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SHORTER ARTICLES

NOTHING UP MY SLEEVE

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Sometimes there is less to mistake than meets the eye. Where a power arising under a trust is purportedly exercised by someone who in fact does not have the power, it is too easy to say that there is a mistake and the power has not been validly exercised, subject only to the application of appropriate equitable remedies, such as rectification. But where (as often happens) the person actually having the power, but not realising it, has also executed the instrument, at the least approving what the other has purported to do, then Jersey law, like English law, ought to hold this in itself a sufficient execution of the power, thus obviating the need for the other remedies.

Introduction

1 Suppose that a power arising under a trust is to be exercised, perhaps a trustee is to be appointed, or one is to be removed. Everyone concerned thinks that, under the terms of the trust, A has the requisite power. A therefore duly executes the instrument purporting to exercise that power, along with B, C and D as other persons interested. Perhaps they are the principal beneficiary, the trustees, maybe even the settlor of the trust. It does not matter. They all want it to happen.

2 Unfortunately everyone is mistaken, and in law A does not have the requisite power. A's execution of the instrument does not have the desired effect. Or even worse: A does not exist and although he is referred to in the instrument he obviously cannot sign (and no-one notices his absence). Or worse still: A is a company that *used* to exist but has since been dissolved, and those signing on A's behalf have no power to bind a non-existent person. These three scenarios raise the same problem, namely a common mistaken belief, implemented and relied on, as to who has power under a trust to do an act. What, if anything, can be done?

3 Well, you might think, it all depends. The Royal Court on two recent occasions has separately invoked the remedies of (i) rectification and (ii) ratification to solve the problem. First, in *Re A, A*

v B,[1] the scenario which occurred was the second of the three above, and the court applied rectification. Then, in *Re BB, Re D Retirement Trust*,[2] it was the third of them, and the court applied ratification. (I suppose it is too late now to halt the slide of Jersey trust case-law into the alphabet soup that is now our daily diet, but all the same it is starting to get a bit tricky sometimes to work out *which* "*Re A*" or "*Re B Trust*" is being referred to.)[3]

Rectification

4 In *Re A, A v B*,[4] the original trustee purported to retire in favour of K, then subsequently K retired in favour of L, and finally L retired in favour of A. It was A who noticed that the power to appoint a new trustee was actually vested in the first instance in the protector of the settlement, and only in default in the trustees for the time being. The appointment of K as trustee was purportedly made by an instrument in which the protector was described as "the Appointor". But in fact there was no protector at the time and the identity of "the Appointor" was left blank in the instrument. As the Royal Court observed—

> "6. As no protector had been appointed to the settlement, the power of appointment in fact vested in the retiring trustee, J, and there should have been no reference to the protector being the Appointor.
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> 7. As a result of these errors, it would appear that K was not validly appointed by the … instrument …"

5 The Royal Court was asked to and did rectify the instrument of appointment by deleting the reference to the protector and describing J, who was after all a party to the instrument, as "the Appointor". J was a company which had since these events been dissolved, and therefore its reinstatement as a trustee, unlicensed and without assets, was not feasible. The court said—

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[1] [2011] JRC 008, 14 January 2011 (Clyde-Smith, Commr; de Veulle, Marett-Crosby, Jurats).

[2] [2011] JRC 148, 28 July 2011 (Clyde-Smith, Commr; Clapham, Milner, Jurats).

[3] The same problem arose some years ago in English family cases, where anonymisation is now routine, and the fashion now has grown up of adding some distinguishing words in brackets as part of the title, to give us all a clue which case this is. Thus: *Re A (A Child: contact order)*, or *Re B (A mental patient: statutory will)*. Perhaps Jersey could adopt something similar.

[4] [2011] JRC 008, 14 January 2011 (Clyde-Smith, Commr; de Veulle, Marett-Crosby, Jurats).

> "18. We agreed that rectification, which is retrospective in effect, was the only practical remedy which should, in the exercise of our discretion, be granted."

