

JERSEY / JUDGMENT

T Settlement [2008] JRC 062 (17 April 2008)

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judgment

deputy bailiff: 1. This is an application for declarations in connection with the purported retirement of a trustee of a settlement known as the T 1998 Discretionary Settlement ("the Trust"). Although the proper law of the Trust is English law, this Court has jurisdiction because the administration of the Trust is carried out in Jersey. The Court announced its decision at the conclusion of the hearing on 10 th April and now gives its reasons.

Background

2. The Trust was created on 20 th November 1998 by the late AT ("the settlor"). The original trustees were Ms Louise Stoten ("Ms Stoten"), who is a partner in the firm of Payne Hicks Beach, English solicitors and ST ("Mrs T") (together the "Original Trustees"). 3. The Trust is a conventional discretionary trust and the class of beneficiaries comprises the settlor's children and remoter issue, the spouses, widows and widowers of the settlor's children and remoter issue, and charities. Clause 12.1 of the trust deed confers the power of appointing new trustees on the trustees for the time being. 4. In May 1999 the Original Trustees decided that the Trust should become UK non-resident for tax purposes and that accordingly a majority of non UK trustees should be appointed. To this end the Original Trustees executed a deed of retirement and appointment of trustees on 25 th May 1999 whereby AIB Trust Company (Jersey) Limited (now known as AIBJerseyTrust Limited ("AIB")) and Mr Anthony Staples ("Mr Staples") (together the "Former Trustees") were appointed as trustees of the Trust jointly with Ms Stoten and in place of Mrs T who retired. The administration of the Trust was moved to Jersey where AIB and Mr Staples were resident. 5. One of the principal assets comprised in the trust fund is a British Virgin Island company ("the Company"). In late 2000 Ms Stoten and the Former Trustees, as the then trustees of the Trust, decided that it would be appropriate to implement a refinancing scheme which involved, amongst other things, the provision of loan facilities to the Company both by Citibank NA ("Citibank") and also by HT, the settlor's son, and the provision of security by the trustees of the Trust. At the outset of the negotiations Ms Stoten represented both the trustees of the Trust and HT. It was decided in these circumstances and following a request from Citibank that she should cease to be a trustee of the Trust. Accordingly on 4 th April 2001 she executed a deed whereby she purported to retire as a trustee ("the Deed of Retirement"). It is clear that the intended effect

of the Deed of Retirement was for Ms Stoten to retire and be discharged as trustee of the Trust from 4 th April 2001 and for the Former Trustees, being resident in Jersey, to be left as the only remaining trustees of the Trust. The Former Trustees were not a party to the Deed of Retirement but it is clear from contemporaneous correspondence (e.g. a facsimile dated 17 th May 2001) that they were fully aware of and agreed to Ms Stoten's retirement. 6. The refinancing scheme was implemented in July 2001. On 25 th July 2001 the Former Trustees, as trustees of the Trust, executed all necessary deeds and documentation on behalf of the Trust, including a trustee resolution ("the Resolution"), a deed of release ("the Release"), a deed of assignment ("the Assignment") and a guarantee ("the Guarantee"). The Resolution referred to them being the present trustees of the Trust and their resolving to enter into the various transactions comprising the refinancing scheme; the Release described them as 'the trustees'; the Assignment described them as 'the trustees of the T 1998 Settlement' and contained at clause 3 various warranties on their part, including that they had power to enter into the Assignment and were the legal owners of the property which was being assigned by way of security; and the Guarantee described them as 'the trustees of the T 1998 Settlement'. 7. The Former Trustees continued to act as the sole trustees of the Trust until 5 th March 2008 when they executed a deed of appointment and retirement of trustees whereby the Former Trustees retired and appointed the representors as trustees of the Trust in their place. The problem 8. In July 2007 a question arose as to whether the requirements for Ms Stoten's valid retirement and discharge as a trustee of the Trust had been satisfied by the Deed of Retirement. The issue arises in this way. 9. As already mentioned Clause 12 of the trust deed provides that the power of appointing new trustees is vested in the trustees for the time being. There are however no provisions in the trust deed governing the retirement of trustees. 10. In the absence of any such provisions in the deed, the conditions under which a trustee can retire without new trustees being appointed are those contained in section 39(1) of the Trustee Act 1925 (as amended) which provides as follows:- "Where a trustee is desirous of being discharged from the trust, and after his discharge there will be either a trust corporation or at least two persons to act as trustees to perform the trust, then, if such trustee as aforesaid by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this Act, without any new trustee being appointed in his place." 11. The following conditions therefore had to be satisfied for Ms Stoten to retire and be effectively discharged from the Trust, namely:- (i) after her discharge there must have been either a trust corporation or two persons remaining as trustees; (ii) she must have declared her desire to be discharged as a trustee by deed; and (iii) the Former Trustees, as her then co-trustees, must by deed have consented:- (a) to her discharge as a trustee; and (b) to the vesting of the trust property in themselves alone. 12. There is no dispute that, following execution of the Deed of Retirement on 4 th April 2001, conditions (i) and (ii) were satisfied. Condition (i) was satisfied because AIB and Mr Staples remained as trustees and condition (ii) was satisfied

