

## Re M Remuneration Trust

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	J. A. Clyde-Smith, Jurats Clapham, Newcombe
<b>Judgment Date:</b>	28 September 2007
<b>Neutral Citation:</b>	[2007] JRC 184
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<b>Court:</b>	Royal Court
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### Text

[2007] JRC 184

ROYAL COURT

(Samedi Division)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, and** Jurats Clapham **and** Newcombe.

In the Matter of the Representation of the a Trust Company Limited, 2007/84.

And in the Matter of the Representation of Mrs D 2007/84.

And in the Matter of the M Remuneration Trust Established on 14th November, 2003

And in the Matter of Article 51 of the Trusts (Jersey) Law 1984 (As Amended).

**Advocate R. J. Macrae for A Trust Company Limited.**

**Advocate L. K. A. Richardson for Mrs D.**

Mr D **appeared in person**.

## Authorities

[Income and Corporation Taxes Act 1988](#).

*IRC v Raphael* [\[1935\] AC 96](#), 142.

*Smith v Lucas* (1881) 18 Ch C 531, 542.

*Melanesian Mission Trust Board v Australian Mutual Providence Society* [1997] 1 NZLR 391, 394 (Lord Hope).

[Investors Compensation Scheme Ltd v West Bromwich Building Society](#) [1981] 1 WLR 896, 913.

*Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [\[1997\] AC 749](#), 767, 775, 782.

*Fenwick v Schmalz* [\(1868\) LR 3 CP 313](#).

Trust (Jersey) Law 1984 (as amended).

Snell's Equity 30th Edition, para 43-01.

*Mackenzie v Coulson* [\(1869\) LR 8 Eq. 368](#).

*Re Slocock's WT* [\[1979\] 1 All ER 358](#) explaining *Whiteside v Whiteside* [1950] 1 WLR 65.

[Allnutt v Wilding](#) [\[2007\] EWCA Civ 412](#).

## THE COMMISSIONER:

- 1 Two issues fell to be determined by the Court in this matter; firstly on the application of the A Trust Company Limited ("the Trustee") whether there was power under the trust deed of the M Remuneration Trust, established on 14<sup>th</sup> November, 2003, ("the Trust") to make loans to Mr D, an excluded person, and if not, on the application of Mrs D whether the trust deed should be rectified to enable such loans to be made.
- 2 The Court sat to hear the matter on 3<sup>rd</sup> September, 2007, and found that there was no power to grant such loans but rectified the trust deed to permit the same. We now set out our reasons for those decisions.

## Background

- 3 Mr and Mrs DB were married in 1985 and had two children. They ran a property business together. In 1996 they formed M Limited ("M") to manage that business.
- 4 In 2003 Mr D sought tax advice from Baxendale Walker, Solicitors. Mr D told us in evidence that his main concern was to avoid, or reduce, inheritance tax for his children. Baxendale Walker produced a report addressed to Mr and Mrs D. The stated objective according to that report was for the future proceeds of sale of the properties to be enjoyed by them and their family free of capital gains tax and inheritance tax. Baxendale Walker proposed what they described as *"a personal asset liberation plan"* and advised as follows:-
- "In our Opinion, the Taxpayers' [i.e. Mr and Mrs D] objectives can be met by using a unique partnership and company arrangement, together with a type of Employee Benefits and Shares Trust (known as an "EBT") as a tax efficient vehicle for holding the proceeds of sale of the [properties] and ultimately for providing such proceeds of sale of the [properties] to the Taxpayers and their family entirely free of Capital Gains Tax and Inheritance Tax."* (their emphasis).
- 5 The proposals put forward by Baxendale Walker can be briefly summarised as follows:-
- (i) Mr and Mrs D, who operated under a partnership, would transfer the properties to M in return for shares in that company.
  - (ii) M would establish an EBT into which it would transfer those properties.
- 6 For the proposed EBT to qualify for that status under English Law, participators in M (i.e. Mr and Mrs D) had to be excluded from benefit but Baxendale Walker advised that:-
- "5.4 [M] Investment Limited may from time to time indicate to the Trustees how it would like them to utilise trust funds: for example, by making a loan to the Taxpayers [Mr and Mrs D].*
- 5.5 The Deed establishing the EBT should provide that neither the Taxpayers nor their children and remoter descendants shall be entitled to receive outright distributions and income or capital from the EBT.*
- 5.5.1 Such persons can, however, receive cash loans from the EBT on interest accrued terms, at any time after the EBT is established.*
- 5.5.2 Other members of their family can receive similar loans.*
- 5.5.3 After the death of one or both of the Taxpayers, their children and further family can receive tax free outright benefits from the EBT."*
- 7 The Trustee was selected as the proposed trustee of the EBT and it wrote a lengthy letter to Mr and Mrs D dated 15<sup>th</sup> August, 2003 in which it advised inter alia that the use of a

