

UPDATE

What do 'subject thereto' and 'share' mean in a trust instrument?

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There have been two recent judgments in the Guernsey Court of Appeal on the construction of trust instruments. While there are no new points of law in the judgments, they are helpful summaries of the law and illustrate how the Court is likely to approach these types of issues in practice.

In the matter of the K Trust [2020] GCA 080

What is the proper meaning of the word 'share' in the context of a trust deed?

Summary

This appeal, by a beneficiary against a decision of the Court, determined the true construction of a trust instrument where there was confusion over how to interpret the meaning of the word 'share' following the death of a minor beneficiary. The appeal was allowed and Construction B1 (summarised below) was held to be the correct construction of the Trust Instrument. The costs were to be met out of the Trust Fund unless applications to the contrary were received within three days of the judgment being handed down.

Facts

The application was not contested by any parties and the trustees took a neutral stance in proceedings.

The judgment, in private, was handed down on 18 November 2019 and that decision was appealed by Beneficiary 'A', who was the surviving spouse of a settlor of two trusts.

The settlor and Beneficiary 'A' had twin daughters who were also beneficiaries of the trust, known as Beneficiary 'B' and Beneficiary 'C'. The settlor died of a terminal illness shortly after settling the trusts and 'C' sadly died whilst a minor, leaving 'A' and 'B' as the remaining beneficiaries of the trust, with 'A' as the principal beneficiary. The beneficial class also included *'any persons added to the class by the Trustees under their powers'* and *'charities'*.

The early death of 'C' led to the construction issue being brought before the Guernsey Court. There is no family difficulty or dispute and relationships were not strained in any way. Concern had arisen because words had not been used with a consistent meaning in the drafting of the trust instrument and this caused confusion as to their meaning and how the trust provisions interacted with one another, following 'C's' death. Faced with this confusion the Trustee sought the views of the Court.

It was accepted that a lack of care had been exercised in drafting the trust instrument and there was concern about the appropriate construction of words used in the drafting. The construction issues arose in respect of the principal income and capital provisions in the trust, especially those that applied in the event of a death of one of the daughters. These stated:

'7. TRUSTS OF CAPITAL AND INCOME The Trustees shall stand possessed of the Trust Fund and the income thereof upon the trusts following that is to say:

7.1 The Trustees shall during the Trust Period stand possessed of the capital and income of the Trust Fund upon trust to pay or apply the Trust Fund with the consent of the Protector and the income therefrom without such consent to or for the benefit of [B and C] (jointly referred to as 'the Daughters' or singly as a 'Daughter') and in determining the amount or amounts to pay or apply the Trustees shall consider the Settlor's wishes in relation to [B and C] as set out in the Memorandum at the Eighth Schedule.

7.2 To the extent appropriate and practicable, the Trustees will apply a notional split of the Trust Fund, in line with the Settlor's wish to maintain the application of equal benefits to the Daughters as far as possible. This, however, should be applied at the discretion of the Trustees, in consultation with the Protector and, in respect to the realisation of investments, the Investment Committee.

7.3 If a Daughter dies without children prior to a Termination Event the Trustees shall transfer her share of the Trust Fund as determined under clause 7.2 (or whatever part of her share which at the time had not been distributed to her) as to one half to [the A trust], and the other half to the surviving Daughter's share of this Trust Fund but if such Daughter's death without children is after a Termination Event the full amount of the deceased Daughter's share will be transferred to the surviving Daughter's share of this Trust Fund.

7.4 If a Daughter dies leaving children the Trustees shall during the Trust Period hold the deceased Daughter's share to pay or apply the Trust Fund with the consent of the Protector and the income therefrom without such consent to or for the benefit of her children and issue and in determining the amounts to pay or apply the Trustees shall consider the Settlor's wishes as set out in the Memorandum at the Eighth Schedule.

7.5 The word 'benefit' is to be interpreted with the widest possible meaning.....'

Share is not a defined term. The Trust Period was not restricted and the Termination Event was the first to occur of the death of 'A', and 'A''s cohabitation or remarriage prior to the daughters completing their education.

The Eighth Schedule of the trust is unusual as it is a memorandum of wishes from the settlor, although it is noted not to be binding as you would expect with an expression of wishes.

It is interesting to note that (amongst other points):

- the settlor did not require the costs of each daughter's education to be equalised in any way,
- at age 30 each daughter received their one third of the income up to a specified limit and at age 35 they received two thirds of income up to a specified limit,
- 'share' was not said to mean a 'fixed share',
- 'share' was also used in relation to capital distributions after age 40

The parties identified four possible constructions:

- 'Construction A': Beneficiary C did not have a 'share' of the Trust Fund, and therefore the Trustee is not required to make any transfer from the Trust to the A Trust.
- 'Construction B1': Beneficiary C did have a 'share' of the Trust Fund to the extent of one half, and therefore the Trustee must transfer one quarter of the Trust Fund to the A Trust.
- 'Construction B2': Beneficiary C did have a 'share' of the Trust Fund to the extent of one third of the Trust Fund, and therefore the Trustee must transfer one sixth of the Trust Fund to the A Trust.
- 'Construction B3': Beneficiary C did have a 'share' of the Trust Fund, which falls to be determined at the discretion of the Trustee.