because the Deed of Retirement fulfilled the necessary requirements. However, because the Former Trustees were not party to the Deed of Retirement, condition (iii) was not at that stage satisfied. 13. The issue in the case is therefore whether the initial absence of the required consent on the part of the Former Trustees was cured by subsequent events, in particular the execution of various documents in July 2001 by Mr Staples and AIB as part of the implementation of the refinancing scheme. 14. If Ms Stoten remains as a trustee, there are likely to be fiscal consequences. Although, if she remained as a trustee, the Trust would have continued to be treated as non-resident in the UK for capital gains tax purposes until 6th April 2007, the amendments to section 69 of the Taxation of Chargeable Gains Act 1992 would then have led to the Trust being treated as resident in the UK from that date. For Ms Stoten to retire now would result in the re-exportation of the Trust and a consequential deemed disposal of the trust assets for capital gains tax purposes and potentially a large charge to tax. 15. As the Trust is governed by English Law, the representors, as current trustees, have taken the advice of leading English counsel Mr Francis Barlow QC. His opinion has been produced to the Court. In summary Mr Barlow concludes that the Deed of Retirement in conjunction with the Release and the Assignment were together effective to discharge Ms Stoten as a trustee of the Trust. 16. In the circumstances the representors seek from this Court declarations:- (i) that the retirement of Ms Stoten was effective from 25th July 2001 and that she was validly discharged from the Trust on that date; (ii) that the Former Trustees were the sole trustees of the Trust from 25th July 2001 until their retirement on 5th March 2008; and (iii) that the representors are the validly appointed trustees of the Trust. 17. On presentation of the representation the Court appointed HT to represent the interests of all the beneficiaries of the Trust because there is no distinction in the interests of the different beneficiaries. HT has not appeared but has written to say that he agrees to the relief sought by the representors. A copy of the representation has also been sent to HM Revenue and Customs and they have been informed of the date of this hearing. They have not however attended the proceedings. Discussion 18. Mr Barlow has prepared a detailed opinion referring to a number of authorities which have been produced to us. In essence there are two key questions:- (i) Does the effective discharge of a trustee under section 39(1) need to be effected by a single deed executed by all necessary parties or are separate deeds permissible? (ii) If the latter, do the deeds executed by the Former Trustees in July 2001 sufficiently evidence their consent to Ms Stoten's discharge as a trustee and the vesting of the trust property in them alone? (i) Single deed or separate deeds? 19. On this first issue, counsel reaches the clear conclusion that section 39(1) does not on a proper construction require a single deed. We would summarise his argument as follows:- (i) Section 6(c) of the Interpretation Act 1978 (the "1978 Act") provides as follows:- "In any Act, unless a contrary intention appears:- (c) words in the singular include the plural and words in the plural include the singular." (ii) Counsel referred to two Privy Council cases where statutory provisions in terms virtually identical to section 6(c) were considered, namely *Sin Poh Amalgamated (HK) Limited v Att Gen of Hong Kong*