personal asset liberation plan often involved an element of loans back to the founder or other individuals or participators. It explained how this would be done and emphasised the possibility that the Trustee might require security for any substantial loans as they would need to have some assurance on the ability of the borrower to repay not merely the capital sum but the interest that had accumulated during the term of the loan.

- 8 M established the Trust on 14<sup>th</sup> November, 2003. It was drafted by Baxendale Walker and is governed by English Law. The beneficiaries are defined as "the present, past and future employees from time to time of the Founder [M] and the wives, husbands, widows, children, step-children and remoter issues of such employees and the spouses and former spouses (whether or not remarried) of such children and remoter issue and "Beneficiary" has a corresponding meaning PROVIDED THAT no Excluded Person shall be a Beneficiary."
- 9 "Excluded Persons" were defined as including M, any person connected with M, any Participator (as defined in the [Income and Corporation Taxes Act 1988](#)) in M and any person connected with any such Participator. Mr and Mrs D came within that definition.
- 10 Baxendale Walker also drafted the documentation dealing with the transfer of the assets and without going into the intervening steps the final position was that the Trustee had settled upon it by M upon the terms of the Trust the beneficial interest in (but not the legal title to) the properties with the right to receive the rent being reserved to M. The total net value of the interest transferred is currently some £3.2 million.
- 11 One loan facility on interest accrued terms in the sum of £1.3 million, sourced out of the equity in the properties, was made to Mr D in 2004 of which £455,831.76 has been drawn down. By this time the marriage between Mr and Mrs D had broken down and a divorce petition was issued by her before the Family Division of the High Court on 25<sup>th</sup> October, 2004.
- 12 On 23<sup>rd</sup> January, 2007, the Family Division of the High Court ordered that the Trustee be joined in as a party to the proceedings on the basis that the Trust was a post-nuptial settlement i.e. a settlement which provides financial benefit for one or other or both spouses and with reference to their married state. Miss J.M.F. Parker Q.C. sitting as a Deputy High Court Judge found as follows:-

***"57. In my judgment, looking at the authorities to which I have been referred, and applying the test as there set out, it seems to me that I have to give a much broader definition than does Ms. Talbot-Rice to the issue of whether or not this is a settlement made on the parties to the marriage. It seems to me that I have to have regard to the Baxendale Walker document for the expression of intent and purpose which was there set out in detail, as I have already recorded it, and the fact that the intention of this settlement was that these parties, and their children, should be able to have the benefit of loans, on interest accrued terms, at any time after the***

***establishment of the EBT. There is no suggestion that the EBT is any more than a vehicle which can be accessed by the Taxpayers, so that these cash loans may be advanced to not only the parties but for the benefit of their children, and other family members, and that it was the sole intention of these parties, that they and their families should benefit in this way. Therefore, I conclude that, notwithstanding that they are neither of them referred to as beneficiaries, (and indeed are excluded), that it is a settlement which was made on the parties to the marriage, and that it is made for the financial benefit of the parties to the marriage, because benefit may be expressed and take effect in extremely wide terms. Quite apart from any advance of capital, the provision of loans to the husband, whether or not made on commercial terms, and whether or not the interest is rolled up and deferred, is a benefit, and in this case probably a substantial one .***