Beneficiary 'A' proposed that Construction B1 should be adopted, while Beneficiary 'B' proposed that Construction A should be adopted. The unborns and unascertained beneficiaries supported Construction A or alternatively Construction B3. The Trustees adopted a neutral stance.

The Law

The Court relied upon sections 68, 69 and 71 of the Trusts (Guernsey) Law, 2007.

The parties agreed that the principles of construction set out in *In the matter of the C Trust* [2013] GLR 105 should be adopted as well as the guidance and authority in the Jersey case of *In the matter of Internine and Intertraders Trusts* [2005] JLR 236 (paragraph 62). From those two decisions the learned Bailiff summarised the guidance as follows:

'10. ... The aim is to establish the presumed intention of the Settlor from the words used in the Trust Instrument, construed against the background of the surrounding circumstances or matrix of facts existing at the time the K Trust was created, the critical provisions being read in the context of the document as a whole, giving words their ordinary meaning as far as possible. When comparing different constructions, a construction that leads to a very unreasonable result would be relevant; the more unreasonable the result, the less likely it would represent the Settlor's intention. In looking at the matrix of facts, evidence of subjective intention, drafts and other matters extrinsic to the Trust Instrument is inadmissible.'

No novel points of law arose.

Prior decision under appeal

In the original judgment under review Bailiff Collas ignored inadmissible material and applying the legal principles which he had set out interpreted the phrase 'C's share..as determined' with the word 'as' meaning 'to the extent' and the word 'determined' in the past sense. Therefore the reference was to something that had happened in the past. It was not a reference to share to be determined now or in the future.

The learned Bailiff felt the opening words, '*To the extent appropriate and practicable...*' supported his construction as it was not appropriate to allocate a notional share to Beneficiary 'C' who had died. He felt none of the suggested constructions would lead to an unreasonable result and that Construction A was the proper construction.

Decision

On appeal the Court felt the question that should be asked was whether one construction was more reasonable than another when considered alongside the matrix of facts. On the facts each child had been treated equally up until 'C's death and it was held Construction B1 was the correct construction. It provided that Beneficiary 'C' did have a 'share' of the Trust Fund (using its ordinary meaning) to the extent of one half and therefore the Trustee must transfer one quarter of the Trust Fund to the A Trust.

It was felt this interpretation of the word 'share' was most closely aligned with the non-binding memorandum of wishes in the Eighth Schedule where paragraph 5.8 provides,

'It should be noted that in using the term 'share' in this Memorandum, it is intended to reflect the approximately equal treatment desired by the Settlor (as referenced in paragraph 5.1) but is not intended to mean a 'fixed share' in the legal sense of that term.'

In the Matter of the R Trust¹

What is the proper meaning of the phrase 'subject thereto' in a trust instrument?

Summary

This appeal concerned the question of whether, on a proper construction of the Declaration of Trust, the Appellant (a beneficiary) had the power to appoint two additional protectors, so that the incumbent protector was not the sole holder of that office. The additional protectors had purported to replace the existing trustees. This was an apparent attempt by the Appellant to stymie ongoing proceedings about the fair partition of the trust assets between the beneficiaries. At first instance, dealing only with the question of construction and not the issue of fraud on a power (which was parked), the Deputy Bailiff Richard McMahon (as he then was) found that the Appellant did not have the power contended for whilst the incumbent protector remained in office. The Court of Appeal upheld this decision.

¹ [2020] GCA 065 (**Re R Trust**). [The authors would like to thank Jeremy Wessels for his assistance with this article]

Facts

The question on appeal was a pure point of law and did not turn on contested facts.

The Declaration of Trust established a Guernsey law trust which made provision for a Protector with various functions, including the power to remove and appoint trustees. The Protector was defined as *'the person or persons for the time being occupying the office of the Protector pursuant to the provisions of Schedule C'*.² Paragraph 1 of Schedule C contained the following provisions dealing with the *'Identity of the Protector'*, each ending with the words *'and subject thereto'*:

'The Protector in relation to the Trust Fund shall be:

1.1 The Incumbent Protector for so long as he has not resigned and is able to act as the Protector and subject thereto

1.2 such person or persons (either jointly or in succession) as A may by deed or deeds executed before the Perpetuity Date (to which the person or persons then nominated are also party) revocably or irrevocably appoint to be the Protector for so long as such person (or as the case may be persons) is in being has not resigned and is able to act as the Protector and subject thereto

1.3 such person or persons (either jointly or in succession) as the person or persons for the time being in office as the Protector under an appointment made under the paragraph above may by deed or deeds executed before the Perpetuity Date (to which the person or persons then nominated are also party) revocably or irrevocably appoint to be the Protector for so long as such person (or as the case may be persons) is in being has not resigned and is able to act as the Protector (and if the appointment made under paragraph 1.2 above provided for successive Protectors then any exercise of this power by an earlier Protector in the succession shall exclude any exercise of this power by a later Protector in the succession) and subject thereto