[1965] 1 WLR 62 and *Blue Metal Industries Limited v Dille*

- [1970] AC 827 . In the latter case Lord Morris of Borth-y-Gest (at p864 e-h) formulated the principle in the following terms:- "By section 21 of the Interpretation Act 1899 (N. S. W.), it is enacted that in all Acts, unless the contrary intention appears, words in the singular shall include the plural and words in the plural shall include the singular. Such a provision is of manifest advantage. It assists the legislature to avoid cumbersome and over-elaborate wording. Prima facie it can be assumed that in the processes which lead to an enactment both draftsmen and legislators have such a provision in mind. It follows that the mere fact that the reading of words in a section suggests an emphasis on singularity as opposed to plurality is not enough to exclude plurality. Words in the singular will include the plural unless the contrary intention appears." (iii) Section 6(c) of the 1978 Act applies "unless a contrary intention appears" . In the case of *Melville v IRC*
- [2001] STC 1271 the Court of Appeal considered the effect of the words "except where the context otherwise requires" in s272 of the Inheritance Tax Act 1984 . Counsel pointed out that the wording was marginally different but that the two expressions were for practicable purposes indistinguishable. Peter Gibson LJ (at 1278 h-j) made the following observations on the expression:- "In *Re Gaul and Houlston's Contract* [1928] Ch 689 at 700, Lawrence LJ indicated that where effect can be given to words, if interpreted in accordance with the statutory interpretation provision, sensibly and properly, the context cannot be said to require otherwise. In *Re Cowley Settled Estates*
- [1926] Ch 725 at 737, Astbury J held that in order to justify departing from the statutory definition, there must be a 'necessary context or requirement'. In my judgment those authorities confirm the correctness of the judge's approach that the statutory interpretation has to be adopted unless the context compels the adoption of another interpretation." (iv) Counsel concludes therefore that the presumption contained in section 6(c) of the 1978 Act that in statutes the singular includes the plural is thus a strong one. Turning to consider section 39(1) itself, he points out that it requires the retiring trustee to declare 'by deed' his desire to do so and the continuing trustees to consent 'by deed' to the discharge of the retiring trustee and the vesting of the trust property in them alone. Thus far there is nothing in the subsection which contemplates that such declaration and such consent have to be embodied in a single deed. However, the subsection goes on to provide that in the event that the declaration has been made and the consent given, the retiring trustees shall be deemed to have retired and shall 'by the deed' be discharged without the appointment of a new trustee. Counsel accepts that these last words appear to contemplate a single deed or, to adopt the words of Lord Morris, 'suggests an emphasis on singularity rather than plurality' . However counsel points out that, as stated by the authorities, that of itself is insufficient to exclude the statutory presumption that the singular includes the plural unless the context 'compels' the adoption of the literal interpretation. In counsel's opinion there is no such context nor is he able to think of any policy considerations which would require a single deed. The consequence in his opinion is that the reference in the final part of the subsection to 'the deed' includes a reference to 'deeds' if more than one. (ii) Do the July 2001 deeds provide sufficient evidence of the

