The Representation of Vistra Fiduciary Ltd re The Maria Trust

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Judge:	Bailiff
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Text

The Maria Trust
The Representation of Vistra Fiduciary Limited

[2022] JRC 164

Before:

R. J. MacRae, Esq., Deputy Bailiff, and Jurats Christensen and Le Heuzé.

ROYAL COURT

(Samedi)

Trusts.

Authorities

B and C v Virtue Trustees (Switzerland) AG [2018] JCA 219.

Walbrook Trustees v Amethyst Trust [2002] JRC 186.

R.E. Sesemann Will Trust [2005] JLR 421.

B & C v Virtue Trustees (Switzerland) AG [2018] JCA 219.

Re B (Care Proceedings: CP: Standard of Proof) [2008] UKHL 35.

Lewin

Murray v Camerons Limited [2020] JRC 179.

G Finance v HSB International Trustee [2020] JRC 230.

Allnut v Wilding [2007] EWCA Civ 412.

Ashcroft v Barnsdale [2010] STC 2544; [2010] EWHC 1948.

MV Promotions v Telegraph Media Group Limited [2020] EWHC 1357 (Ch).

Giles v Royal National Institute for the Blind [2014] EWHC 1373 (Ch).

Graham v Lynch [2020] EWHC 986 (Ch).

Re Moody [1990] JLR 264.

Advocate E. Moran **for the Representor**.

Bailiff

THE DEPUTY

1 On 14 th June 2022 we granted the relief sought in the Representation in this matter. We now give our reasons for so doing.

Background

2 The Representation was issued by Vistra Fiduciary Limited, the Trustee ("the Trustee") of The Maria Trust ("the Trust") for rectification of the Trust Instrument to include E ("the settlor"), the economic settlor of the Trust within the definition of Excluded Person in Clause 1 of the Trust Instrument.

3 The settlor died in February 2019 and accordingly was not a party to the proceedings. However, the Representation was supported by those convened to the hearing of the Representation, namely the settlor's two sons F and G, the former of whom is the only beneficiary of the Trust, and the protector, H, who is a lawyer qualified in a jurisdiction outside Europe.

4 Her Majesty's Revenue and Customs (“HMRC”) were also notified of the application and responded by letter to the effect that they did not wish to be joined to the proceedings but drew the Court's attention to the decision of *B and C v Virtue Trustees (Switzerland) AG* [2018] JCA 219 to which we will refer below.

The facts

5 The affidavit of F reveals that he is an academic working at a leading UK university where he has been based for over 20 years. As to his parents, his father, a lawyer worked in his country of birth in a firm created by his father and grandfather. He also invested in several companies with the investments being held by a Panamanian holding company that we shall call P Inc. As to his mother, the settlor, she was from the outset sole owner of P Inc, owning 100% of the shares.

6 The father died intestate in 2009 and his estate was divided under the law of his domicile between his wife and two sons. At this time — and until subsequent distributions were made to the sons in 2014 and 2016 — the settlor continued to hold all the shares in P Inc.

7 In 2008, F and his wife were looking to purchase their first family home in England. They did not envisage seeking or acquiring parental assistance and were going to purchase a property with the assistance of a mortgage. However, in August 2009 F's parents arrived in England and told him that his father was suffering from terminal cancer and did not have long to live. They wanted to purchase a property and set up trusts for the benefit of the children and F's father identified a property as a suitable home for his son and his son's family. Before the property was purchased, the father died on 7 th September 2009. Nonetheless, the purchase proceeded with funds derived from P Inc.

8 In his affidavit in support of the application, G states that he also travelled to England at this time and was aware of the plan to set up a trust into which his mother (the settlor) could transfer funds so that the Trust could purchase the property for F, and that there was no intention or need for his mother to retain any interest in the property purchased in this manner for F and his family.

9 H has also sworn an affidavit in his capacity as protector of the Trust in support of the Representation. He knew the settlor and the father well, and understood from the outset that the property was to be purchased in order to benefit F, with the source of funds being P Inc. He spoke to the settlor, he said that she intended to create a trust that would be exclusively for the benefit of F and that it was not her intention to retain any interest in the Trust, and the only reason to set up a Trust — instead of gifting the money directly to F — was to *“protect the property from UK inheritance tax”*.