6 As is well known, rectification is a doctrine allowing the court, satisfied that the intentions of the parties have been misrecorded in a document, to rectify the document so as to make it accord with those intentions. It is interesting to note that, beyond a bare reference to J's intention to retire as trustee of the settlement in favour of K,[5] the court did not discuss the question of the parties' intentions in executing the instrument at all in the judgment. In particular, the court did not discuss whether J intended to exercise the power to appoint K as trustee, which intention was then not properly recorded in the instrument. The significance of this will become apparent later.

Ratification

7 A similar point arose in *Re BB, Re D Retirement Trust*.[6] Here, the original trustee of the trust as set up was G. The "principal employer", D, a limited company, had the power under the trust to appoint new and additional trustees. In 1996 D was put into liquidation and dissolved. But in 1997 the existing trustee G, having overlooked the dissolution of D, purported to give to D under the trust instrument one month's notice of resignation as trustee. If D had existed, this would have triggered an obligation under the trust on D to appoint a new trustee to replace him. An instrument was then executed by G and (apparently) D, under which G purported to retire and D purported to appoint A as trustee in his place. The corporate seal of D was placed on the instrument and two corporate signatories executed it, all seemingly in ignorance of the fact that D had already been dissolved the previous year. Two months later, a further instrument was executed under which D in the same way as before purported to appoint two others as additional trustees. The non-existence of D at these critical times was noticed only in 2009. The question was what to do about it.

8 Upon advice, the three persons who had up till then considered themselves to be the current trustees of the trust (namely A and the two others) brought these proceedings seeking *inter alia* a declaration or at least confirmation of the validity of their appointments as trustees. The purportedly retired trustee, G, was convened, and its lawyers questioned whether the court had any power to confirm the appointments *retrospectively* (obviously the court could appoint them

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[5] See para 15.

[6] [2011] JRC 148, 28 July 2011 (Clyde-Smith, Commr; Clapham, Milner, Jurats).

prospectively). Those lawyers suggested instead an application for *rectification* of both instruments of appointment of trustees, following the case of *Re A*, mentioned above. In the event such an application in respect of the first instrument was made at the hearing, but by G rather than by the representors. The latter rested on the wisdom of the court, but, if the court saw fit to make the rectification, sought in relation to the first instrument, applied for the same relief in relation to the second.

9 The Royal Court was clear that the instruments as they stood were invalid—

> "16. D did not exist at the time the first and second appointments were entered into. It was not in issue therefore that those appointments were invalid and we so declare."

10 In relation to rectification, G argued that, since there was no principal employer in existence at the relevant time G itself was able to appoint a successor trustee under what was then art 13(1) of the Trusts (Jersey) Law 1984 as amended. Since G had executed the instrument with the intention of divesting itself of the trusteeship in favour of A, it could be rectified by deleting the references to D and showing G as the appointor.

11 The court could not immediately accept the argument. It had first to get over the fact that art 13(1) in terms applied only "where the terms of the trust contain no provision for the appointment if a new or additional trustee …" This trust instrument did contain a provision conferring such power on the principal employer. However, in *Re Royal Trust (BVI) Ltd & Baptiste*,[7] the court had given a generous interpretation to the words of art 13(1), in effect construing it as meaning "where the terms of the trust contain no provision capable of being exercised in the circumstances for the appointment if a new or additional trustee …" The court in the present case agreed with that approach.

12 The court then turned to rectification, and had to grapple with the question of intention—

> "27. The first part of the test for rectification requires the Court to ascertain the true intentions of the parties. Whilst it is clear from the face of the instrument that G intended to resign as trustee, did it intend to exercise the power to appoint the new trustee? There was no discussion in the judgment in *Re A* as to the extent to

[7] Jersey unreported, 29 October 1990, Le Cras, Commr.

> which, in rectifying a document, the Court can impute to a party an intention it may not have had."

Whatever the position might have been in *Re A*, here, as the court said—

> "it is difficult to say that it was G's true intention to do anything other than to retire. As for A, its intention, again from the face of the instrument, was to be appointed trustee by D and to give indemnities to G".[8]

13 This and other difficulties led the court to consider whether there was any other practical remedy for the situation in which the parties now found themselves. It concluded that there was. The court could (and did) appoint the would-be trustees as the trustees for the future, and *ratified* their actions for the past as in effect trustees *de son tort*. It said:

> "43. The definition of a trustee in Article 2 of the Trusts Law is wide enough to encompass a trustee *de son tort* and therefore the Court would have jurisdiction to make orders in relation to the representors under Article 51 of the Trusts Law. That article makes no express reference to ratification of past acts of trustees but if there is any doubt as to the Court's power to ratify the past actions of the representors under Article 51, then in our view, the Court has an inherent jurisdiction to do so."

