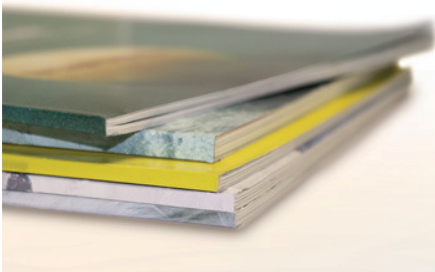


How to Avoid a Void Trust

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Benjamin Franklin said that “... nothing can be said to be certain except death and taxes.” However, two recent cases remind us that in relation to a trust, there must be three certainties: intention, subject matter and object, failing which a trust will be void. This problem arises most traditionally at the time that a trust structure is established, so that in fact there is never a trust. However, as the second case shows, it can also arise during the lifetime of the trust.

In the **Representation of AIB Jersey Trust Ltd** [2010] JRC012, the purported discretionary trust was found to be invalid from the outset. The trust deed defined the beneficiaries as those within the class described at Schedule 4 (or added thereafter) and if none, the trust fund was to be held for the charity (the RNLI) named at Schedule 7. The unfortunate draftsman, a lawyer, whilst correctly leaving Schedule 4 blank, had erroneously failed to fill in the name of the longstop charitable beneficiary at Schedule 7. As there were then no identifiable beneficiaries, it was intended that individuals would be added later pursuant to the trustee’s power to add, the trust failed for want of certainty.

Want of Certainty

The trustee put forward certain arguments in support of the validity of the trust. Firstly, that there was a combined oral and written settlement as the evidence showed that the settlor, lawyer and trustee all intended the RNLI to be the residuary

beneficiary. This was rejected as the evidence also showed that the settlor intended that the full terms of the trust be contained in the trust deed. Nor was the power to add to the class of beneficiaries sufficient to salvage the situation. As the Bailiff stated:

“A beneficiary of a discretionary trust is a person in whose favour a discretion to distribute income or capital of a trust may be exercised. Trustees may only exercise their power to distribute income or capital in favour of a person who is a beneficiary. It is the beneficiaries who are the objects of the discretionary trust. They must be sufficiently certain to satisfy the requirement as to certainty of objects.”

A power to add beneficiaries is something completely different. It means what it says. A person who is a possible object of a power to add beneficiaries is not in fact a beneficiary unless or until the power is exercised in his favour and he is added as a beneficiary ... The sole right that he has is as a possible object of the power to add beneficiaries.” Indeed, in this case he went on to say that it was “...hard to imagine a clearer case of a failure as to the certainty of objects”.

Fortunately, the court did feel able to rectify the trust deed to add in the RNLI as default beneficiary. The usual test for rectification was applied and was satisfied:

- (i) was the Court satisfied that as a result of a genuine mistake the trust deed does not carry out the true intentions of the parties

and the settlor in particular?

- (ii) had there been full and frank disclosure?
- (iii) is there any other practical remedy?

As rectification takes effect from the date of the instrument, the trust had in effect been validly constituted since its inception.

In **Re A Trust** [2010] JRC013, an employee benefit trust was established in March 2000. Although governed by English law, the trust had a Jersey trustee, and thus the Royal Court had jurisdiction to deal with the case, albeit with the assistance of opinions from English Counsel. The founder of the trust was A Co., the parent of a trading company I Limited, which carried on business as an online dating agency. The beneficiaries of the trust were the employees (past, present and future), their spouses and issue of A Co and its subsidiaries. In May 2000, I Limited became the subject of a reverse merger with an American company, and I Limited ceased to be a subsidiary of A Co. A Co did not have any employees of its own. Thus, although it was not appreciated at the time, it appeared that there were no beneficiaries of the trust.

The Royal Court quoted from Underhill and Hayton 17th Edition at 29.10:

“Even though it may appear, at the time of execution, that a settlement effectively disposes of the whole of the settlor’s interest in the property comprised in it, later events may nonetheless give rise to a resulting trust. This may be so if the beneficial interest fails for want of beneficiaries.”

Key principles

It went on to cite with approval, the key principle underlying the need for beneficiaries: that there must be “... a beneficiary... to have the trust positively enforced...”, “... at all times during the existence of a trust.” (Thomas & Hudson, *The Law of Trusts*, Oxford 2004 at para 6.14). “*The fact that there might be such persons at some stage in the future ... was not good enough*”.

The court held that the trusts had failed for want of beneficiaries in or around May 2000. Subsequent acts which included the establishment of certain sub-trusts were invalid. There was no application for rectification and thus the funds were held on a resulting trust for those who had contributed the monies.

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