Purposive Construction in the Law of Trusts

John Child

Address: Wilberforce Chambers, 8, New Square, Lincoln=s Inn, London, WC2A 3QP

Email: jchild@wilberforce.co.uk

[2000] PCB 238

It is now well established that in construing a commercial contract the Court will normally adopt a purposive and flexible approach in order to ascertain the true meaning of the parties. It will attempt to find out the commercial purpose of the transaction, and will construe the words used in the light of that purpose. The strict literal meaning of the words in question will not be insisted upon

if that does not coincide with the likely commercial purpose, particularly if the adoption of that strict literal meaning would produce an unreasonable result.

As Lord Reid said in *Schuler AG v. Wickman Machine Tool Sales Limited*:

"The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result, the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear."

Such principles have now been applied by two separate judges of the Chancery Division in the construction of trust deeds.

The *Johnstone* cases

The decisions in question were made in connected cases concerning certain discretionary settlements that had been entered into in the 1970s by four brothers belonging to the Johnstone family. Each of the settlements was in a similar form, and accordingly the same point arose in respect of each of them. The

relevant discretionary beneficiaries were defined in each case as including the particular settlor's children and remoter issue born during "the Trust Period". This in turn was defined as being the period of 80 years *commencing at the date of the settlement*. Unfortunately, at the time that they made the settlements, each of the brothers had already had their families. Each had had several children, although none of them had had any grandchildren. The principal purpose of making the settlements had been to benefit the children, and yet they were apparently excluded because they had all been born before the date of the settlement in question, and hence before the commencement of the Trust Period as defined.

All the settlements were administered for many years on the footing that they included the children of the settlor as discretionary beneficiaries (as well as his grandchildren when they were subsequently born after the date of the settlement). This was because the construction point was not originally noticed. It was only when Guernsey trustees were appointed for one of the settlements many years later that the point was first taken. A preliminary opinion obtained for the Guernsey trustees expressed the view that, short of rectification, each settlor's children were excluded from benefit under his settlement.

In these circumstances three of the settlors individually commenced proceedings in the High Court, asking in each case whether, on the true construction of his settlement, his children then already in existence were included within the class of the discretionary beneficiaries, and seeking rectification if they were

not. One case was delayed in coming before the Court. The other two, concerning the settlements respectively made by Ian Johnstone and his brother Ernest, were heard by Robert Walker J. (as he then was) in 1997.

Before him Counsel for a representative grandchild of each settlor (Miss Alexandra Mason) argued in favour of the strict literal construction. She submitted that, as in the case of each settlement the settlor's children were all already born and in existence when the settlement was made, and as the defined Trust Period only commenced on the date of the settlement, such children could not be said to be children or remoter issue "who may be born during the Trust Period" so as to fall within the definition of "the Beneficiaries" for the purposes of the settlement. Rather, qualifying beneficiaries had to be confined to issue of the settlor (namely, his grandchildren or more remote issue) who were born after the execution of the settlement. Counsel for the settlor (appointed also to represent his children) argued for the adoption instead of a more purposive construction, which would recognise that it was most unlikely that the settlor would have intended to have excluded his own children from benefit (or to benefit only issue of his born after the execution of the settlement).

Robert Walker J.'s approach

It was this latter approach which the judge accepted to be the correct one. He said:

“In the course of the 20th century the approach; of the court, to the construction of documents has become increasingly more purposive and flexible, as opposed to being literal and bound to formulae approved by authority.... One legal principle on which Mr Child relied is what Lord Reid said in *Schuler AG v. Wickman Machine Tool Sales Limited* [He then cited the passage set out at the start of this article]. That was said in relation to a commercial document but the same principle applies to voluntary dispositions whether they are made during lifetime or by will.”

He then turned to the two settlements and said:

A... I have the strongest possible conviction, without any evidence apart from the settlements themselves and the information as to the state of the settlors’ respective’ families ... that Ian and Ernest intended. to include and not exclude the four existing children. which each had at that time. If there had been some extraordinary family reason or some extraordinary tax reason for excluding them, I would have expected to see the exclusion spelled out very much more plainly. Consistently with the general principles to which I have referred, I may give effect to my strong conviction even at the cost of some stretching of the literal language of the

two settlements so long as I do not stretch it to and beyond breaking point."

It remained to find a way of construing the words used so as to produce the desired effect. Counsel for the settlors submitted first that here "born" could exceptionally be construed as meaning "having been born" and hence "living". He pointed out that the word occasionally had this secondary meaning. For example, a reference to "the children of the testator born at the date of his will" is actually a reference to those living at the date of the will who have been born prior to it. Secondly, he relied by analogy on various nineteenth century cases where the Court, presumably out of a desire not to defeat by a strict construction the likely intention of the testator, had construed references to future children as also including existing children. Such cases, such as *Doe d. James v. Hallett*, *Harrison v. Harrison* and *Locke v. Dunlop* are referred to in *Theobald on Wills* (15th ed.) at p.394. Robert Walker J. paid acknowledgement to those old cases, but in reaching his decision preferred the first submission. He said:

A... the conclusion which I reach . .. is that in clause 1(2)(a) of each settlement, the word "born" should be taken as more or less equivalent to living so as to include any child (whether his or her day of birth was before or after the date of the settlement) if the child was, is or will be alive during any part of the trust period. It seems to me that it is admittedly stretching language but it is, in my judgment, an admissible stretching of language as a proper

process of construction in order to avoid an absurd result on what in my view is a somewhat imperfectly drafted instrument.@

Accordingly, it did not prove to be necessary, in the event, to proceed to the question of rectification.