consent of the Former Trustees to the discharge of Ms Stoten and the vesting of the trust property in them alone? 20. It is quite clear that the Former Trustees did in fact consent to the discharge of Ms Stoten as trustee and to the vesting of the trust property in the two of them. This is evidenced not only by the facsimile dated 17 th May 2001 referred to earlier but also by the fact that thereafter they proceeded at all times to act on the basis that they were the only two trustees of the Trust. For example, they entered into the July refinancing transactions as trustees of the Trust and, when they retired in favour of the representors, the recital in the relevant deed referred to the fact that Ms Stoten had retired by means of the Deed of Retirement. However, the question is whether this consent of the Former Trustees was given by deed as required by section 39(1). 21. The relevant deeds for these purposes are the Release and the Assignment, both dated 25 th July 2001; both are expressed to be executed as deeds. In his opinion, Mr Barlow refers to the Guarantee also being a deed. However it is accepted that that is not the case. Mr Barlow attended the hearing and confirmed to the Court that this made no difference to his opinion; the Release and the Assignment were sufficient. 22. The question therefore is whether the Release and the Assignment constitute sufficient evidence of an intention on the part of the Former Trustees to consent to the discharge of Ms Stoten as trustee and the vesting of the trust property in them alone. 23. Mr Barlow stated that the position of the Former Trustees in relation to the giving of consent to the discharge of Ms Stoten is akin to that of the donee of a power, as the Former Trustees had the power either to agree to the discharge of Ms Stoten or to refuse to agree to it. 24. The classic statement of the principles governing the exercise of powers is to be found in *Re Ackerley*

[1913] 1 Ch 510 in which Sargant J said at 515:- "And accordingly 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." This statement has been applied in a number of cases including *Re Holford's Settlement*

[1945] Ch 21, *Re Knight deceased*

[1957] Ch 441 and *Re Lawrence's Will Trust*

[1972] Ch 418. Although Sargant J's observations were directed specifically to the exercise of special powers of appointment, they apply in relation to dispositive powers generally and to other powers, e.g. powers to remove trustees. 25. As can be seen, there are therefore two alternative routes which can be followed. The first is a reference to the power itself and the second is a reference to the property which is subject to the power. Counsel considers each of these in turn and we shall do likewise. (a) Reference to the power 26. Counsel states that there are a number of decisions indicating that an indirect or oblique reference to the power may be sufficient evidence of an intention to exercise it and refers to *Halsbury's Laws Vol 36(2) (Re-issue)*, para 320, *Lees v Lees*

(1871) IR 5 Eq 549, *Re Farnell's Settled Estates*

(1886) 33 Ch D 599 and *Gazdar v Kleinwort Benson (Geneva) Trustees SA* (Unreported Ch D 30 th March 1987). We will mention only the last two cases. 27. In *Farnell* the will under consideration contained a power for the trustees to appoint new trustees. At the material time that power was vested in the sole surviving executor. The testator's estate included a renewable lease. After the testator's death, the lessor granted a new lease to four persons described as 'the present trustees' of the will. None of these had in fact been appointed as trustees of the will but one of them was the surviving executor in whom the power of appointing trustees was vested. The executor was party to the lease and North J accepted during argument that the statement in the lease that the four lessees were the present trustees of the will operated as an appointment by the executor of the lessees as trustees. 28. Both *Lees v Lees* and *Farnell* were cited and applied in *Gazdar*. In that case there were three trustees of a settlement and the power of appointing new trustees was vested in the settlor. By a deed of appointment the settlor purported to appoint four additional trustees, thus bringing the total number of trustees up to seven. This was invalid as only four trustees were permitted by statute. By a second deed to which the settlor, the original and the additional trustees were party and which referred to the earlier deed, the three original trustees retired. It was held that the later deed should be construed as an appointment of the four additional trustees as trustees in place of the original trustees. 29. Counsel points out that in the present case all parties acted on the assumption that Ms Stoten had effectively retired as a trustee and that the Release and the Assignment executed in July 2001 refer to the Former Trustees as 'the trustees'. Counsel gives his opinion that this may well of itself be sufficient evidence of their intention to consent to Ms Stoten's retirement and to the vesting of the trust property in themselves alone. Reference to the property 30. Even if that is not the case, Mr Barlow considers that the facts fall within the second limb referred by Sargant J in the passage referred to earlier. He points out that there is a line of authority which establishes that the requisite intention may be inferred in the absence of any reference, however oblique, to the relevant power or even any consciousness of the existence of such power. These authorities establish that it is sufficient to show an intention to do the relevant act and that it is not necessary to prove a specific intention to exercise the relevant power enabling that act to be done. He refers specifically to four cases namely *Re Morgan*

