The Representation of Rathbone Trustees Jersey Ltd (formerly Lex Trust Company Ltd) and Nicola Kirstine Adamson and Christopher Piers Martin Harris ("the Representors"), Trustees of the McLean Family Settlement

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	15 August 2002
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Text

[2002] JRC 152

ROYAL COURT

(Samedi Division)

Before:

Sir Philip Bailhache, Bailiff, **and** Jurats Le Brocq **and** Allo.

In the matter of the Representation of Rathbone Trustees Jersey Limited (formerly Lex Trust Company Limited) and Nicola Kirstine Adamson and Christopher Piers Martin Harris ("the Representors"), Trustees of the McLean Family Settlement
And in the matter of the McLean Family Settlement ("the Settlement")

Advocate J. P. Speck **for the Representors**.

Advocate M. Renouf **on behalf of Advocate C.G.P. Lakeman, guardian ad litem of the minor and unascertained beneficiaries of the Settlement**.

Authorities

In Re Moody Jersey "A" Settlement (1990) JLR 264.

In Re Representation of Détente Limited (26th November, 1998) Jersey Unreported; [1998/236A].

In Re Westbury Settlement (2001) JLR N. 17.

Applications by the Representors to vary a Deed of Appointment.

Bailiff

THE

1 This is an application by Rathbone Trustees Jersey Limited (formerly Lex Trust Company Limited), Nicola Kirstine Adamson and Christopher Piers Martin Harris) ("the Trustees"), the current Trustees of a Settlement known as the "McLean Family Settlement" which was established by Deed dated 27 th June, 1990.

2 The Trustees seek to rectify an error in a Deed of Appointment which was supplemental to the Settlement and which was made on the 15 th March, 1991. It is asserted that the Deed of Appointment should have been expressed to benefit all the children of the Settlor, Colin William McLean to whom we shall refer as "the Settlor" and his partner Margaret Anderson Lawson to whom we shall refer as "Miss Lawson".

3 The Deed contains a Schedule, paragraph 1 of which provides:

> *"1. In this Appointment the following terms shall, unless the context otherwise requires, have the following meanings:*
>
> *(a) "the Beneficiaries means":-*
>
> *(i) Aaron Lawson McLean*
>
> *(ii) any other person born hereafter whose parents are both the Principal Beneficiary and the Second Beneficiary"*

We interpose here to state that those beneficiaries are respectively the Settlor and Miss

Lawson.

> *"(iii) any child of any person falling within (i) or (ii) above who shall have died before surviving to the relevant time in relation to him provided that no person shall be a Beneficiary who shall not have been born before the date 80 years ("the 80th Anniversary") from the execution of the Settlement or who shall have been born after a time at which there was no beneficiary in existence who had not then survived to the relevant time"*.

4 The Deed of Appointment was drafted in November, 1990, but at the date when it was executed on the 15 th March, 1991, a second child, Luke, had been born to the Settlor and Miss Lawson on the 3 rd March, 1991. Because he is not a named beneficiary and was not "born hereafter" Luke is not a beneficiary of the Settlement.

5 The error came to light in May, 1997, and was disclosed to the Settlor in November, 1997. Consideration was then given to the making of an application to this Court for rectification of the error. In April, 1998, a draft affidavit was sent to the Settlor but in May, 1998, the Trustees wrote to him confirming that they would defer the application to this Court, because the Settlor was receiving advice as to his tax position. Further letters were sent by the Trustees to the Settlor during 1999, and early 2000, seeking information as to what advice the Settlor had received from his accountants.

6 In October, 2000, it transpired that an investigation was being undertaken by the Inland Revenue and that the Settlor wished this to be resolved before swearing the affidavit in relation to this application. In January, 2001, a further affidavit was sent to the Settlor for signature, but it was not until January, 2002, that the Settlor confirmed that the tax investigation had been completed and that he was agreeable to swearing the affidavit. This application for rectification was accordingly made.