1.4 such person or persons (either jointly or in succession) as the person or persons for the time being in office as the Protector under paragraph 1.3 above may by deed or deeds executed before the Perpetuity Date (to which the person or persons then nominated are also party) revocably or irrevocably appoint to be the Protector for so long as such person (or as the case may be persons) is in being has not resigned and is able to act as the Protector (and any exercise of this power by an earlier Protector in the succession set out in paragraphs 1.3 shall exclude any exercise of this power by a later Protector in the succession) and subject thereto

1.5 such person or persons (either jointly or in succession) as the Trustees may by deed or deeds executed before the Perpetuity Date (to which the person or persons then nominated are also party) revocably or irrevocably appoint to be the Protector for so long as such person (or as the case may be persons) is in being has not resigned and is able to act as the Protector.

*1.6 Any statement in a deed appointing the Protector that any person is no longer in office as the Protector no longer living or no longer capable of acting shall be conclusive in favour of any person dealing with the Trustees.'*³

The question of interpretation concerned the meaning of the words *'subject thereto'* in the Declaration of Trust. The Appellant (supported by two of the respondents) contended that it meant *'subject to there being, for the time being, fewer than three persons together holding the office as the Protector'* so that all the powers of appointment in paragraphs 1.2 to 1.5 are available at any time to add to the number of Protectors in office unless there are already three Protectors. The other respondents (including the Trustee) all submitted that it meant *'subject to the conditions which precede them in the sub-clause not being satisfied'*; in other words, only if a method of appointment in one sub-paragraph has not been exercised or the appointment made under it has come to an end, can a power of appointment in the next paragraph be exercised effectively.

The Incumbent Protector was named in the Declaration of Trust and under paragraph 1.1 and he remained the Protector as he had not resigned and was still able to act. In December 2019, the Appellant executed an

² Ibid, at 4.

³ Ibid, at 6.

instrument purporting to appoint two companies as additional Protectors to act concurrently with the Incumbent Protector. As the powers of the Protectors were exercisable by majority where there was more than one, this effectively gave control to the two appointed by the Appellant. In January 2020, they then executed an instrument purporting to change the trustees.

The Law

It was common ground that, on interpretation of an instrument such as the Declaration of Trust, the court must identify the objective meaning of the language and not '*speculate on the subjective intentions of persons involved in drawing it up*'.⁴ However words and phrases derive their meaning from context, so the court must also consider the context of the instrument and the setting in which it was made. This involved an appreciation of the impact of alternative interpretations. The approach taken in England & Wales was equally applicable in Guernsey.

The following extract from the judgment given by Sir Richard Collas, Bailiff, in the matter of K Trust (unreported, [2019] GRC089), was cited with approval:

*'... The aim is to establish the presumed intention of the Settlor from the words used in the Trust Instrument, construed against the background of the surrounding circumstances or matrix of facts existing at the time the [K Trust] was created, the critical provisions being read in the context of the document as a whole, giving words their ordinary meaning as far as possible. When comparing different constructions, a construction that leads to a very unreasonable result would be relevant; the more unreasonable the result, the less likely it would represent the Settlor's intention. In looking at the matrix of facts, evidence of subjective intention, drafts and other matters extrinsic to the Trust Instrument is inadmissible.'*⁵

Decision

It was held that the decision of the Deputy Bailiff at first instance had been correct and that it was the 'plain meaning' of the words used. The sub-paragraphs of the relevant clause applied in a cascade, i.e. each sub-paragraph did not become operative until the sub-paragraph above it had been exhausted. This was the meaning of 'subject thereto'; subject to the sub-clause immediately preceding it. This was in keeping with Stroud's Judicial Dictionary of Words and Phrases 9th edn, *Gray v Goulding*⁶ and other cases.

One of the reasons given for reaching that conclusion was that the same phrase had been used elsewhere in the Declaration of Trust to specify who has power to appoint trustees and it was clear in that provision that it was used to specify that the Protector had that power (exclusively) and only if there was no Protector, did the power lie with the Trustees. Since words are normally used with the same meaning throughout a document, that supported a similar construction of the phrase in the protector appointment provisions.

The Court also considered the consequences of each interpretation in reaching its conclusion. For example, under the Appellant's construction, if there were two protectors, one appointed under 1.3 and the other under 1.4, either of the protectors could appoint a third, with no priority between them:

*'It cannot have been the intention of the settlors that the method of determining the identity of the (maximum) of three persons capable of being appointed to the office of Protector would be to give a number of persons competing, but simultaneous powers of appointment... This would be a recipe for chaos.'*⁷

The word did not therefore have the meaning contended for by the Appellant. The meaning that the Appellant contended for was 'linguistically strained, being contrary to an ordinary meaning of the words 'subject to' or 'subject thereto' and has an obviously unintended and unreasonable result.'⁸

Accordingly, the appeal was dismissed. As the additional protectors' appointment was not valid, the appointments of the new trustees were also invalid.

⁴ Ibid, at 19.

⁵ Ibid, at 20.

⁶ (1860) 2 LT 198

⁷ *Re R Trust*, at 39.

⁸ Ibid, at 23.

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