Rimer J.'s approach

The third *Johnstone* case eventually came on for hearing in July 1999 before Rimer J. It was slightly different from the two earlier cases, where the "armchair evidence" relied upon by Robert Walker J. had shown that each settlor was happily married at the time that he made his settlement. In the third case the settlor in question was in the process of getting a divorce when he made the settlement. Nevertheless, the evidence was that he then had no plans to remarry, and that the youngest of his three children then in existence had been born over 13 years previously. Although getting divorced, he continued to enjoy excellent relations with his children both then and subsequently.

Again, it was submitted on behalf of a representative grandchild of the settlor that the word "born" should be given its primary meaning, and that to construe it as being equivalent to "living"

was to give it an unnatural meaning. Rimer J. said that he would have agreed with this if he had been construing the word in a vacuum, but that he had to take the background circumstances into account. At the time that he made the settlement, the settlor could reasonably have thought that he had finished his family. It would be surprising if, on its true construction, the settlement excluded the children he had, when there was only a remote possibility that he would have any more. There was nothing in the settlement itself to explain why he would wish to exclude them. If they were excluded, the only discretionary objects available at the date of execution of the settlement would be the settlor's brothers and sisters and charities. That would be a very capricious result. In these circumstances the judge was also prepared to adopt the approach indicated by Lord Reid in the *Schuler case* (which he again held was as applicable to trust instruments as it was to commercial documents) in order to get a sensible result.

It should be made clear that in adopting the approach that they did, Robert Walker J. and Rimer J., were simply adopting a purposive construction of the trust instruments in question in the light of the available "armchair evidence". They were not seeking to exercise the alternative jurisdiction of the Court, recognised in cases such as *Re Macandrew's Will Trusts*, *actually to change language* in order to correct an obvious mistake. As Robert Walker J. said in the earlier two *Johnstone* cases:

"That jurisdiction requires the court to be wholly satisfied both that a mistake has been made and as to precisely what the mistake

was. Mr Child submits, and I am inclined to agree, that this case comes near to that principle but does not quite get there."

It is to be hoped that the purposive approach adopted by the Court in the three *Johnstone* cases will now be more generally adopted in trust cases, in order to obtain a decision that is more likely to coincide with the actual intentions of the settlor or testator in question.

Re Owen's Estate - a harsh decision?

A good example of a recent case that almost certainly would have benefited from, but unfortunately did not receive, such an approach is *Re Owen's Estate*, a decision of Mr Stanley Burnton, Q.C. (sitting as a Deputy High Court Judge of the Chancery Division) given on March 18, 1998. In that case the testator had by means of a home-made will left his estate to his wife Lilian Florence Owen. The will then gave four small pecuniary legacies, and continued:

"in the event of it should it occur the Demise of Lilian Florence Owen together with me, the Estate be equally shared between:- Mrs Jenifer Clare and Mr Peter Mottram".

In the event, the testator's wife predeceased him by several years. He did not have any children himself, but his wife's sister Mrs Violet Mottram had had two children. They were the Mrs Jenifer Clare and Mr Peter Mottram mentioned in the will. Two of the pecuniary legatees were Mrs Clare's two children, Susan and Karen. The question of construction was whether the testator's residuary estate passed under the gift contained in the will in favour of Mrs Clare and Mr Mottram or rather passed on a partial intestacy of the testator. The former result would be achieved if the words "together with" in the above passage were construed as meaning "as well as", a quite possible meaning for the words, so that all that would be required was that the testator should have died as well as his wife. The latter result would be achieved if such words had to be given the meaning "at the same time as", because, although both the testator and his wife had died, a period of some seven years had separated the two events. Surprisingly, the judge opted for the latter result. He said:

"In my judgment, the will is quite clear. The contingency referred to in the last sentence of the will was that the Testator's wife might die together with him.... It may well be that it would have been more sensible for the Testator to have provided for the possibility of his wife predeceasing him. Although Jenifer Clare and Peter Mottram were not related to him by blood, but by marriage, it is clear from the terms of the will itself that he favoured them.... It may well be that if he had decided to provide for the possibility of his wife predeceasing him, he would have wanted his residuary estate to go to the same persons. However, he did not provide for

that possibility. If the Testator had intended to provide for his wife predeceasing him, he could, and in my judgment would, have done so in far more clear and obvious language than he in fact used."

This seems to be a particularly harsh decision, producing an intestacy, on what was after all a home-made will. This is especially so, since "as well as" is quite a normal, and is by no means a strained, meaning of "together with". Although "together with" is undoubtedly capable of having the meaning "at the same time as", this is not its only or even necessarily its primary meaning. The adoption of a more purposive approach to construction would surely have produced a fairer result.

 Home