country] under Sharia rules of succession. Mr Escher does not claim any expertise in this area but indicates that he believes that was part of A's motivation.

32. Mr Escher describes the circumstances leading up to the creation of the Trust and it is clear, without going into any detail, that A and D often met with him together and D was fully involved in the run up to the creation of the Trust.

33. In his affidavit Mr Escher observes that he had a meeting with A on 9th December 1995 in connection with the incorporation of L (a company which is wholly owned by the Trust and contains its assets) and, as a second action point noted in a filenote that the meeting was "*to prepare proposal for the setup of a discretionary trust settlement with the beneficiaries to the client, the wife and the children of [A]. The current wife is his second wife with no children born in his second marriage."*

34. Mr Escher observes that it was D who seemed to be the main driver in the latter years for the creation of the settlement even though it was A's idea. Mr Escher gained the impression that A found it difficult to relinquish control of his assets and was so busy in his legal practice that it was difficult for him to find time to deal with it.

35. In particular Mr Escher recalls a meeting in March 1998 which he describes as a "jovial one" when A was smiling and in good humour. A had wished to settle the Trust and he knew that it was necessary both to protect D and for tax planning purposes although he had wrestled for some time with the idea of ceding control of his assets. At the meetings including that of March 1998 A instructed Mr Escher to proceed with the establishment of the Trust. Mr Escher describes how A amended them in manuscript and approved the draft of the Trust Instrument. He made three principal amendments. The first was to remove his sister from the list of beneficiaries, the second was to change the ultimate beneficiary from the Red Cross to the Yemen Red Crescent and the third was to change protector from KPMG Fides to D. Mr Escher believes the reason that he changed the protector was both because of the deep bond between him and D but also to try and protect her to the maximum degree possible. Mr Escher says this:-

"I do not believe that he had any appreciation that making D protector would potentially have a collateral effect of excluding her from benefit. D's potential exclusion was not something that occurred to me. If it had, I would have raised it with A immediately as this would certainly not have been something that he intended."

36. On 6th April 1998 Mr Escher filled in an identification and valuation of a new client form and under the heading of 'Background Information' noted that there had been a number of discussions over the years focussed on how A could best protect D should she survive him. Mr Escher also noted that:-

"Setting up of a structure for estate planning purposes is the primary goal. Tax minimisation for the event of his potential future resident in the UK however not to be neglected.

Trustees to use their powers to ensure, whilst having regard to the letter of wishes, that D, if she survives him, will not have to worry in respect to financial support and living accommodation at all during the rest of her life."

37. Furthermore, Mr Escher says, at paragraph 59 of his affidavit that:-

"It was clear to me, from both my extensive discussions with A over the period of several years, and from the wishes he formally recorded in the First Letter of Wishes, it is principle (sic) concern in instructing the settlement of the Trust (after providing for himself during his lifetime) was to ensure that a full provision was made for D. It was on this basis that the Trust was established."

38. Mr Escher says that A thought that it was essential in order to protect D's interest that she was the protector of the Trust.

39. Shortly after the Trust had been established, however, a potential issue with regard to D's appointment as protector was identified and legal advice was taken by Ms Margareta Zweifel ("Ms Zweifel") a colleague of Mr Escher from a London solicitor Michelle Bate ("Mrs Bate"). Mrs Bate in a letter of 12th May 1998 identifies the issue presently before the Court:-

"Strictly speaking therefore although Clause 1(ix) defines an excluded person in the Second Schedule named certain excluded persons it could be argued that the

[Trust Instrument] itself does not specifically veto distributions to excluded persons unless specifically added under Clause 3. However, my view is that the general understanding of the Trust is that an excluded person is one excluded from benefit and therefore as such any trustee, protector or appointor or any person related to such should be excluded from benefit. The reason for this is clear in that it is intended that the protector, trustee etc should be independent of the beneficiaries.

I would therefore suggest that if [D] and/or members of her family are to be benefitted then she should not act as Protector of the Trust."