***58. Secondly, however, I have to be satisfied that the settlement is made in their character of parties to the marriage, qua husband and wife, as opposed to in any other capacity. That, of course, in one sense, is a question interlinked with the one which I have already considered, but, none the less, I must consider it separately. It is submitted to me by Ms. Talbot-Rice that the establishment of this Trust was entered into by these parties not as parties to a marriage but as business partners, and therefore these Trusts do not have the necessary nuptial element .***

***59. There was indeed a partnership run by these parties, and they were also directors of the company, and she submits to me that, therefore, I must look at their business relationship to the exclusion of their marital relationship. But, again, I must have regard to the contents of the Baxendale Walker report. These parties are, first of all, referred to in their character as husband and wife. The fact they are married, that they have children, the fact that they have personal assets, the fact that their intention is to provide tax savings for themselves and their family, is the characterisation of their relationship and forms the background, and, indeed, the backbone, of the advice that is given and the arrangements which are proposed. The reference to the partnership comes later on in the Baxendale Walker document and plainly forms part of the picture, as, of course, I recognise, but the fact that this couple were also business partners, as is so often the case, does not detract from the fact that, in my view, these Trusts do have the necessary nuptial element, because these parties were primarily husband and wife and secondarily, or additionally, business partners."***

13 The Trustee has served notice of appeal against this decision which appeal has been stayed pending the outcome of this application.

14 Mr and Mrs D appear to have reached agreement in principle that Mrs D should receive a

sum equivalent to one half of the family assets including but not limited to the assets of the Trust. They say this can be achieved in a fiscally advantageous manner if the Trustee were to loan a sum not likely to exceed one half of the value of the assets of the Trust to Mr D who will then gift that sum to Mrs D in full settlement of her financial claims.

- 15 Doubt has now been cast by the Trustee upon its ability to make loans to Mr D, notwithstanding the fact that it has already made such a loan. If it has no power to do so and Mrs D's application for rectification to enable such loans to be made fails, then because all of the "*family wealth*" is locked up within the Trust she will have no option other than to seek to set the Trust aside on the grounds of mistake or undue influence, both of which claims Mr D would be likely to contest giving rise to time consuming and expensive litigation. As this is an English proper law trust and the assets are all situated in the United Kingdom, the English Court (barring a successful appeal) clearly has the power to enforce any variation of the Trust it may order but that would lead to tax ramifications and in particular the loss of the EBT status.

### **Power to make loans**

- 16 The general powers of the Trustee are set out in schedule 1 of the trust deed, paragraph 1.2.17 of which provides that the Trustee shall have "power to lend any part of the Trust Fund to any person and to provide guarantees to any person (including the Founder) whether or not taking security for the same and on such terms as the Trustees may think fit." Although excluded persons are not expressly included along with the Founder they are not excluded from this power.
- 17 However under provision of clause 5.1 this power to make loans is expressly subject to the provisions of clause 10 which is in the following terms:-

#### "10 Irrevocable Limitations of Trustees' Powers

*10.1 Notwithstanding anything to the contrary express or implied in this Deed, no power or discretion hereby or by law conferred on the Trustees shall be exercisable nor exercised by the Trustees in such manner as to cause any part of the Trust Fund or the income thereof to be used to provide a Prohibited Benefit or to become payable to or applicable for the benefit of the Founder PROVIDED THAT where the Trustees make any payment to or provide any benefit for a Beneficiary in circumstances where the Founder is liable to account to the Revenue Authorities of the United Kingdom for income tax and/or national insurance contributions in respect of such payment or benefit then the Trustees shall pay to the Founder such sum as shall be required to fully discharge that liability.*

*10.2 Notwithstanding anything to the contrary express or implied in this Deed, no dispositive duty or power and no administrative duty or power conferred on the Trustees by law or under the Trusts hereof or any amendments to the Trusts*



*hereof shall be exercisable nor exercised by the Trustees in such manner as to cause any part of the Trust Funds to be applied (whether by advancement, or appointment upon new Trustees or appointment upon existing Trusts or otherwise) to or for the benefit of any Excluded Person."*

