TRUSTS

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> ***The court's judgment in PTNZ in relation to the protector's role may be a welcome clarification given the surprising lack of authority on the point of whether a protector's consent rights are joint or review powers.***

International estate planners can find themselves playing a similar role to interpreters when analysing different jurisdictions' legal terms, structures, roles and relationships to work out how they should be understood by the courts and/or the tax authorities in their home jurisdiction. To quote the slogan, 'don't just translate words, translate ideas'.

At the heart of the November 2020 decision in *PTNZ v AS* is how specific terms contained in trust deeds should be properly construed; whether an 'heir' of the deceased settlor's estate under Monegasque law has an equivalent function to the office of an 'executor, administrator or personal representative' under English law. Whatever the decision, it would have a direct impact on the governance of the trusts, since those satisfying the English definition had a role in the appointment of a protector.

Facts of the case – a 'blessing' application to solve a curse?

This case involved a 'category two' *Public Trustee v Cooper* application (where the trustee is not surrendering its discretion but seeks the sanction of the court for a 'particularly momentous' decision) in relation to a fundamental restructuring of four trusts (the trusts). A dispute arose between beneficiaries of the trusts in relation to their beneficial interests post-restructuring.

The trusts

The trusts were English law discretionary trusts with a professional trustee based in New Zealand (the trustee) and an administrator based in Jersey. The trust fund comprised Bahamian-registered companies and bank accounts in Jersey.

The settlor

The settlor, principal beneficiary and protector of the trusts (until his death) (the settlor) was resident in Monaco when he settled the trusts. He was domiciled in Monaco at the date of his death but died in Switzerland.

The beneficiaries

The beneficiaries included the settlor's wife and the adult children of both the settlor and his deceased brother (the beneficiaries). Illegitimate children (of which there were two) were not beneficiaries of the trusts but were proposed to be added as beneficiaries under new trusts.

Wider circumstances

The wider circumstances surrounding the family wealth caused further complexity. The family had significant business interests. Their assets in Switzerland and Jersey were frozen following separate investigations by relevant authorities in one jurisdiction into environmental offences and criminal offences alleged to have been committed by some of the beneficiaries. The settlement and plea bargain with the relevant authorities required the payment of over €1bn to the authorities of the investigating country.

Proposed restructuring

The proposal to fund the €1bn payment involved separate family trusts. However, a general restructure of the family wealth, including the trusts that are the subject matter of this case, was undertaken focusing heavily on the surviving wealth. The proposal involved terminating the trusts and distributing the assets to the settlor on the basis that he would resettle €340m on six new trusts for the benefit of certain beneficiaries and their children.

The trustee made a momentous decision to restructure the trusts and to redistribute the funds. It was proposed that the trusts would be varied or amended, and two new trusts would be created adding the settlor's brother's two illegitimate children and their issue as beneficiaries so that there would be six trusts in total.

Revised decision

Following the blessing of the Jersey court in May 2017, the original proposal was not implemented but, instead, revised later. The trustee therefore commenced further proceedings in the Jersey court to obtain the blessing of the revised proposal. However, a number of the beneficiaries opposed the blessing, alleging that they were not aware of the initial blessing from the Jersey court and did not consent to the proposals being put forward. The trustee therefore issued proceedings in the English court seeking a blessing in respect of their original and revised decisions.

The death of the settlor; disputed appointment of protector

Sixteen days after proceedings were issued in the English court, the settlor died. Following his death, various disputes within the family arose as to how the trustee should proceed with the restructuring of the trusts.

Subsequently, the children of the settlor and his wife, who inherited the settlor's estate, purportedly exercised a power contained in the trust deeds to appoint a replacement

protector (the protector). The protector then gave notice of his intention to replace the trustee.

Injunction proceedings were issued, and the protector provided an undertaking that he would not exercise any of his powers until determination by the English court as to whether the protector had been validly appointed.

Issues – identity, legitimacy and involvement of the protector

The decision in this case concerns three important questions:

- whether the appointment of the protector was valid or void (the validity issue);
- assuming the protector was validly appointed, whether his consent was required in relation to the decision of the trustee subject to the blessing application; and
- assuming that the protector's consent was so required, whether there should be any restriction on the role he should play in relation to the blessing application (the protector issues).

The validity issue

The first critical question was whether the protector had been validly appointed.

What power was contained in the trust deeds?