40. There is no record, according to Mr Escher of the Former Trustee raising these concerns with him and he presumed that D was able to benefit despite acting as protector. In November 2001 Mr Escher met with A in [city] and the discussion focussed on A's retirement plans. He said that he was in the process of amending his letter of wishes since it was his intention to include additional members of his and D's families. His mother, who was a named beneficiary, had by this time passed away. There were a number of meetings between Mr Escher and A which it is not necessary to detail. Suffice to say that a common theme amongst others within those meetings was A's intention to amend his letter of wishes. By letter dated 11th July 2003 A raised a number of issues ahead of a meeting which Mr Escher says took place on 16th July 2003. One of the points was that A said that after his death the beneficiaries under the Trust should be divided into three groups with each group being entitled to one third of the income. Group A was to comprise D and E and E's descendants. Group B would comprise B for the education of his children and Group C would comprise C for the education of his children.

41. Mr Escher gives evidence that he met with A, D and a Mr Dewhurst on 16th July 2003. At that meeting A revealed that he was suffering from liver cancer and that his health was deteriorating rapidly with a poor prognosis. Dealing with his affairs was therefore a priority. He gave more detail concerning how he wished to vary his letter of wishes but in essence his instructions followed the same general theme as set out in his letter of 11th July 2003.

42. By letter dated 16th July 2003 A wrote to the Former Trustee requesting them to "*issue a supplemental declaration of trust naming my wife's daughter and any child or remoter issue as additional beneficiaries of the settlement.*" He further created the Second Letter of Wishes which, in general terms, we have referred to above. The Second Letter of Wishes declared null and void the First Letter of Wishes, repeated the request that during his lifetime A should be regarded as the principal beneficiary and again divided the trust fund between beneficiaries falling into categories A, B and C generally along the lines foreshadowed in the letter of 11th July 2003.

43. Importantly Mr Escher says at paragraph 82 of his affidavit:-

> *"For the sake of completeness, I would like to add that I have no doubt whatsoever that these were A's true wishes."*

44. Mr Escher then sets out his understanding of whom, following the Second Letter of Wishes the beneficiaries of the Trust were. They were:-

(i) D

(ii) B

(iii) C

(iv) Any wife, widow, child or remoter issue of either B or C

(v) E

(vi) Any child or remoter issue of E; and

(vii) The Yemen Red Crescent Organisation as the "ultimate beneficiaries".

45. There then follows an explanation from Mr Escher of what to his knowledge took place after A's death. Although we have taken that into account, and it is clear that issues were raised by B and C in connection with the administration of the Trust, we do not set out that detail of what we were told as it does not seem to us to assist us in determining A's intentions at the time that the Trust was created.

46. Mr Escher does tell us, however, what the distributions from the Trust have been to the beneficiaries. It is clear that D received approximately US$2.1 million between 2003 to 2013; B received approximately US$4 million between 2003 to 2017; C received approximately US$4.2 million between 2003 to 2017; E received approximately US$50,000 in 2015 and G received approximately US$30,000 in 2017. Mr Escher confirms that all of the distributions were made following A's express wishes. In the concluding paragraphs of his affidavit Mr Escher confirms at paragraphs 139 et seq:-

"139. It is also quite clear to me that A was mindful of the difficulties D might face in the event of his death, and that he wished to protect her position to ensure that she was provided for. I believe it was because A and D were so close that A insisted that D should act as Protector of the Trust. Had that not happened, however, the issue at the root of this application would not have arisen.

140. I am also very clear in my mind that in 2003 A wanted E (and her issue) to benefit from the Trust as well. He set out his intentions very clearly in the Second Letter of Wishes, and in our discussions before his updated wishes were finalised. He was clearly unaware that there was any difficulty in adding E. This suggests strongly to me that he had no intention of excluding D or E from benefit.

141. I do not believe either that there was any intention to exclude B or C or their respective families. B and C were A's sons from his first marriage. They were beneficiaries of the Trust and A's natural heirs."