This seems to be the first case in Jersey law of such ratification.

14 Accordingly it was not necessary to rectify the instruments of appointment, even if the requirements for that remedy had been met, and the court reached no concluded view on that issue. As for G, who had unbeknownst to itself continued as trustee when it thought it had retired, the court was prepared to relieve it from any breach of trust under art 45(1) of the 1984 Law. All's well that ends well.

"Will there be anything else, sir?"

"Well, yes, actually, there will. What about the elephant in the room"?

> "The elephant in the room, sir? *Good Lord, sir!* How did *that* get in here?"

15 Who knows? But let's explain it anyway. Here's the problem. Everyone thinks that, under the terms of the trust, one person has the necessary power. That person therefore duly executes (or doesn't

[8] At para 28.

execute) the instrument purporting to exercise that power, along with others. But they are all wrong. That person doesn't have the power. Someone else does. But suppose that the "someone else" *also* executes the instrument. Approving it, wanting it to happen. So—just doing a bit of blue sky thinking for a moment—if the *right* person executes the instrument intending to make the right thing happen, *wanting* the right thing to happen, why do we get so pernickety just because the instrument is *also* executed by the wrong person?

16 Good question. What does Jersey law say about this? Not much (but we will come back to that). Well, what about English law, then? A bit more. Actually, quite a lot. Indeed, English law says, in broad terms, that if the right person executes the document, intending the document to take effect, let's not get too fussed if they thought someone else had the power, at least where there is no indication that the right person didn't want it to happen. After all, if the mistake had been discovered at that point, and the right person identified as having the power in question, wouldn't the right person still have executed it nonetheless? That's the trouble with English law, you may think. All substance and no form. Most civilians would be foaming at the mouth by now.

17 There are lots of English cases on this point. But in *Re Ackerley*[9] Sargant, J summarised the principle in this way—

> "I should prefer to state the rule thus namely, that in order to exercise a special power there must be a sufficient expression or indication of intention in the will or other instrument alleged to exercise it; and that either a reference to the power or a reference to the property subject to the power constitutes in general a sufficient indication for the purpose."

18 So the rule concentrates on a sufficient indication of intention to exercise the power, but regards that as satisfied in *either* of two situations: (i) where there is reference to the power, and (ii) where there is reference to the property subject to the power. As to the former limb, even an indirect reference to the power will suffice. Thus, in *Re Farnell's Settled Estates*,[10] an executor and trustee of a will trust had the power to appoint new trustees. The estate included a renewable lease. It expired, and was renewed by the lessor in favour of four persons who had not otherwise been appointed as trustees of the will, but were described as "the present trustees of the will". The surviving executor and trustee was a party to that lease. North, J accepted that

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[9] [1913] 1 Ch 510, at 515.
[10] (1886), 33 Ch D 599.

the execution of the lease by the executor operated as an implied appointment by him of the four persons as trustees.

19 As to the latter limb, this is important in practice because there are often cases where there is no reference, even indirect, to the power whose exercise is in question. In *Davis v Richards & Wallington Industries Ltd*,[11] Scott, J, after discussing the relevant cases, said—

> "A disponor (A) purports to make a disposition of property. The disposition cannot be effective unless associated with the exercise of a power vested in A and that A could properly have exercised in order to make the disposition. The disposition makes no mention of the power and does not purport to be an exercise of it. The effect of the principle and cases to which I have referred is that A's intention to make the disposition justifies imputing to him an intention to exercise the power, provided always that an intention not to exercise the power cannot be inferred. If the requisite intention can be imputed, the court will treat the disposition as an exercise of the power."

20 In that case this meant that a power conferred on an employer under an interim trust deed to remove trustees was exercised when a trustee had indicated his intention to retire and the definitive trust deed was executed by the employer and the two remaining trustees, and even though no reference was made in the deed to the exercise by the employer of the power to remove trustees.