- 18 Prohibited "Benefits" are defined in clause 1.1.5.2 as including "any sum or benefit or property provided to or for, or at any time capable of being provided to or for any Excluded Person."
- 19 As this is an English proper law trust to which we must apply English Law, the parties provided helpful opinions from English Counsel, Elspeth Talbot-Rice on behalf of the Trustee and Penelope Reed on behalf of Mrs D. The starting point, as pointed out by Elspeth Talbot-Rice, is that the deed expressly prohibits the Trustee from exercising its powers and discretions to cause the Trust Fund to be used to provide a Prohibited Benefit, namely "any sum ... or property provided to or for, or at any time capable of being provided to or for any Excluded Person." (emphasis added). On the face of it, to make a loan is to provide a sum.
- 20 Penelope Reed however pointed out that the drafting of any EBT is tax driven and in her view clause 10 was clearly intended to ensure that section 13.2 of the [IHTA](#) 1984 did not apply. That section provides that:-

*"Subsection (1) above shall not apply if the trusts permit any of the property to be applied at any time (whether during any such period as is referred to in section 86(1) below or later) for the benefit of - (a) a person who is a participant in the company making the disposition."*

She referred to the judgment of Lord Hoffman in *Investors Compensation Scheme Limited v West Bromwich Building Society* [\[1998\] 1 WLR 896](#) where he made clear that the Court must look at the background circumstances and what the parties using those words against the background would have meant. In her view the crucial point to ensure EBT status is that the Trust Fund should not be applied or be applicable for the "benefit" of the participators. Whilst she saw the argument that the provision of this sum could cover a loan being made, the words are included in the definition of "Prohibited Benefits" (her emphasis) and should be read *ejusdem generis*. The definition connotes in her view some element of bounty in the "provision" of a sum or property or a benefit. If this construction is looked at against the background facts that this is an EBT and the aim is to prevent assets being applied for the benefit of participators or sums being paid out to them, then she argued a sum paid to an Excluded Person for full consideration does not seem to be what clause 10.1 is intended to cover. It is not the provision of a sum because the sum has to be repaid. She thought clause 10.1 could have been more happily drafted but on balance in her view the proper construction of clause 10.1 would not prevent the Trustee from making a loan to Mr D on strictly commercial terms i.e. terms that would be incapable of conferring any benefit on Mr D. She foresaw more difficulty in ensuring that the terms were strictly commercial in this way.

21 While conceding that this is a perfectly respectable argument, Elspeth Talbot-Rice made the following points in response:-

It was hard in her view to say in this case that giving the words "any sum" their natural ordinary meaning would be attributing to M an intention which it plainly could not have had. It does not lead to absurdity or lead to a very unreasonable result and it does not create any inconsistency with the rest of the instrument. In this regard she said it was important to bear in mind that the task of ascertaining the intention of M must be approached objectively ( *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749, 767, 775, 782) and that it is not permissible to look at the Baxendale Walker document to glean the relevant intention ( *Shore v Wilson* (1842) 9 Cl & Fin. 355, 565, Tindal CJ). The relevant intention must be gleaned from the trust deed, placed in context which in this case appears to have been a desire to protect the assets settled into a Trust by M from UK taxation, but giving the benefit of such assets to M's employees and thus attracting the tax benefits of an EBT. The juxtaposition of clauses 10.1 and 10.2 with "Prohibited Benefits" being used in clause 10.1 but not in the clause which follows it, clause 10.2 (in which prohibition is against providing a benefit to an Excluded Person) was striking in her view. It strongly suggests that something different (and more) was meant by the use of the term "Prohibited Benefits" in clause 10.1 than simply prohibiting the provision of a benefit to an Excluded Person, because otherwise the same wording as is used in clause 10.2 would have been used.