47. We also received the evidence in the form of an affidavit from Ms Zweifel which, so far as the matters in Mr Escher's affidavit were within her knowledge she endorses them to be true and accurate.

48. She merely gives evidence as to the stance that she believes will be taken by B or C and E in terms of participating in the application before us.

The evidence of B and C

49. The principal evidence against the relief sought by the Representors is the evidence of B who swore an affidavit on 15th January, 2018.

50. In it he makes a number of observations about the actions of the Trustee and what has occurred within the Trust. He also makes the observation that the Trust Instrument has remained unchanged for approximately 20 years. He asserts that A created the Trust to secure his retirement and to secure a high standard of living for his sons and for the third generation of his grandsons whom he had always looked after.

51. He raises a number of concerns and complaints in connection with the Trust but, of significance to our determination in particular, is the fact that he disputes the validity of the letter of request of 16th July 2003 by which A asked for the addition of E and her offspring as beneficiaries of the Trust. This causes concern to B because the letter derives from a supposed meeting which Mr

Escher claims he had with A on 16th July 2003 but, to B's knowledge and understanding, his father was not in London where the meeting was supposed to have taken place on that date. He points to evidence that suggests such a meeting could have taken place with D alone but not with his late father.

52. He points out that the Second Letter of Wishes was prepared very shortly before A's death and the implication is that the Second Letter of Wishes did not reflect A's true intention and that D was highly influential over A. It raises the spectre that prior to his death A may not have had capacity to execute the Second Letter of Wishes.

53. B's affidavit evidence is supported by affidavit evidence from his wife, his daughter G, his daughter H, his son I, his son-in-law J, and his son-in-law K, all of whom simply deposed to the fact that they have read B's affidavit and believe it to be true. G, however, filed a second affidavit dated 29th January 2018 in which she deposed to her relationship with A citing him as a loving grandfather who provided her with extensive direct financial support and was generous to her, paying for her education in the United Kingdom. She also spoke to us directly to the same effect.

54. She also makes reference to the alleged meeting of 16th July 2003 and says that in her view that meeting could not have been attended by A because to her knowledge he was not in London on that day and did not attend London until 20th July. She derives her knowledge from a review of her grandfather's original passport, a copy of which was subsequently provided to the Court in full, which says that there is no entry stamp showing that A was in London on 16th July. There was, however, an entry stamp at London Heathrow showing that he entered the country on 20th July 2003, some 4 days thereafter.

55. On this latter point we should note that after the hearing before us in a letter dated 1st February 2018 Messrs Mourant Ozannes, who act for the Representors, made reference to a full copy of A's passport and drew our attention to an exit stamp from the [country] dated 15th July, 2003 which could accord with the suggestion of a trip to London for a meeting on 16th July. There is no clearly delineated entry stamp into London, however, but we are directed to the Heathrow entry stamp, the date of which is wholly obscured as at least leaving open the possibility that A did actually arrive in London in accordance with the evidence of Mr Escher the day before a meeting which took place on 16th July.

56. G's affidavit goes on to exhibit, however, a manuscript note which she identifies as being in the hand of D which lists the number of days that she spent in the United Kingdom in 2003. There is one entry which suggests that she arrived on 4th July and left on 16th July 2003 (excluding arrival and departure dates). It is suggested in G's affidavit that we should infer from this that D

attended the meeting on her own but not with A. G's affidavit goes on to make observations about D's behaviour following the death of A but it is not clear to us that this assists in any way in identifying A's intention.

57. We also had the benefit of a second affidavit from Mr Escher ("Mr Escher's second affidavit") which he prepared in part in response to some of the allegations made by B. In particular Mr Escher refers to the written submissions filed by B before us and in particular the allegations or suggestions that the evidence demonstrated that D was the driving force behind the settlement of the Trust in the first place and was in control of A at and around his death; that D had control over A; and that there is no evidence that A was well enough to understand his actions nor that he had capacity. Mr Escher points out that this was the first time that he had been aware that there was any suggestion that A lacked mental capacity in the days immediately preceding his death.