10 As to the 2017 instrument of exclusion, to which we will come shortly, purporting to exclude the settlor from benefit under the Trust, H attests that this document was not discussed with him as the protector at the time and he was not consulted about that change, but he is satisfied that the purpose of the instrument of exclusion was to correct an error in the Trust Instrument as executed.

11 A feature of the background is the advice that was taken from Mr Collingwood, who has also sworn an affidavit for the purpose of these proceedings. Mr Collingwood is a chartered accountant, a fellow of the Institute of Chartered Accountants of England and Wales and a fellow of the Chartered Institute of Taxation. He is also a director of tax planning at an English law firm called HMG Law. On 14 th October 2009 he met F who was seeking urgent tax advice in relation to the purchase of a property. F was accompanied by two bankers from Deutsche Bank and Mr Collingwood made a contemporaneous file note which he exhibited to his affidavit which stated, *inter alia*, that at the end of the meeting HMG Law was to " *give tax advice on the inheritance tax and international tax structure for the purchase of a new house by [F]"* and *"liaise with a firm of offshore trustees to form a trust"*. Notwithstanding F's impeccable academic credentials (which we do not set out as this will be an anonymised judgment) at a leading university, owing to his and his parents' jurisdiction of origin, this was assessed as a *"high risk client"* for the purpose of money laundering and HMG Law noted it was going to have to verify that the funds being contributed by the settlor were *"clean"*.

12 Under the title "Problem" it was noted that F intended to purchase the property with the funds *"to come from his mother, who has recently been widowed.* The problem is whether [F] should buy the property in his own name or via a trust". F and his parents were born outside the UK. The "tax background" was set out and it was noted that Mr Collingwood *"concluded that for tax purposes it would be better if [the property] were acquired by an offshore trust.* Discussion took place as to whether this could be a Jersey trust …". It was noted that the vendor was keen to complete the sale within the next 10 days. It was argued, and this was plainly the case, that the only reason for the establishment of the Trust was to legitimately avoid the incidence of inheritance tax.

13 The following day, 15 th October 2009, Mr Collingwood made contact with Mr Le Marquand of Fiduciary Management Limited (FML) — the former name of the Trustee prior to its acquisition by the Vistra group of companies. The purpose of the call was to establish if that entity formed trusts to hold UK properties for non-domiciled settlors and whether they could do so within the tight timescales dictated. Mr Le Marquand advised that such a trust could be set up, and that it was anticipated to be a discretionary trust. Later that day he sent an email to Mr Le Marquand with various documentation, including inviting Mr Le Marquand to verify the identity of the two Deutsche Bank bankers, which he did. There was various correspondence in relation to compliance documentation sought from the settlor and Mr Le Marquand supplied to Mr Collingwood a draft discretionary trust deed to be settled under Jersey law by the trustee by way of a declaration.

14 On 15 th October 2009, Mr Le Marquand wrote to Mr Collingwood in relation to the proposed discretionary trust and under the title “Trust Structure” said *“The Trust will be discretionary which will acquire/hold a UK residence as its principal asset to be occupied by the principal beneficiary for the purposes of Inheritance Tax and capital gains planning.* HMG Law will provide tax and legal advice both for the structure and to the settlor/beneficiaries. The Settlor resides outside the UK and the principal beneficiary is UK resident non-domiciled”. The penultimate paragraph noted that Mr Le Marquand had provided a draft discretionary trust with the provision to appoint a Protector and Mr Collingwood added *“We will need to determine when the Protector's consent is required by the Trustee to exercise their powers, as set out in Schedule 6 of the Deed”*.

15 Accordingly, it was plain from the terms of the letter that the purpose of the Trust was inheritance tax planning, and that HMG Law were to give the appropriate tax and legal advice.