(i) If it were to be accepted, it requires the Court to find that the words "*sum*" and "*property*" in the definition of "*Prohibited Benefits*" are entirely redundant which in turn renders the entire definition of "*Prohibited Benefit*" entirely redundant. In her view Penelope Reed's construction required the Court to find that the trust deed includes an unnecessary definition and/or words within that definition which are meaningless. That is something which she advised the Court would not lightly do; a cardinal presumption in construing a document is that the parties to it have intended what they have in fact said, so their words must be construed as they stand; the meaning of the words used must be considered, not what maybe guessed to be the intention of the parties ( *IRC v Raphael* [1935] AC 96, 142, *Smith v Lucas* (1881) 18 Ch C 531, 542).

(ii) Words used are to be given their ordinary natural meaning. If the meaning of words is clear and unambiguous, the Court will assume that it is what the parties intended ( *Melanesian Mission Trust Board v Australian Mutual Providence Society* [1997] 1 NZLR 391, 394 (Lord Hope)).

(iii) She referred to the following passage in the Judgment of Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1997] 1 WLR 896, 913:

***"The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand if one would nevertheless***



conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had."

- 22 . In relation to the *ejusdem generis* rule she pointed out that this rule of construction operates to restrict general words, which are preceded by several words which point to a confined meaning, to the genus of the confined meaning of the preceding words, for example, "other accidents beyond the charterer's control" at the end of a list of specific exceptions in a charter party were construed to cover only accidents similar to those expressly mentioned ( *Fenwick v Schmalz* (1868) LR 3 CP 313). She pointed out that the word "sum" in the definition of "Prohibited Benefits" comes first not last, is a specific not a general word and there is not real genus in the clause to which the word "sum" can be restricted.
- 23 In reply Penelope Reed reiterated her main point that the words "sum" and "property" have to be construed in the context of the terms "Prohibited Benefits" and the use of the verb "provided". In her view each connotes an element of bounty. The matter can be tested, she said, by asking whether if an Excluded Person purchased a property from the Trustee for full consideration could it be said that the Trustee was "providing" them the property? She does not think that the words in clause 10 would be wide enough to cover that and did not see why similar considerations did not apply in respect of a loan made on commercial terms.
- 24 She agreed with the approach to construction of Elspeth Talbot-Rice and that any construction of the trust must be undertaken objectively — in particular she agreed that the Baxendale Walker advice was not admissible on this point (as opposed to when rectification is being addressed) but she reiterated that the construction process has to take place in the context of the surrounding circumstances and she did not see why the Court could not take into account the fact that this was a trust designed to take advantage of the tax benefits available to an EBT which necessitated benefits not being provided to Participators. As to the juxtaposition of clauses 10.1 and 10.2, she agreed with the argument of Elspeth Talbot-Rice but was not convinced that the relevant parts of clause 10.1 do more than clause 10.2. It struck her that the draftsman had taken two clauses which do similar things albeit in different ways and had used both - the first dealing also with the benefits to the Founder. She thought there was some repetition which there ought not to be in a well drafted trust instrument and this was not well drafted. She also agreed with the strict analysis of the *ejusdem generis* rule as expounded by Elspeth Talbot-Rice but reiterated her view that the provision of "sum" and "property" when construed against the background of this clause connotes some element of bounty.
- 25 We are grateful to the arguments of both English Counsel and on balance we prefer the arguments put forward by Elspeth Talbot-Rice. Both Counsel agree that it is not permissible for us to have regard to the Baxendale Walker advice to glean the intention of M. That intention must be gleaned from the trust deed itself placed in context which we agree appears to have been a desire to protect the assets settled into the Trust by M from UK

taxation by giving the benefit of such assets to M's employees and thus attracting the tax benefit of an EBT. In that context, as Elspeth Talbot-Rice says, it is difficult to say giving the words "any sum" their natural and ordinary meaning there would be attributing to M an intention which it plainly could not have had and it does not lead to absurdity or to a very unreasonable result and it does not create inconsistency with the rest of the instrument. We conclude therefore that the Trustee is prohibited by clause 10.1 from providing any sum to Mr D whether by way of commercial loan or otherwise.