58. In Mr Escher's second affidavit he says that in the final days of A's life he attended a clinic in Germany where A was receiving care to assist him with the arrangements for his affairs. He recalls "*very clearly that A remained keenly aware of exactly what was being arranged and effected and to his last day was as sharp as ever.*" Mr Escher confirms that he did not have any cause to consider that A's capacity might be impaired. He also confirmed that D did not bring any inappropriate influence over A whilst Mr Escher was there and that A was a man with a strong and determined personality. He concludes by saying, at paragraph 13:-

> *"I therefore have no doubt whatsoever that A understood the decisions he was making, and understood their consequences. As ever, D was supportive of her husband, but in no way controlling or unduly influential. I never had any cause for concern in either regard."*

59. In Mr Escher's second affidavit, Mr Escher goes on to talk about other transactions at the time leading up to A's death. In particular he reviews certain property transactions. He exhibits a number of documents in connection with those transactions signed by A. A witness to A's signature was Dr Kai Rosler who Mr Escher describes as "*one of the doctors treating A at the German clinic. I infer from the application of Dr Rosler's signature to those documents that A's capacity was not, as far as Dr Rosler was concerned, an issue. None of my recollections or Virtue Jersey's contemporaneous documents note A's capacity to be an issue either*."

60. We heard also from Advocate MacDonald (in place of Advocate Evans) as guardian-ad-litem for the B and C minors and Advocate Swart for the D minors.

61. The submission of Advocate Evans is largely contained in his letter to the Court of 25th January 2018 supplemented by submissions from Advocate MacDonald. He sets out much of the background which is common to all of the parties. We do not think it necessary to refer in any detail to Advocate Evans' letter although we have found it thorough, well considered and helpful.

62. We have also had the benefit of a letter from Advocate Swart together with his submissions. Similarly we do not think it necessary to go into detail as to what the letter and submissions say although we have also found these helpful and well considered .

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 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.

67. Accordingly we amend the deed in the manner sought in paragraph 1 of the prayer of the Representation dated 23rd November, 2017.

68. Turning now to the issue of a ratification it seems to us that it is unnecessary for us to ratify the actions taken by the Former Trustee and the Trustee because the rectification is deemed to date from the creation of the Trust.

69. It appears that there may be a dispute between the beneficiaries as to the capacity of A to give instructions to change the beneficial class in 2003 and to execute the Second Letter of Wishes, the result of which E became a beneficiary and has received a relatively modest benefit. It seems to us that the preponderance of evidence suggests that A did have capacity but we are conscious that this is a matter that has not been tested by cross-examination nor indeed does it appear to us to have been raised other than as a concern. We do not therefore make any determination as to A's mental capacity in 2003. As we have said in our view the preponderance of evidence suggests that he had capacity but we leave over the possibility that there could be a challenge to the validity of the Second Letter of Wishes and the alteration of the class of beneficiaries should parties wish to launch such a challenge.

70. In the light of the order that we have made the Trustee can treat the alteration of the class of beneficiaries, and the implementation of the Second Letter of Wishes as unimpeded by any mistake made at the creation of the Trust by A when he named D as protector. That says nothing about the validity of the requests made by A in 2003 about which we make no final determination.

71. It seems to us that it is a matter for the Trustee as to whether or not they are satisfied that A had capacity or whether they wish to have that matter argued before the Court. Similarly it is a matter for those beneficiaries who feel it appropriate to challenge if they believe that there is a real issue in that regard. This, so it seems to us, falls within the characterisation of hostile trust litigation and is not a matter to be resolved within a rectification application.

Authorities

R.E. Sesemann Will Trust [2005] JLR 421.

Allnutt and another –v- Wilding and others [2007] EWCA Civ 412.

In Re Madge's Settlement [1994] JLR Note 16b.

Re The S Settlement 2001/154.