The trust deeds included the following clause:

> *The Protector for the time being, or in the event of his death his executor, administrator or personal representative, shall have power by instrument in writing delivered to the trustees to appoint a replacement or additional Protector…*

The settlor delivered no instrument appointing his replacement protector.

What about the settlor's executor, administrator or personal representative?

The settlor made two holographic wills. His first will appointed his wife as heir to all his rights and shares in two identified companies and the current accounts of those companies of which he was a beneficiary. His second will provided:

> *I dispose of my hereditary estate under the laws of Quebec, Canada. I confirm all acts of donation effected by me in the past in favour of my heirs; assets*

> *having been thus donated shall not be included in my estate for the purposes of my succession.*

As understood in English law, the settlor did not therefore appoint an executor, administrator or personal representative of his estate. However, as the settlor died domiciled in Monaco, his wills and the administration of his estate were governed by Monaco law. Under Monaco law there is no concept of executors, administrators or personal representatives. Instead, the settlor's wife and his three children were the sole legal 'heirs' of his estate.

Is an 'heir' equivalent to an executor, administrator or personal representative?

In English law, these three terms are used to describe persons who administer an estate. However, there are key differences.

'Executor'

An executor is appointed by the deceased in the will. An executor's power to administer the estate therefore derives from the will itself, not from the grant of probate, with the deceased's estate vesting in the executor on death. The grant of probate is simply evidential proof of the executor's title to act.

'Administrator'

An administrator can be appointed (typically from among the legatees or heirs) where:

- the deceased did not leave a will;
- the will did not appoint an executor; or
- the executor appointed is unable or unwilling to act.

There is no fixed or technical meaning of an administrator. However, s55(1)(ii) of the Administration of Estates Act 1925 states:

> *'Administrator' means a person to whom administration is granted.*

Therefore, unlike an executor, an administrator derives their authority from the grant, with no powers of disposition prior to that time. Where the administrator is based outside England and Wales, a representative of the deceased must obtain a grant of probate or letters of administration in the UK (*Dicey, Morris & Collins on the Conflict of Laws* (15th ed) at para 26-037).

Nevertheless, in this case, the settlor died domiciled outside England and Wales and had no estate in the jurisdiction. Master Shuman noted that r30(1) of the Non-Contentious Probate Rules 1987 provides discretion in this regard and the general rule is that a grant will not be ordered unless there is property to be administered in this jurisdiction (*Williams, Mortimer & Sunnucks on Executors, Administrators and Probate* (21st ed) at para 5-02).

‘Personal representative’

Executors and administrators of deceased estates are collectively referred to as personal representatives. There is no single meaning or technical definition, so this term tends to be used in a broader and more flexible way. However, Master Shuman noted that s24(1), Guardianship (Missing Persons) Act 2017 states:

> *… ‘personal representative’, in relation to a person who has died, means—*
>
> *(a) a person responsible for administering the person’s estate under the law of England and Wales, or*
>
> *(b) a person who, under the law of another country or territory, has functions equivalent to those of administering the person’s estate under the law of England and Wales.*

Does an heir have an equivalent function to a personal representative?

Heirs under Monaco law carry a range of rights, powers and responsibilities in respect of a deceased’s assets and in the administration of their estate. Article 607 of the Civil Code provides that heirs immediately upon the death of the deceased become the joint owners of all the assets in the estate and are jointly responsible for the administration. It was therefore held that heirs under Monaco law have characteristics of the office of personal representative.

Do heirs still need to apply for a grant?

The debate then centred around whether the words ‘executor, administrator or personal representative’ implied the words ‘appointed by an English court’ or could simply include any equivalent person appointed under the law of another jurisdiction. The heirs in this case did not apply for a grant, since there were no assets in this jurisdiction.

Master Shuman placed considerable weight on the fact that there was no UK will and therefore no grant of probate in the UK. Therefore, to follow the former interpretation would, to her mind, restrict the scope of the clause unduly. She also found that the trust deeds used the terms in a disjunctive way implying that ‘personal representative’ was intended to bear its own separate meaning. Master Shuman therefore decided that the words must include a person or people who had not obtained an English grant as well as those who had.

