

C Trust

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Le Brocq, Tibbo
Judgment Date:	02 May 2008
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Text

[2008] JRC 71

ROYAL COURT

(Samedi Division)

Before:

J. A. Clyde-Smith, **Esq., Commissioner and** Jurats Le Brocq **and** Tibbo.

In the Matter of the C Trust

And in the Matter of an Application for Rectification of the Settlement Deed

Between
Bedell Trustees Limited
Representor
and
CW
Respondent

Advocate J. Dickinson for the Representor.

Advocate N. Pearmain for the Respondent.

Authorities

R. E. Sesemann Will Trust [\[2005\] JLR 421](#).

In the matter of the Moody Jersey "A" Settlement [\[1990\] JLR 264](#).

In Re McLean Family Settlement [\[2002\] JRC 152](#).

In Re Madge's Settlement 17th May 1994 Unreported.

Snell's Principles of Equity 29th Ed'n.

COMMISSIONER:

- 1 On 3rd April 2008 the Court rectified a trust known as the C Trust ("the Trust") established on 17th April 2001 between SW and Bedell Trustees Limited ("the representor") and we now set out our reasons.
- 2 In January 2001, Bedell Cristin were instructed by the Birmingham office of the law firm Messrs Garret's on behalf of SW to set up a Jersey trust for SW, who was and remains domiciled in the U.K. The primary purpose of the trust was asset protection but it was to be drafted to include an interest in possession for SW, with a successive interest in possession for SW's wife, during what was defined as the "Initial Period" and this for the mitigation of U.K. inheritance tax charges that would otherwise arise on the creation of the trust.
- 3 The trust deed, having established the successive interests in possession during what was defined as the "Initial Period" went on in clause 5 to give the trustees certain overriding powers of appointment and advancement subject to the following opening provisos:-

"Notwithstanding the trusts and powers hereinbefore declared and contained the Trustees may at any time during the Trust Period if in their absolute discretion they shall so think fit but if during the Initial Period then either (i) only so as to take effect from and after the end of such an Initial Period or (ii) to deprive the Life Tenant in possession of any income of the Trust Fund that shall have arisen prior to the exercise of the power...[powers of appointment and advancement]."

- 4 It is quite clear from the history of the drafting that in the final draft, probably as a result of

formatting problems Bedell Cristin were experiencing, the words “not so as” had been inadvertently deleted from the beginning of the second proviso which should and was intended to have read:-

“ (ii) *not so as to deprive the Life Tenant in possession of any income of the Trust Fund that shall have arisen prior to the exercise of the power*” (emphasis added).

- 5 As a consequence, the intention to create interests in possession was entirely defeated in that on the face of it the trustees were empowered to deprive the life tenants of income that had arisen prior to the exercise of the overriding powers given to them in clause 5.
- 6 As a further consequence of this, SW may have incurred a U.K. inheritance tax liability on the transfer to the Trust in an amount equal to 20% of the sum transferred, and a further charge to tax on his death, if occurring prior to 16th April 2008, equal in amount up to a further 20% of that sum could result, depending on the amount of the “nil rate band” utilised by SW. Furthermore, the Trust could find itself subject to a U.K. inheritance tax regime where the Trust is subject to a 10 yearly inheritance tax charge, currently equating to a maximum value of 6% of the trust property, and any distributions from the Trust will be subject to an additional proportionate U.K. inheritance tax charge, currently also at a maximum effective rate of 6% of the value of each such distribution.
- 7 The test for rectification is well-established in Jersey. Before the Court may order rectification, it must be satisfied:-

(See *R. E. Sesemann Will Trust* [\[2005\] JLR 421](#)).

- (i) by sufficient evidence that there has been a genuine mistake, so that the deed fails to carry out the intention of the parties;
- (ii) that there has been full and frank disclosure; and
- (iii) that there is no other practical remedy.

- 8 The achievement, as one of the primary purposes of the rectification, of legitimate tax planning objectives does not operate as a bar to the granting of an order for rectification (see *In the matter of the Moody Jersey “A” Settlement* [\[1990\] JLR 264](#)).
- 9 The Court was presented with three comprehensive affidavits sworn by SW, Advocate Alan Dart and Advocate Mason Birbeck and had no hesitation in finding all three tests satisfied. We regarded this as a typographical error. The only issue related to that of delay.
- 10 The error first came to the attention of Bedell Cristin on 19th April 2004, when they were drafting a proposed deed of exclusion and variation. The settlor was not informed until 28th

September 2005, some 18 months later. He was advised that an application should be made to the Court for rectification. The settlor took advice and wrote to Bedell Cristin on 6th February 2006 approving the proposed application. A draft affidavit was sent to the settlor in June 2006 and received back on 21st August 2006, when the matter was referred to Bedell Cristin's litigation department. The representation was brought before the Court in February 2008. Allowing six months for the preparation of the necessary paperwork for such an application, it has thus taken some three and a half years from the discovery of this error to the matter being brought before the Court. Such a delay is regrettable and it is particularly regrettable that it took so long for the settlor to be informed. It seems to us that where errors are discovered which potentially impact upon the interests of the beneficiaries, it is important that they, or the person with whom the trustees normally deal on their behalf, should be informed promptly, so that they can take advice and protect their interests. Bedell Cristin very openly acknowledged that other work commitments played their part in these delays and they have apologised to the Court unreservedly.

- 11 However, as Mr Pearmain, representing the minor beneficiary CW, pointed out, rectification is overwhelmingly in her interests and the interests of the beneficiaries generally and it would compound the injustice to them if, following failures on the part of advisers in the drafting of the deed, the Court were to refuse rectification because of further failures in the bringing of the application by the same or other advisors, leaving them with the very burdensome and uncertain remedy of legal action. By contrast, rectification is a perfect remedy in that it operates retrospectively.
- 12 Trustees who are aware of an error are under a duty to apply timeously to correct it (see *In Re McLean Family Settlement* [2002] JRC 152 and clearly, unreasonable delay may result in the Court penalising a trustee in costs. In this case, the representor had agreed to bear its own costs and to pay the costs of the SW and CW. Otherwise the significance of delay would ordinarily lie in its effect on the burden of proof. The issue of delay was first referred to in *In Re Madge's Settlement* 17th May 1994 Unreported, where the Court referred to the following passage of the 29th edition of Snell's Principles of Equity:-

“ **Burden of proof.** He who seeks rectification must establish his case by “strong irrefragable evidence” which means “something more than the highest degree of probability”. There must be evidence “of the clearest and most satisfactory description that will establish the mistake with a “high degree of conviction” and “leave no fair and reasonable doubt upon the mind that the deed does not embody the final intention of the parties”. In the modern phrase, there must be “convincing proof” of the mistake on the part of all parties. This heavy burden of proof becomes even more difficult to discharge with the passage of the years”.
- 14 Under Jersey law, the burden of proof is lower than would appear to have been the case under English law at that time (see paragraph 7 above) but it is clear that delay could affect the quality of the evidence before the Court (for example, memories fade and/or documents are lost) and the discharge of that burden. In this case, there had been no diminution in the

quality of the evidence before us and we therefore granted the application.