16 As to the terms of the draft Trust, this was also exhibited to the evidence before us, and annotated with notes made by Mr Collingwood in manuscript. In the *“words and expressions”* provisions in the *“Interpretation”, “Excluded Person”* was defined as *“The Trustees for the time being and any other person constituted an Excluded Person pursuant to Clauses 9 or 11”*.

17 The power of exclusion at Clause 9 allowed the Trustees in their absolute discretion to declare that a person or persons who would or might become a beneficiary may be wholly or partly excluded from future benefit or shall cease to be a beneficiary and that such a person shall be an excluded person and that such instrument may be irrevocable or revocable during the Trust Period. Clause 10 provided that no excluded person shall be capable of taking any benefit of any kind by virtue or in consequence of the Trust.

18 Mr Collingwood understood the Trust as drafted meant that the settlor would not be able to benefit from it. He failed to appreciate that it was possible for the settlor to be added as a beneficiary. He, in his words, *“simply assumed that the draft provided by Mr Le Marquand was similar to a standard form English law discretionary trust and that the settlor would be excluded from benefit”*. He continues *“Had I appreciated that [the settlor] would not be excluded from benefit, I would have ensured that the draft trust deed was amended so as to exclude her. This change to the draft deed would have been in accordance with my understanding of what [the settlor] wanted the trust to do, which was to benefit only [F] and his family and to shelter the trust assets from inheritance tax on her passing”*. The only change that Mr Collingwood made to the Trust was to widen the class of beneficiaries to include F's wife, his issue and their spouses.

19 Mr Collingwood met with the settlor and F on 16 th October 2009 and his note read “His [F's] mother needs to take independent legal advice about setting up the trust because she will be putting significant sums into it which will be beyond her reach.” Mr Collingwood says “I believe that both [the settlor] and I understood that she was giving away the cash

absolutely and that she would have no future access to the gifted cash. I explained that there were reservation of benefit rules which meant that she could not benefit from assets in the trust without invalidating the gift for inheritance tax purposes. A benefit would include spending more than a couple of weeks holiday a year in the house bought with the funds. That discussion was necessary because she was giving the cash away absolutely and was not a beneficiary". Mr Collingwood went on to say that he believed that the settlor "Understood and intended that she would be excluded from benefitting from the trust. Indeed, if she intended to be a beneficiary, the gifts with the reservation rules would have been irrelevant".

20 Subsequently, on 19 th October 2009, Mr Collingwood sent a formal letter of advice to F that he copied to Mr Le Marquand. It contained the following tax advice:

> ***"To avoid having [the property] subject to UK inheritance tax, I recommend that you and your mother set up a discretionary trust outside the UK.*** Assets within the trust are deemed to be outside the United Kingdom. This applies even if it is land within the United Kingdom. Similarly as the trustees will not be resident in the United Kingdom there will be no capital gains tax liability when those assets are sold. Because your mother is domiciled [outside the UK], there will be no inheritance tax payable on the assets within the trust."

21 Mr Collingwood observes:

> ***"The clear implication of this advice is that the assets in the trust will be sheltered from English inheritance tax on the passing of [the settlor].*** I gave this advice because I believed from my review of the draft trust deed that [the settlor] was excluded from benefit. This accorded with my understanding of what [the settlor] was trying to achieve from the trust namely to benefit only her son and his family and to do so in a tax efficient way. I do not believe that it was ever contemplated by her that she would have any interest in the trust or that she could be added as a beneficiary."

22 This clear evidence of intention was replicated in the application for trust services form provided by Mr Le Marquand to Mr Collingwood, which Mr Collingwood completed, identifying the settlor as the *"ultimate client"* and stating that the purpose/rationale on the Trust was *"to acquire UK property to be occupied by the principal beneficiary under licence to occupy arrangement.* The client is UK non-resident, and the beneficiary is UK resident/non-domiciled. The trust provides estate planning in respect of UK inheritance tax". Mr Collingwood identified himself as the tax/legal adviser *"relied upon"*.

23 He was the only taxation or legal adviser who advised the Trustee, the settlor or F. The application form went on to set out the identity of the beneficiaries and that of the protector.