Construing the terms of the trust deeds

In construing the terms of the trust deeds, the decision in this case reiterates that construction is not simply a literal exercise. Master Shuman considered and restated the legal principles and relevant case law concerning the construction of lifetime trusts. Put briefly at para 42:

> *… the court needs to sit in the settlor's armchair and construe the objective meaning of the words in light of the relevant factual matrix.*

The relevant case law confirms that the approach to construction in commercial contracts applies to wills and similarly to lifetime trusts. In this context, the decision applies *Marley v Rawlings* [2014] which determined that the interpretation of a will or commercial document should begin with the intention of the parties. It was agreed among the counsel (para 42) that the task for the court in construing a trust instrument was to ascertain:

> *… the objective meaning of the words used, and the objective intention of the parties to it (or in the case of a unilateral document such as a settlement or a will, the settlor or testator) by interpreting the whole of the words used against their documentary and factual context.*

In this case, the genesis of the trusts forms part of the relevant surrounding circumstances for the purposes of construction. In particular, the settlor had no obvious ties to or connections with England and Wales. When the trusts were settled, it was found to be 'highly pertinent' that the settlor was resident in Monaco. It was unlikely that he would have assets in England or Wales to administer, as proved to be the case. The succession to his estate was governed by the laws of domicile at the date of his death. Master Shuman therefore held she was satisfied that the settlor did *not* intend that 'executor, administrator or personal representative' was to be given a restrictive meaning. On this basis, it was held that the protector was validly appointed by the settlor's heirs under Monaco law.

The protector issues

Having found that the protector had been validly appointed, the second and third questions concerned the role the protector should play in the blessing proceedings.

What powers were given to the protector under the terms of the trust deeds?

The trust deeds provided substantial powers to the protector, for example, the powers to remove and appoint trustees.

In addition, the protector had wide powers of consent, for example, over the trustee's power to appoint the trust fund and to pay or apply capital of the trust fund in favour of any beneficiary, to add or remove any person from the class of beneficiaries and to vary the terms of the trusts.

Furthermore, the trust deeds provided that the protector should not be prevented from exercising any power or discretion conferred by the trusts by reason of any direct or indirect interest, whether personal or in a fiduciary capacity.

Personal or fiduciary powers

The parties agreed that the protector's powers of consent were to be exercised in good faith and for the purposes for which they were conferred, which meant that the *fraud on a power* rule applied to the protector.

However, there was disagreement among the parties as to whether the protector's powers of consent were properly described as fiduciary or 'limited or restricted'. Master Shuman noted at para 82:

> *The protector's powers of consent are independent of the powers of the trustee and are to be exercised by the protector on the basis of his own discretion. Whilst the beneficiaries' views are material to the exercise of the protector's powers of consent, he is not bound to follow them. The fact that the decision of the protector is contrary to the wishes of one or more beneficiaries is not in itself a valid criticism of the exercise of that power. Further when considering the exercise of his powers of consent it is not necessary for the protector to reach the same conclusion as the trustee by the same route in order to consent to the trustee's decision.*

The trust deeds allowed the protector to exercise his powers in a way which benefited himself, which was found to be consistent with the intention of the settlor when the trusts were established. However, Master Shuman noted at para 81 that:

> *… that does not preclude the power from being classified as a fiduciary power but it would more obviously fit within the limited or restricted power class.*

As the protector intended to exercise his powers acting in the interest of the beneficiaries of the trusts as a whole, and he had no personal interest in any potential exercise of his powers, no conclusion needed to be reached by the court on the classification of the relevant powers. Therefore, only the scope rather than the nature of the powers needed to be determined.

The protector's power to consent

The parties then identified two different interpretations of the protector's power to consent. Either the protector holds effectively:

- a joint power with the trustee – ie a power to withhold consent even if the trustee is neither acting unreasonably nor for improper purpose; or
- a power of review – ie a more limited role effectively ensuring that the trustee is neither acting unreasonably nor for an improper purpose.

Surprisingly, there is no direct authority on this particular point. Nevertheless, Master Shuman took (at para 96) the view that:

> *... there is no magic in the word protector, what the court is concerned with is the nature of the power that that person holds.*

The question was therefore whether the protector's role should be interpreted restrictively based on the terms of the trust deeds and the objective intentions of the settlor when the trusts were created.

The protector's role

Master Shuman found that, as a matter of construction, the genesis of the trusts and the language used in the trust deeds were consistent with the settlor's intention when the trusts were established that the protector would hold *joint power* with the trustee rather than a review power. She did not accept that, for the protector's powers to be joint, the trust deed needed to have said so.