21 It will be seen that here, then, is the answer to the question about intention quite properly raised by the Royal Court in *Re BB, Re D Retirement Trust*.[12] The employer intended to make the definitive trust deed. It could not as a matter of law be made without the concurrence of all the trustees. Therefore, in order for the definitive trust deed to have effect, the retiring trustee had to be removed. The employer had the power of removal. There was no intention shown *not* to exercise that power. Therefore the court was justified in imputing to the employer the intention to remove.

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[11] [1990] 1 WLR 1511.

[12] [2011] JRC 148, 28 July 2011 (Clyde-Smith, Commr; Clapham, Milner, Jurats).

Jersey trust law

22 That is English law. But the reader may ask why the Royal Court should accept this (on one view) generous approach to intention? Actually, it already has. In *Re Representation Epona Trustees Ltd, Re T 1998 Discretionary Settlement*,[13] there were three trustees of an English law trust, two Jersey and one English. The English trustee purported to retire by deed executed by her but not by the Jersey trustees (although on the evidence it was clear that they agreed with it). A few months later the remaining trustees executed various deeds as part of a refinancing scheme, in which they were described as "the trustees" of the trust. The English trustee would have been a necessary party to these deeds had she still been a trustee. The Royal Court received expert evidence of English law, which required that the English trustee's retirement could not take effect without the consent *by deed* of the continuing trustees.

23 That expert evidence dealt also with the principle of imputed exercise of powers discussed above, and in its application to the facts of the case was summarised by the court in this way—

> "33. … In counsel's opinion the doctrine embodied in the cases referred to above applied so that the Release and the Assignment, both of which were executed by [the Jersey trustees] as deeds, must be taken to have embodied an exercise of their power to consent to [the English trustee]'s retirement and to the vesting of the trust property in them alone and to have perfected her discharge as a trustee. The fact that they were not conscious that they were so consenting is immaterial. Their intention to effect the transactions embodied in the Release and the Assignment as the trustees (and the only trustees), of the Trust was sufficient."

24 The court accepted this evidence, and declared that the English trustee had properly retired, because—

> "the execution by [the Jersey trustees] of the Release and the Assignment on 25th July 2001 was effective to constitute the giving of their consent by deed to [the English trustee]'s discharge as a trustee and to the vesting of the trust property in themselves alone."

25 That case, of course, concerned an English law trust. But plainly the Jersey court was not so shocked by the English law approach to ascertaining the intentions of those who executed trust instruments that it felt unable to give effect to it. And, in any event, in private

[13] [2008] JRC 062, 17 April 2008 (Birt, B; de Veulle, Clapham, Jurats).

international law matters of evidence and fact-finding are for the forum rather than the *lex causae*.[14]

26 If, therefore, the English approach exemplified by *Davis v Richards & Wallington Industries Ltd*[15] may properly be adopted by the Royal Court in relation to Jersey trust cases, it appears to supply a simple answer to the range of scenarios envisaged at the outset of this note. Certainly it would have met the needs of the trusts in *Re A, A v B*,[16] and *Re BB, Re D Retirement Trust*.[17] Where there is a common mistaken belief, implemented and relied upon, as to who has power under a trust to do an act, and the wrong person executes the instrument, *but so does the right person*, then, in the absence of any expressed objection by the right person to executing the power, the right person may have imputed to him, her or it the intention to exercise the power, and, because there is therefore no problem to be solved, there is no need for rectification, ratification or any other remedy.

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[14] *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No 2)* [1967] 1 AC 853; *Re Fuld (No 3)* [1968] P 675; *Macmillan Inc v Bishopsgate Trust (No 3)* [1996] 1 WLR 387; *Harding v Wealands* [2007] 2 AC 1; *Maher v Groupama Grand Est* [2009] EWCA Civ 1191; *Fiona Trust & Holding Corporation v Privalov* [2010] EWHC 3199 (Comm).

[15] [1990] 1 WLR 1511.

[16] [2011] JRC 008, 14 January 2011 (Clyde-Smith, Commr; de Veulle, Marett-Crosby, Jurats).

[17] [2011] JRC 148, 28 July 2011 (Clyde-Smith, Commr; Clapham, Milner, Jurats).