24 In his affidavit, F also confirms that he and his mother understood that she would be excluded from benefitting from the Trust. Mr Le Marquand says in his affidavit that, based on the information provided by Mr Collingwood, including his letter of advice dated 19 th October 2009, and the application for trust services, the intention of the settlor was to establish a trust that would shield the property from UK inheritance tax on her death. Mr Le Marquand made minor changes to the draft Trust Instrument – identifying the name of the Trust and inserting particular provisions in relation to the protector. Mr Le Marquand was not aware that Mr Collingwood had advised the settlor that she would be excluded from benefitting from the Trust once it had been established, or that he had provided that advice because Mr Collingwood had misread or misunderstood the Trust Instrument. Mr Le Marquand relied on Mr Collingwood and his firm to ensure that the draft Trust Instrument would establish a structure that reflected the intentions and wishes of the settlor. Accordingly, the Trustee believed that the Trust that was drafted was carrying into effect the intentions of the economic settlor of the Trust.

25 As to the problem that has arisen, that was first considered in tax advice given to the Trustees by Charles Russell Speechlys ("CRS") in November 2016. CRS advised that provided the cash required to purchase the property was transferred to the trustees outside the United Kingdom, there would be no inheritance tax payable on establishing the Trust. If the cash was transferred in the United Kingdom there was a risk that inheritance tax would have been payable at 20% on that transfer. As the Trust acquired an asset in the United Kingdom, it fell within the inheritance tax regime for the taxation of discretionary trusts which includes provision for a 6% charge on the value of the Trust assets every ten years with the first charge due to be paid in October 2019. There is, we understand, no difficulty in relation to this particular charge. However, the Gift with Reservation Of Benefit (or 'GROB') Rules may also apply. CRS advised:

> ***"Where discretionary trusts are involved, HMRC consider that the donor reserves a benefit if it is possible for them to benefit from the trust in future, even if the donor in fact makes no use of the property in future.*** We therefore consider it likely that the property will be subject to IHT on [the settlor's] death at a rate of 40% over her available nil rate band….."

26 The advice that they gave in November 2016 was that this risk could be *'mitigated'* partly or wholly depending upon the duration of the settlor's life, if she was excluded from all benefit under the Trust:

> ***"This would be treated as a gift by [the settlor] for IHT purposes, which would be free of IHT provided she survives seven years from the date she was excluded from the Trust."***

27 An Instrument of Exclusion was drafted. It was purportedly executed on 5 th May 2017 by the Trustee, pursuant to Clause 9 of the Trust. However, there was no reference to the protector's consent being sought in the Instrument; consent of the protector was not in fact sought and accordingly that Instrument was probably invalid.

28 In any event, the settlor died in February 2019 and subsequent analysis by CRS in December 2021 was to the effect that a significant IHT liability arose on her death — subject to the Trust being rectified. In CRS's most recent advice they state that, in the view of HMRC there is a reservation of benefit in this case by virtue of the fact that an individual had settled a discretionary trust of which she was not a beneficiary, but the Trustee has the power to add and the power could be exercised so as to cause the settlor to become a beneficiary. CRS said it can be *'confidently assumed'* that HMRC would take the position that the settlor reserved a benefit in the assets of the Trust and in those circumstances the IHT return filed should identify an IHT liability of at least £540,000 by reference to a valuation of the property of £2 million. The IHT charge falls on the Trustee (and potentially F).

29 CRS went on to say:

> ***"The rectification of the Trust Deed to include [the settlor] as an Excluded Person as contemplated by the present application would result in the elimination of the IHT liability outlined above.*** This is on the basis that if the Trust Deed is so rectified, there would no reservation of benefit in the Property on [the settlor's] death and the Property would not be within [the settlor's] estate for IHT purposes."

30 We would describe the *'settlor'* as such, notwithstanding the fact that this was a Trust created by a declaration by the Trustee, as we understand that for United Kingdom tax purposes the economic settlor would be treated as the person who settled a discretionary trust such as this.