She noted that the settlor's purpose of the protector holding the power of consent was to control the trustee's exercise of their broad discretionary powers. She further noted that this is consistent with an offshore trust which typically appoints a protector as the settlor is unlikely to know the professional trustee and there may be limited trust between them. The power of consent being a *joint* power rather than a restrictive review power therefore provides a solution to control the power exercised by the trustee.

There was therefore no reason to limit the protector's role in the blessing proceedings.

Conclusion for practitioners

Interpreters and translators facilitate communication not by merely mechanically transferring words between languages but by understanding the full subtlety of meaning or significance of words and accurately conveying messages across cultures. Estate planners working with international families and structures also need to bridge the gaps between foreign law concepts. Questions can often appear deceptively simple, but the draftsman and adviser must remember that language is full of words that have subtle shades of meaning.

The correct interpretation of specific terms can have a direct impact on a range of fundamental legal issues, such as determining who is responsible to pay the debts of a deceased's estate and whether an individual has standing overseas where assets may be located. For example, in the 2019 case of *ATF 145 III 205 (5A_488/2018)* (note the judgment is only available in French, German and Italian), the Swiss Supreme Court had to decide whether the status of a personal representative under English law corresponded to that of the official liquidator under Swiss law. The court ruled that an English personal representative is to be equated to a Swiss *'exécuteur testamentaire'* and therefore the personal representative of the deceased's estate did not have the standing of a liquidator under Swiss local rules.

The court's judgment in *PTNZ* in relation to the protector's role may be a welcome clarification given the surprising lack of authority on the point of whether a protector's consent rights are joint or review powers. It may well not be the last word on this topic, however.

Practical points

This case gives rise to several practical points for practitioners:

- While professional trustees should not abdicate responsibility by seeking court approval, a 'momentous decision' application is a very helpful tool for trustees, especially where the beneficiaries are not in agreement with proposed reorganisations or if there are doubts as to the powers the trustees have to carry out the reorganisation.
- Administering substantial family trusts for the benefit of different branches of a family can give rise to potential areas of conflicts particularly after the settlor has died. Where the settlor intends to create multigenerational trusts, preventing potential disputes in the future must be at the forefront of the minds of the settlor and the trustees. Trusts are flexible and trustees should be prepared to reflect the change in circumstances of a family as a whole, which may include for example creating sub-funds or trusts for each family branch if tension arises between different branches wishing to benefit from the trust structure.
- Despite increasing globalisation, every country continues to be highly individual in how its inheritance, estate administration and tax rules play out. Having a footprint in more than one jurisdiction complicates the analysis. To avoid unexpected results, testators should review which laws apply to which assets regularly as this may change depending on the testator's residence, domicile, citizenship and the location of the assets in question.
- Care is needed in relation to choice of law elections contained in wills as they may be ineffective, as was the case here.
- When construing the meaning of trust deeds, documents such as letters of wishes and file notes recording the settlor's intentions at the time that the trust is created can be critical when resolving uncertainties in the future.
- Trustees could take the lead in proactively encouraging families to engage in and discuss succession planning. When trusts are established, consider prospectively appointing successor protectors and other office holders in the event of death or incapacity.
- Consider carefully when drafting a trust whether the settlor would prefer to circumscribe the power of the protector by reducing the scope of their discretion, as otherwise the current view is that this discretion is unfettered.
- Consider whether it is appropriate for the protector to act in a personal or fiduciary manner in relation to specific powers that may be reserved.

Extra care needs to be taken by settlors who reserve wide powers for themselves or their close associates since the cases of *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017], *Clayton v Clayton* [2016] and *Webb v Webb* [2020] to ensure that the trust can withstand an attack as to the transfer of beneficial ownership (for instance, by a local tax authority or creditors or under a marital claim).

Cases Referenced

- ATF 145 III 205 (5A_488/2018)
- Clayton v Clayton [2016] WTLR 955 NZ SC
- JSC Mezhdunarodniy Promyshlenniy Bank & anr v Pugachev & ors [2017] EWHC 2426 (Ch); WTLR(w) 2018-01
- Marley v Rawlings [2011] WTLR 595 ChD; [2012] WTLR 639 CA; [2014] WTLR 299 SC; [2014] WTLR 1511 SC (costs)
- PTNZ v AS & ors [2020] EWHC 3114 (Ch); [2020] WTLR 1423 ChD
- Public Trustee v Cooper [2001] WTLR 901 ChD
- Webb v Webb [2020] WTLR 1461 PC

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