(1857) 7 IR Ch R 18, *Cowlshaw v Hardy*

(1857) 25 Beav 169, *Mogridge v Clapp*

(1892) 3 Ch 382 and *Davis v Richards and Wallington Industries Limited*

[1990] 1 WLR 1511. We propose for the sake of brevity to refer only to two of these cases. 31. In *Re Morgan*, a decision of the Irish Privy Council, Monaghan CJ said this at p 50:- "The question which we have to consider is - what is the true rule of law as to the construction of instruments executing a power? I deny altogether that it is necessary to deduce from

the instrument an intention that the power should be executed. All that is necessary is, to deduce from the instrument an intention to do the act, which act can only be done by an execution of the power; and that when we once come to the conclusion that the intention is clear to do the act, and that the act cannot be done except by executing the power, and cannot be done by means of any estate which the party possessed, the law will consider such act an execution of the power." 32. In *Davis v Richards and Wallington Industries Limited* a group of companies created a pension fund and executed an interim deed to be superseded in due course by a definitive deed. The interim deed conferred on the parent company power to appoint and remove trustees. In 1981 the final scheme was settled and a definitive deed was prepared and engrossed for execution. However, before it was executed, one of the three individuals who were the original trustees of the scheme at the time purported to retire by letter. Thereafter he played no further part in the administration of the scheme. Eventually in 1982 the definitive scheme was executed by the parent company and the two remaining trustees, the retiring trustee's name having been struck out in the engrossment of the definitive deed. One of the contentions advanced in the case was that the definitive deed was invalid on the grounds that the retiring trustee had not been effectively discharged and that he was therefore a necessary party to the definitive deed but had not executed it. Scott J decided that, on its true construction, the interim deed did confer a power on trustees to resign and held that the retiring trustee had therefore by his letter effectively retired from office. However, he went on to consider the position on the footing that the retiring trustee had not been effectively discharged and remained a trustee at the time the definitive deed was executed. We would quote the following extracts from his judgment at 1530 - 1531:- "Mr Lloyd argued, on the footing that Mr Parsons remained a trustee, that the execution by Industries of the definitive deed represented, by implication, its exercise of its clause 8 power to remove him as a trustee. He relied on the principle that a disposition of property may be regarded as the implied exercise by the disponent of a power vested in him and the exercise of which would be necessary for the disposition to take effect..... Counsel for the other defendants point out that the cases where this principle had been applied were all dealing with dispositions of property. The point in this present case does not arise out of a disposition of property; it arises out of an attempt to bring into effect rules of a pension scheme. The point taken is, factually speaking, correct but I do not regard it as an answer to Mr Lloyd's argument. A disponent (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. In the present case, Industries purported, in conjunction with Mr Davis and Mr Wardle, to bring into effect valid rules for the pension scheme. It was objected that Mr Parsons was a trustee whose concurrence was necessary. But Industries had power to remove Mr Parsons as a trustee and could properly have exercised that power in order to bring the rules into effect. I can see no difference in principle between the position of A in my example and the position of Industries, nor any reason why the courts should be prepared to apply an ameliorating principle of equity only to dispositions of property. In my judgment, the principle is applicable in the present case, unless an intention on Industries' part not to exercise its power of removal can be inferred. It was argued by counsel opposing Mr Lloyd that that intention could be inferred from the facts of this case. They pointed to the fact that Mr Parson's status as a trustee was in the mind of the parties who executed the definitive deed, as evidenced by the striking out of his name from the exordium and testatum. How, in the face of that, can an intention to remove him as a trustee be imputed to Industries? But, in my judgment, this approach to intention is misdirected. It is not, in my judgment, necessary to infer a positive