31 As to the position of Mr Collingwood's firm, HMG, we were told that a letter before action had been sent on behalf of the Trustee, that a 'standstill agreement' was in place and that, in any event, the costs of the application would be met by HMG.

32 The Trustee has acted promptly in bringing this application and there was no suggestion or question of delay.

33 In his affidavit, G says that in view of the tax consequences that may have arisen there is the possibility of a claim under Jersey law to set aside his mother's dispositions into trust on the grounds of mistake and that, if such an application was successful, the property would be held on constructive trusts for his mother's estate under which he is the sole heir. In addition, the property would remain part of his mother's estate and there would still be a liability to UK inheritance tax. Accordingly, setting aside the transfers into trust on the grounds of mistake may not have the effect of eliminating the inheritance tax liability that has arisen and would be directly contrary to the wishes of his mother which were to purchase the property as a gift for his brother.

The law

34 The legal principles pursuant to which trusts are rectified by the Royal Court were until recently long settled.

35 The familiar test was set out by the Royal Court in *Walbrook Trustees v Amethyst Trust* [2002] JRC 186, where Birt DB said:

> ***"The principles upon which the Court will grant rectification of a settlement are well established.*** The Court has to be satisfied that there has been a mistake such that the document does not carry out the true intention of the parties to the document. We were referred to the case of *In re Westbury Settlement…* ***which set out a 4 stage test which the Representor must satisfy before rectification may be ordered namely:***
>
> > ***(1) There must be sufficient evidence of the error;***
> >
> > ***(2) it must be established to the highest degree of civil probability that a genuine mistake has been made;***
> >
> > ***(3) there must be full and frank disclosure; and***
> >
> > ***(4) there should be no other remedy, that is to say no other practical remedy*** .
>
> ***We must confess that we do not see a great difference between 1 and 2 of that four-stage test, as they seem to us to say much the same thing.*** We would prefer to combine them so that the test becomes a three-stage test with the first stage being that the Court must be satisfied to the civil standard that a mistake has been made so that the Settlement does not carry out the true intention of the parties (and the Settlor in particular)."

36 This three stage test has been frequently cited in such cases and in *R.E. Sesemann Will Trust* [2005] JLR 421, Birt DB said:

> ***"12. The test for rectification in Jersey is well established. There are three requirements:***
>
> > ***(i) The court must be satisfied by sufficient evidence that a genuine mistake has been made so that the document does not carry out the true intention of the party(ies)*** .
> >
> > ***(ii) There must be full and frank disclosure*** .
> >
> > ***(iii) There should be no other practical remedy.*** The remedy of rectification remains a discretionary remedy .

> ***13. The important aspect in this case is whether the first requirement is met. There is a clear distinction to be drawn between the transaction itself and the objective behind the transaction. The court can rectify a deed which does not reflect the transaction which the parties intended to achieve but the court cannot use rectification as a method of allowing the parties to achieve some other transaction which, in hindsight, would have been more desirable."***

37 It is clear from the dicta in *Walbrook Trustees v Amethyst* that when the Court referred to *'sufficient evidence'* in *Re Sesemann* that it meant that the Court must be satisfied to the civil standard that a mistake has been made so the document does not carry out the true intention of the relevant parties. The familiar and long-standing Jersey test was considered by the Court of Appeal in *B & C v Virtue Trustees (Switzerland) AG* [2018] JCA 219. At paragraph 20, the Court of Appeal observed that the standard of proof 'is no more than proof on the balance of probabilities'. It is clear from authorities that in all civil cases that is now the standard of proof, absent exceptional circumstances, even cases where the Court, in a different context is dealing with allegations of sexual abuse. As Baroness Hale said in *Re B (Care Proceedings: CP: Standard of Proof)* [2008] UKHL 35 at paragraph 70:

> ***"I…would announce loud and clear that the standard of proof in finding the facts necessary to establish that the threshold…***.is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies."

38 In our view it is unhelpful to speak, as the old authorities do, of the need for *'strong irrefragable evidence'*, which according to Snell means *'something more than the highest degree of probability'* in circumstances where the standard of proof is the normal civil burden, namely balance of probabilities.