7 The relevant law is conveniently summarised in a judgment of this Court in *In Re the Representation of Détente Limited*, (26th November, 1998) Jersey Unreported; [1998/236A] in which Hamon, Deputy Bailiff, stated:

> ***"Rectification of Trusts is now well established by these Courts.*** If a settlement or other instrument is properly made but by mistake it does not necessarily record the intention of the maker, the Court in those circumstances may rectify it to make it reflect the true intention. There are a whole line of early cases in this jurisdiction that reflect that view: *Re Williams* (1975) 262 Ex 261; *Re McCreary* (1978) 265 Ex 87; *Re Baxley* (1979) 266 Ex 360; *Re Seale* (22 July, 1983) Jersey Unreported; *Re Coleman* (12 July 1985) Jersey Unreported, *Re G J Saunders Childrens Jersey Settlement* (4 April 1991) Jersey Unreported ***and the list goes on as the Trust Law came into force and as this Trust jurisdiction has expanded***.
>
> ***As Mr Speck has said to us we have several criteria to follow.*** I think that we

> can summarise these criteria as follows: there must be sufficient evidence of the error – we are satisfied in that regard. There must be full and frank disclosure – we are satisfied in that regard. Rectification will not generally be granted if another remedy is available which will serve the same purpose and we refer in that instance to *Whiteside v Whiteside* (1950) Ch.D. 65. ***We are satisfied that, in this case, there is no other remedy.*** As Mr Speck has point out, the remedy is discretionary but there is no rule that the Court will refuse to rectify a deed where the effect of the registration would be to save tax (*In the Matter of Moody Jersey "A" Settlement* (1990) JLR 264)."

8 Applying those criteria to this case we express ourselves satisfied on the evidence that an error was made in excluding Luke from the definition of beneficiaries in the Deed of Appointment. We are also satisfied that there has been full and frank disclosure by the Trustees in relation to this application. We are also satisfied that there is no other means of remedying the error and that if this application is not granted Luke will be excluded from the class of beneficiaries. The Deed of Appointment is irrevocable.

9 We turn next to the only question which has caused some concern, and that is the delay that has occurred between the realisation that an error had been made and the making of an application to this Court for rectification. The Trustees became aware of the error in May, 1997, and advised the Settlor of the error by letter of the 13 th November, 1997. This application was not, however, presented to the Court until the 5 th July, 2002. A delay of some 5 years has therefore ensued between realisation that an error had occurred and the application for rectification. Should equitable relief be granted in such circumstances? The reasons given by Counsel for the Trustees for the delay are these: the Settlor had been taking his own advice on his taxation position and it was thought that the whole purpose of the Trust might have fallen away. The Trustees did not wish to make what might have been a pointless application for rectification if the Settlement was ultimately to be wound up. Mr Speck submitted that the question of delay was related principally to the standard of proof. He submitted that the delay had not been unreasonable, and had not been caused by the Trustees in that they had been waiting for the concurrence of the Settlor.

10 We are not satisfied that these are adequate reasons. The Trustees were aware of their error and were under a duty to apply to the Court to correct it. That application should have been made timeously. The fact that the Settlor was preoccupied with his own fiscal affairs was not a good reason for compounding the original error by failing to apply to correct it. Viewing the matter in the round, however, it would be very unfortunate if the error of the Trustees were to be allowed to prejudice the position of Luke. He is the only one of the 5 children of the Settlor and Miss Lawson who is not a beneficiary under the Settlement, contrary to the intention of his parents. This is the compelling consideration that persuades us to exercise our equitable jurisdiction in favour of allowing the Trustees' application.

11 Advocate Speck told us that the Trustees were ready and willing to pay the costs of this application personally. That is in our judgment entirely right and proper. Advocate Renouf,

appeared for Advocate Lakeman, who is the guardian *ad litem* of the minor beneficiaries and submitted to the wisdom of the Court. He did not oppose the application of the Trustees.

12 We accordingly grant the application of the Trustees and order rectification of the Deed of Appointment executed on the 15 th March, 1991 by substituting for the words in paragraph (1) (a) (i) the words “Aaron Lawson McLean and Luke Lawson McLean”. We order finally that the costs of the application including the costs of the guardian *ad litem* be paid by the Trustees personally.