

Rectification and trusts: A Cayman Islands perspective

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Rectification is about 'putting the record straight'¹. It is an equitable remedy by which the court can order that the wording of a document is rectified so that it reflects the true intentions of the parties. That does not mean, however, that the court can re-write history should one of the parties subsequently have a change of heart. Rather, it is a means by which the words of the document can be changed to reflect what was actually agreed between the parties.

In the trusts context, imagine that Mr A decides to settle his farm in Devon and his town house in London on trust for his five children and executes a trust deed governed by English law which he believes carries those wishes into effect. Fifteen years later he discovers that, owing to a drafting error, only the town house in London is in fact settled on trust. In those circumstances Mr A could ask the English court to exercise its discretion to rectify the trust deed so that it reflects Mr A's intentions on the date he executed the document. As the English court held in *Allnut v Wilding*²:

'...In the case of a voluntary settlement, rectification involves bringing the trust document into line with the true intentions of the Settlor as held by him at the date when he executed the document.'

Given the likely repercussions for Mr A, his five children and the trustees of his settlement having acted for the last fifteen years on the basis that both properties were settled on trust, it is easy to see why rectification can be such a welcome remedy.

What if Mr A's trust had been governed by Cayman Islands law?

The position in Cayman

Rectification is a long-established equitable remedy in the trusts context in the Cayman Islands, with the earliest of such reported cases being that of *B v Trust Management*³. In that case Chief Justice Collett held that the Cayman court had jurisdiction to rectify a trust deed on an application by the settlor 'when it can be shown that the deed did not in fact give effect to his intentions, because of the incorrect legal advice he received at the time of its preparation'. The Chief Justice also held that the Cayman court may exercise its discretion to rectify an error which would otherwise have enabled a legitimate claim to be made by the UK revenue authorities.

The Cayman courts have gone further, granting rectification even where an application is resisted on the basis it is contrary to the interests of the beneficiaries of a settlement. In *Briggs v Integritas Trust Management (Cayman) Limited*⁴, for example, the applicant sought rectification of two trust deeds

¹ *Allnut and another v Wilding and others* [2007] WTLR 941 at 944

² See note 1

³ [1988-89] CILR N-22

⁴ [1988-89] CILR 456

governed by Cayman Islands law. The applicant settlor had instructed his lawyers to prepare two trusts from which his three children were to benefit. The eldest child, Kerry, was his wife's child by a previous marriage, but had always been regarded by the settlor as his daughter. The settlor intended that all three children should benefit equally from each settlement and maintained that he gave clear instructions to this effect to his lawyers. He admitted that when the time came to execute the documents 'I flipped through the settlements but did not read them...It was unfortunate that I totally relied upon my solicitors. I saw no reason to double-check the work ...after I had given them very clear instructions...'⁵.

The lawyer who drafted the documents did not take clear notes of the settlor's instructions and neglected to define the beneficiaries of the trust so as to include Kerry. The application was resisted on behalf of the two younger children (a) on the basis that the settlor had failed to produce clear and convincing evidence of his intentions; and (b) the solicitor's negligence must be vicariously that of the settlor, a factor which should weigh heavily against granting rectification.

Quoting Evershed M.R. in *Whiteside v Whiteside*⁶ the court held that the discretionary remedy of rectification 'must be cautiously watched and jealously exercised'. It went on to hold that 'strong and convincing evidence is required to prove the settlor's intention'⁷. It was satisfied that the settlor's intention had always been to benefit Kerry in the same way as his other two daughters. Schofield J noted a 'greater readiness' to order rectification where all parties agree and will benefit, other than in circumstances where certain beneficiaries will lose out by rectification, which 'is not inconsistent with a cautious and jealous exercise of the court's discretion'⁸. The court ordered rectification and in doing so held that the settlor was not at fault for failing to read the documents before executing them.

In *Megerisi v Scotiabank Trust (Cayman) Limited & Ors*⁹ the Cayman court applied the principles in circumstances similar to those facing Mr A in our example above. In the Megerisi case the settlement, as drafted, omitted to assign to the original trustee the principal asset intended to be settled by the settlor. As Anderson AG J put it, the applicant sought to 'rectify the error by which essentially the entire corpus of the purported trust was excluded from the settlement'¹⁰.

The settlor had decided to settle the assets on trust governed by Cayman Islands law on the advice of his legal advisors so as to avoid becoming liable to UK inheritance tax on his death. The Cayman court, noting that this may well have been the only reason for the application for rectification, stated that the fact that a tax advantage would follow as a result of an order for rectification would not be a bar to the exercise of the court's discretion. Further, ordering rectification, the court held that whilst rectification would not be available if there was a convenient alternative remedy, the mere availability of a claim in negligence, the outcome of which was uncertain, did not preclude the court from ordering rectification. Subsequent cases have supported this line of reasoning with the Cayman court willing to order rectification in circumstances where it considers that there is no practical and convenient alternative remedy open to the applicant.

Conclusion

Rectification is a long-established equitable remedy in the Cayman Islands and the reported cases demonstrate that the Cayman court is willing to grant rectification where the evidence supports such an order being made so as to set the record straight.

⁵ Page 462, line 9

⁶ [1950] Ch. 65

⁷ Page 466, line 18

⁸ Page 471, line 11

⁹ [2004-05] CILR 456

¹⁰ Paragraph 8

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