39 There does not appear to have been any argument in the Court of Appeal in *B & C* to the effect that the long-standing approach of the Jersey Courts to rectification was wrong – indeed, the Court of Appeal held at paragraph 23 that there was no difference between the law of England and the law of Jersey relating to the rectification of voluntary settlements.

40 However, Martin JA, at paragraph 23 of the judgment of the Court of Appeal, indicated his preference for the formulation set out at paragraph 4–069 of Lewin. This, now paragraph 5–079, says:

> ***"The conditions which must be satisfied in order for the court to order rectification of a voluntary settlement are as follows:***
>
> ***(1) There must be convincing proof to counteract the evidence of a***

different intention represented by the document itself;

(2) There must be a flaw (that is an operative mistake) in the written document such that it does not, on its true construction, give effect to the settlor's intention;

(3) The specific intention of the settlor must be shown; it is not sufficient to show that the settlor did not intend what was recorded; it must also be shown what he did intend; and

(4) There must be an issue capable of being contested between the parties affected by the mistake notwithstanding that all relevant parties consent."

41 The footnote to this paragraph notes that this summary was approved to be the case by the Jersey Court of Appeal in *B v Virtue Trustees (Switzerland)*. It does not necessarily appear that this formulation has been specifically adopted by the English Courts and we have had regard to what was said at paragraph 168 of the decision of the Royal Court in *Murray v Camerons Limited* [2020] JRC 179, where the Bailiff observed:

"168. We are supported in that view that the above authority is and was not binding on the Royal Court because the point on which the Court proceeded was not argued before it by the case of *FSHC Group Holdings Limited v GLAS Trust Corp Limited* [2019] EWCA Civ 1361; 2020 1 All ER ***in which the Court of Appeal of England and Wales, at paragraph 136 of the judgment in a case involving the English law of contract said this:-***

"Subsequent authorities have clearly established that the suggestion which attracted the Court of Appeal in *Joscelyne v Nissen* ***is a correct approach and that a court is not bound by a proposition of law which was not the subject of argument because it was not disputed in an earlier case (even if that proposition formed part of the ratio decidendi of the case).*** In *Re Hetherington (decd), Gibbs v McDonnell* [1989] 2 All ER 129 ***at 133*** , [1990] Ch 1 ***at 10, Sir Nicolas Browne-Wilkinson V-C held that, as a first instance judge, he was entitled to decline to follow even a decision of the House of Lords in which a proposition of law necessary for the decision was not disputed.*** After a review of the authorities, he concluded that:

"…the authorities therefore clearly establish that even where a decision of a point of law in a particular sense was essential to an earlier decision of a superior court, but that superior court merely assumed the correctness of the law on a particular issue, a judge in a later case is not bound to hold that the law is decided in that sense."

See also *R (on the application of Kadhim) v Brent London BC* [2001] QB 955, [2001] 2 WLR 1674 ***(para [33])***; *Rawlinson v Hunter Trustees SA (as Trustee of the Tchenguiz Family Trust) v Director of the Serious Fraud Office (No 2)*, *Tchenguiz v Director of the Serious Fraud Office* [2014] EWCA Civ 1129,

[2015] 1 WLR 797 ***(para [43]).”***

42 These principles apply to this case. This Court is not bound by the propositions of law referred to above which were considered in the *B and C* case as they were not the subject of argument.

43 As to the elements of the test proposed by Lewin, the reference to *‘convincing proof’* does, as set out above, appear to be inconsistent with the usual civil burden of proof – what is required is simply proof sufficient to discharge the burden which the parties seeking rectification must discharge.

44 The second element of the test in Lewin is captured by the first element of the established test in Jersey. As to the third element of the test in Lewin, it was suggested by the Court of Appeal that the first requirement identified in the established Jersey approach does not sufficiently capture the need for the Court to (a) be satisfied that the parties did not intend what the document records and (b) identify what they did in fact intend (paragraph 21 of the decision of the Court of Appeal in *B and C*). In our view, consideration of whether the applicant has proved that a mistake has been made so the document does not carry out the true intentions of the parties necessarily includes examination of what the relevant party/parties intended.