intention to exercise the power. The facts of this case make it impossible, I agree, to infer that positive intention. The intention will, however, be imputed to Industries unless the facts of the case justify the inference that Industries had the positive intention not to exercise its power. That this is the right approach is, in my judgment, established by *Wade v Paget* (1784) 1 Bro C C 363, discussed in *Sugden on Powers*, 7th ed, vol. 1, p. 419-420. The recitals to the deed which the court was considering would have precluded the inference of an intention by the settlor to exercise his special power of appointment. Nevertheless, an intention not to exercise the power could not be inferred and equity treated the power as exercised. In my opinion, the same approach should be adopted in the present case. The facts of the present case leave no real doubt but that (i) Mr Parson's name was included in the deed at a time when he was a trustee, (ii) his name was removed from the deed because everyone thought that on his resignation he had ceased to be a trustee and (iii) Industries neither intended to remove him as a trustee nor intended not to remove him as a trustee; his removal was simply not in anyone's mind. In these circumstances, in my judgment, the principle prayed in aid by Mr Lloyd applies. Industries intended to bring the rules into effect. If, contrary to my view, Mr Parsons was still a trustee, equity will support that intention by imputing to Industries an intention to exercise its power of removal and by treating that power as exercised by Industries' execution of the definitive deed." 33. The position in the present case is that by the Deed of Retirement Ms Stoten purported to retire as a trustee and was treated on all hands as having retired even though she had not effectively been discharged by that deed. The Former Trustees entered into a refinancing scheme on the footing that they were the sole trustees of the Trust. The only way in which they could lawfully have done so and bound the beneficiaries under the Trust was by consenting by deed to Ms Stoten's discharge as a trustee and to the vesting of the trust property in them alone. 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 Former Trustees as deeds, must be taken to have embodied an exercise of their power to consent to Ms Stoten'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. In conclusion 34. We are conscious that the point which we are considering falls to be decided under English law as the proper law of the Trust. We have received expert evidence from leading counsel that the combined effect of the Deed of Retirement, the Release and the Assignment is to effectively discharge Ms Stoten as trustee as from 25 th July 2001 leaving the Former Trustees as the sole trustees with the property duly vested in them. 35. In view of the absence of adversarial argument and of the fiscal consequences of any order we may make, we have scrutinised closely Mr Barlow's opinion and the cases to which he refers. For the reasons he gives we accept his opinion that section 39(1) does not require a single deed. We share his caution as to whether the Release and the Assignment contain sufficient reference (however oblique or implied) to the relevant power so as to fall within the first limb of the principle described by Sargant J but we are completely satisfied that, in respect of the principle conveniently summarised by Scott J in Davis , the execution by the Former Trustees of the Release and the Assignment on 25 th July 2001 was effective to constitute the giving of their consent by deed to Ms Stoten's discharge as a trustee and to the vesting of the trust property in themselves alone. 36. We accordingly grant the declarations sought by the representors namely:- (i) that the retirement of Ms Stoten was effective from 25 th July 2001 and she was validly discharged from the Trust on that date; (ii) that the Former Trustees were the sole trustees of the Trust from 25 th July 2001 until their retirement on 5 th March 2008; and (iii) that the representors are the validly appointed trustees of the Trust. Authorities Trustee Act 1925 (as amended). Taxation of Chargeable Gains Act 1992. Interpretation Act 1978. Sin Poh Amalgamated (HK) Limited v Att Gen of Hong Kong

[1965] 1 WLR 62 . Blue Metal Industries Limited v Dilley

[1970] AC 827 . Melville v IRC

[2001] STC 1271 . Inheritance Tax Act 1984 s272. Re Ackerley

[1913] 1 Ch 510 . Re Holford's Settlement [1945] Ch 21. Re Knight deceased [1957] Ch 441. Re Lawrence's Will Trust [1972] Ch 418. Halsbury's Laws Vol 36(2) (Re-issue). Lees v Lees (1871) IR 5 Eq 549. Re Farnell's Settled Estates

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