## Rectification

- 26 To the extent that in rectifying the Trust the Court is exercising its powers under Article 51 of the Trust (Jersey) Law 1984 (as amended) as opposed to its inherent powers (upon which we were not addressed) leave was given to Mrs D to bring her representation seeking rectification of the trust deed.
- 27 To her representation Mrs D had convened the three employees of M, Mr D and the Trustee. The employees have not appeared, although they did write identical letters, prepared by Mr D, in relation to the Trustee's application which preceded that of Mrs D confirming that they would not be attending the earlier hearing fixed for the Trustee's application and stating their view that the Trust should remain in force. At this hearing the Trustee, acted in the interests of the Trust as a whole and agreed in particular to represent the interest of minors and unborns who come within the class of beneficiaries of the Trust. We were satisfied therefore that all interested parties in respect of this application had been notified and given an opportunity to be heard and/or represented.
- 28 Mrs D sought an order from the Court rectifying the trust deed by adding the following proviso to clause 1.1.5.2: "provided that nothing shall prevent the Trustees from exercising their powers to make loans to any Excluded Person on terms which do not confer any benefit on them."
- 29 It was common ground that in considering rectification the Court should apply English Law and English Counsel were agreed that the principles to be applied under English Law were as follows:-
- (i) Where by mistake a written instrument does not reflect the true agreement of the parties or the intention of the settlor in the case of a voluntary settlement, the Court may rectify the document. ( Snell's Equity 30<sup>th</sup> Edition, para 43-01).
  - (ii) The remedy is discretionary.
  - (iii) The Court does not rectify agreements, but the instruments reflecting them. ( *Mackenzie v Coulson* [\(1869\) LR 8 Eq. 368](#)).
  - (iv) The Court will rectify an instrument notwithstanding the fact that the effect of the

rectification is to secure a fiscal advantage. ( *Re Slocock's WT* [1979] 1 All ER 358 explaining *Whiteside v Whiteside* [1950] 1 WLR 65).

(v) The evidence in support of a claim in rectification must be "strong irrefragable evidence." ( *Lake v Lake* [1979] STC 865).

(vi) It is crucial to distinguish between a mistake as to the consequences of the document - for example that the tax implications were different from that anticipated as for example in the recent Court of Appeal case *Allnutt v Wilding* [2007] EWCA Civ 412 - and its effect.

- 30 It is of course the intention of M as the settlor of the assets that is relevant, but Mr and Mrs D were its directors and shareholders. M through them had acted on the advice given by Baxendale Walker and the Trustee in its letter of 15<sup>th</sup> August 2003, both of which were clear that in the proposed trust deed there would be power to make loans to Mr and Mrs D who were otherwise to be excluded from benefit. As we have found earlier in this Judgment, the trust deed as drafted did not, in fact, permit this. The mistake that was made was not as to the consequences of the trust deed but as to its effect.
- 31 We were satisfied therefore that there was irrefragable or indisputable evidence that as a result of a mistake in the drafting of the trust deed, it does not reflect the true intention of the settlor M in that it does not permit loans the terms of which confer no benefit to be made to Excluded Persons including Mr and Mrs D.
- 32 We had some difficulty in relation to the exercise of our discretion to give the remedy. The Court felt uncomfortable with the use in this case by Mr and Mrs D of an EBT as a "*tax efficient vehicle*" for the benefit of themselves and their children apparently with scant reference to benefiting the actual employees of M, limited in number as they are. We accepted however that there is no evidence before us that the employees will not benefit in the future and there is no suggestion that the Trust is a sham. Indeed a different English Counsel for Mrs D had earlier considered, on her behalf, whether the Trust could be attacked by her as such and concluded that any attempt to characterise the Trust as a sham would fail.
- 33 There was also a concern that in rectifying the trust deed the Court might tacitly be encouraging the Trustee to exercise its powers by making loans to Mr D but we recognised that the issue of the actual exercise of a power to make a loan as opposed to the existence of the power itself is not before us and will be a matter strictly for the Trustee to consider unless any further application is made to us.
- 34 On the evidence before us we were satisfied that the trust deed did not reflect the intention of M and we therefore have exercised our discretionary power by rectifying the trust deed in the manner requested.