45 Finally, as to the fourth element required to be proved by Lewin, namely identification of *‘an issue capable of being contested between the parties effected by the mistake’*, this is an element of the test which was not expanded upon by the Court of Appeal in *B and C*. As noted by Commissioner Clyde-Smith giving the judgment of the Court in *G Finance v HSB International Trustee* [2020] JRC 230 at paragraph 27 *‘the precise meaning of this is unclear’*, but it was *‘…clear that the English Court will not grant rectification if doing so will make no difference to the parties rights’*.

46 The *‘need for an issue between the parties’* has never been an essential requirement according to the Jersey authorities on rectification. As to the meaning of the phrase, according to Lewin at paragraph 5–084, there needs to be *‘an issue capable of being contested between the parties or between the settlor and the beneficiaries or the intended beneficiaries, notwithstanding that rectification is sought or consented to by all of them’*.

47 In this case, the economic/effective settlor is dead and there was no dispute between the Trustee or the persons convened to the hearing, namely F, G or the protector who all supported the application. There was an issue capable of being contested between some of those parties and HMG (and indeed HMRC), but HMG was not a party to the application or, in any sense, a party to the Trust. It appears that this limb of the test set out in Lewin was designed to prevent applications for rectification which were driven by fiscal considerations only and would not affect the rights of the parties to the application. However, there is no difficulty in principle with applications for rectification whether under the law of England or

the law of Jersey being fiscally driven. As the English Court of Appeal said in *Allnut v Wilding* [2007] EWCA Civ 412 per Mummery LJ:

> ***"….Rectification is about putting the record straight. In the case of a voluntary settlement, rectification involves bringing the trust instrument into line with the true intentions of the settlor as held by him at the date when he executed the whole document. This can be done by the Court when, owing to a mistake in the drafting of the document, it fails to record the settlor's true intentions."***

48 However, rectification is not available to parties who simply wish to rewrite history and enter into a rather better or different transaction from the one that they entered into.

49 The approach of the English Courts to this requirement appears to have been to strain to identify *'an issue capable of being contested between the parties'*. For example, in *Ashcroft v Barnsdale* [2010] STC 2544; [2010] EWHC 1948, the English High Court considered a case where the parties sought to correct a mistake in a will by executing a Deed of Rectification which was submitted to HMRC. HMRC refused to accept that the Deed of Rectification was effective and said that the parties need to seek a Court order. HMRC did not wish to be joined as a party to the application but would be bound by the Court's decision. Judge Hodge QC held at paragraph 22 that the existence of the Deed of Rectification was not a bar to making such an order as:

> ***"…there still remains an issue, capable of being contested between the parties, which will be addressed by an order for rectification.*** HMRC's letter of 19 October 2007 makes it clear that HMRC cannot accept the Deed of Rectification as having any effect for Inheritance Tax purposes unless the parties obtain a Court Order rectifying the Deed of Rectification."

50 The judgment went on to hold that as HMRC had said that they would be bound by a Court order:

> ***"It follows that an Order for Rectification will have practical consequences, in terms of altering HMRC's treatment of the ultimate incidence of the inheritance tax chargeable in respect of the pecuniary legacy….***Will [under the Will], as varied by the Deed of Rectification. Such an order will also avert any dispute between the Claimant and his two children as to whether (by virtue of a Deed of Rectification) they should be liable to reimburse him for the additional inheritance tax…for which he has already accounted to HMRC…"

51 Accordingly, we were content for the Court to proceed on the footing that this and all applications should have practical consequences of benefit to one or more parties to the application. Rectification is an equitable remedy in any event and the Court would be extremely unlikely to grant an application which did not lead to practical consequences of benefit to one or more parties. Indeed, in *MV Promotions v Telegraph Media Group Limited*

[2020] EWHC 1357 (Ch) at paragraph 3, His Honour Judge Hodge QC said:

> ***"Even if the requirements for rectification are made out, Mr Chapman points out that the relief remains discretionary.*** As such, the Court may refuse to grant relief in circumstances such as these where there is no practical significance to the outcome."

52 A similar approach was adopted by Barling J in *Giles v Royal National Institute for the Blind* [2014] EWHC 1373 (Ch) in the claim for rectification involving, if the application succeeded, the repayment of inheritance tax. The Court was asked to rectify a defective Deed of Variation of a will. Having sent out the relevant requirements, the Court said in relation to the need for there to be 'an issue capable of being contested between the parties notwithstanding that all relevant parties consent':

> ***"This criterion has been much criticised: the purpose of it, and its actual content and scope are, by no means clear."***

53 In our view, it is not appropriate for this Court to adopt a criterion that is unnecessary and has been criticised in this and, we understand, other cases. On the facts of that case, the judge held in considering whether or not there was an issue capable of being contested:

> ***"38. As already indicated, there is no need for an actual dispute to exist, and it is irrelevant that rectification of the instrument in question is sought or consented to by all interested parties*** .
>
> ***39. In the present case the only party adversely effected by the proposed rectification is HMRC and, as said earlier, they have indicated that they do not wish to be joined and do not object to the claim."***

54 The judge went on to analyse counsel's submissions that there were various issues, none of which were actually being contested but which were capable of being contested by parties, none of whom were actually parties to the application in the sense that they did not wish to be joined, did not object to the claim and had not been heard.

55 The English Court came to a similar conclusion in *Graham v Lynch* [2020] EWHC 986 (Ch) where Master Kaye considered an application to rectify a trust Instrument on the grounds of mistake, the application being to expressly exclude certain persons from benefit. The application was unopposed. At paragraph 67, the judge said:

> ***"This is not a case where the parties' positions would not be altered by the rectification other than in relation to tax.*** The position is more akin to Giles. I accept that the substance of the unrectified transaction gives rise to the tax implications which can be regarded as an issue which could be contested."

56 Counsel further identified, as in Giles, that a *'potential claim for negligence can be taken*

into account when considering if there is an issue'.

57 In the course of argument, counsel drew our attention to many Jersey rectification cases in order, inter alia, to establish that it has never been a requirement of the Court to identify an issue between the parties. Some of those are instructive. An early case of the rectification of a trust is *Re Moody* [1990] JLR 264 where Crill, Bailiff, noted that rectification was a discretionary remedy which should be 'cautiously watched' and 'jealously exercised'. We agree.

Decision

58 Applying the established test for rectification, we find as follows.

59 First, we are satisfied that the Representor has proved to the civil standard that a genuine mistake has been made so the document does not carry out the true intention of the relevant parties, in this case the officer of the Trustee that declared the Trust (Mr Le Marquand) and the economic settlor. On the evidence, the Trustee's intention was to carry out the intentions of the economic settlor. Her intentions and wishes were extremely clear. She wished to gift the property to her son, F via, on advice that she, F and the Trustee received, a discretionary trust from which she could not benefit so as to ensure that the property and the Trust, so far as possible, were not liable for inheritance tax. Not only was it her intention that she not be able to benefit from the Trust, it was her intention having regard to the advice she received that she be excluded from benefit and the Trust Instrument that was drafted was intended to achieve that objective (see paragraph 21 above). The Trust Instrument that was drafted failed to achieve this objective and accordingly there has been a mistake.

60 We are satisfied that the Trustee has made full and frank disclosure to us, as have the other parties who have sworn affidavits in response to this application.

61 Thirdly, we are satisfied that there is no other practical remedy. The Court has previously indicated that generally litigation against professional advisers is not to be regarded as a practical remedy when compared with the clear and clean outcome of an application to rectify an instrument.

62 Finally and fourthly, we are satisfied that it is proper for the Court to exercise its discretion in favour of rectifying the Trust in this case and we order that the definition of *'Excluded Persons'* in Clause 1 of the Trust be rectified so that it provides that the Trustees for the time being, the settlor and any other person constituted an Excluded Person pursuant to Clauses 9 or 11 of the Trust are within the definition of Excluded Persons.