

Judgment 48/2009

**In re The O'Neill Trusts – Royal Court (Civil Action File 1388)
– 30 October 2009**

Trusts (Guernsey) Law, 2007 (s.4(1)(a) and s.79) – application to rectify settlements – principles to be adopted – application granted

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

Civil 1388

The 30th day of October, 2009 before John Russell Finch Esquire, Judge of the Royal Court; sitting alone

In the matter of

THE O'NEILL SETTLEMENTS

(“the O'Neill Settlements”)

and

EMBLETON TRUST CORPORATION LIMITED

(“Applicant”)

ON THE APPLICATION of the Applicant dated the 11th day of August 2009;

WHEREAS THE COURT on the 15th day of September 2009, having heard Advocates St J. A. Robilliard and R. Clark, Counsel for the Applicant and the minor and unborn Beneficiaries of the O'Neill Settlements respectively, GRANTED the application, MADE no order as to costs and RESERVED its written judgment;

THE COURT this day handed down its written Judgment, in the terms attached hereto and ORDERED THAT:

1. The Deeds of Appointment executed on 7th February 2007 in respect of the O'Neill Settlements (that is to say:
 - (a) “The JN Trust” being constituted on the 28th day of August 1987 between (1) Patrick O'Neill and (2) St Julian's Trustee Company Limited;

- (b) “The Panther Trust” being constituted on the 1st October 1987 between (1) Patrick O’Neill and (2) St Julian’s Trustee Company Limited;
- (c) “The Property Trust” being constituted on the 2nd of August 1990 between (1) Patrick O’Neill and (2) Rothschild Trust Company International Limited;
- (d) “The Kilbeggan Trust” being constituted on 2 August 1990 between (1) Patrick O’Neill and (2) Rothschild Trust Company International Limited; and
- (e) “The Venture Trust” being constituted on the 2nd August 1990 between (1) Patrick O’Neill and (2) Rothschild Trust Company International Limited).

be rectified in accordance with the drafts attached to the Schedule hereto such rectification taking effect from the said 7th February 2007.

M A TOSTEVIN
Her Majesty’s Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

**IN THE MATTER OF
THE O'NEILL TRUSTS**

(Application for Rectification)

Application heard on: 16th September 2009

Decision handed down: 30th October 2009

Before: John Russell FINCH Esquire, Judge of the Royal Court

Counsel for the Applicant: S J A Robilliard
Counsel for the Minor and Unborn Beneficiaries: R Clark

Cases referred to:

In the matter of the C Trust [2008] JRC 07 1

In the matter of the Estate of Gamble (Royal Court, 6th February, 2003)

In Re The P Trust (Royal Court, 17th January, 2005)

Re Slocock's Will Trusts [1979] 1 All ER 358

Whiteside v Whiteside [1949] Ch. 448

Statute referred to:

Trusts (Guernsey) Law, 2007, Sections 4(1)(a) and 79

JUDGMENT

1. This is an application for rectification of five related family settlements, all of which relate to the O'Neill family. The Trust documents are exhibited to the affidavit of Piers David Barclay at PDB1. This affidavit, which goes into considerable detail, is the main affidavit in the application. There are supporting affidavits from Patrick O'Neill, the *paterfamilias* and his wife and children. In addition it should be noted that the interests of the minor and yet to be born beneficiaries were represented by Advocate Clark, who supported the proposed rectification.
2. The details are complex and a great deal of discussion went into the tax planning issues. Suffice it to say for the purposes of this decision that there was a simple (as Holmes J of the U.S. Supreme Court was wont to say "humble") drafting error. In the words of paragraph 6 of the Skeleton argument put forward on behalf of the Applicant, "*it was an oversight*". It is abundantly clear from the relevant affidavits and supporting documentation that Mr Patrick O'Neill's intention was to terminate his life interest in the five settlements to accord with a change in English law. The drafts wrongly contained a power of revocation and Patrick was intending to irrevocably give up his interests. The end result is that all the careful planning to save tax, the long meetings and e-mails, were of little avail, unless the Court comes to the aid of the family.

3. The UK Revenue did not appear and was not represented. However, Advocate Robilliard painstakingly took me through various cases that they had asked to be drawn to the Court's attention and which were taken into account in the previous and analogous Guernsey case of Gamble (Royal Court, 6th February, 2003).

Legal Principles

4. The Royal Court has jurisdiction in respect of this application by virtue of Section 4(1)(a) of The Trusts (Guernsey) Laws 2007. The proper law of the O'Neill trusts is that of Guernsey. I am able to sit alone both by virtue of Section 79 of that law, and the recent Royal Court reforms. These are, in any event, purely matters of law. A good place to start is the Gamble case (Supra), to be found in volume 3 of the Applicant's Bundle, at B1(i), where the Bailiff directed the Jurats that as a matter of law, the Court should be applying English principles in deciding whether or not to grant rectification. It is clear there is a discretion, whether or not the application is opposed. The Bailiff adopted the observations of Graham J in Re Slocock's Will Trusts [1979] 1 All ER 358 at 363 (see tab B2 (vii) of the bundle):

"The true principles governing these matters is conceived to be as follows. (1) The court has a discretion to rectify where it is satisfied that the document does not carry out the intention of the parties. This is the basic principle. (2) Parties are entitled to enter into any transaction which is legal, and, in particular, entitled to arrange their affairs to avoid payment of tax if they legitimately can. The Finance Acts 1969 and 1975 tell them explicitly how they can do so in the case of estate duty and capital transfer tax. (3) If a mistake is made in a document legitimately designed to avoid the payment of tax, there is no reason why it should not be corrected. The Crown is in no privileged position qua such a document. It would not be a correct exercise of the discretion in such circumstances to refuse rectification merely because the Crown would thereby be deprived of an accidental and unexpected windfall. (4) As counsel for the trustees submitted, neither Whiteside v Whiteside nor any other case contains anything which compels the court to the conclusion that rectification of a document should be refused where the sole purpose of seeking it is to enable the parties to obtain a legitimate fiscal advantage which it was their common intention to obtain at the time of the execution of the document."

I follow what has been indicated in the Guernsey authority.

5. The case that has caused me some concern, and which has had to be grappled with in subsequent judgments is Whiteside v Whiteside [1949] Ch 448. Like Graham J (at 362, B-C), I do not find the decision "very easy to follow". The simplest view of that case is that there was no issue between the parties that was outstanding and required rectification. This case was also alluded to by Graham J in his judgment as follows:

"It may possibly be that the Crown asked that Whiteside v Whiteside should be brought to the notice of the court because it was thought the court might take the view, perhaps basing itself on the words of Evershed MR, that it ought not to rectify where the only effect of such rectification is to give a tax advantage. I do not think that such a proposition stated in such general terms can be correct. Nor do I think that there is anything in Whiteside v Whiteside which says that it is."

6. That the effect of any revocation would enable the Trusts to be taxed differently is not a bar. After all, the rectification only puts the situation back to where everyone had intended. The point is plainly made in the Jersey case of In the matter of the C Trust [2008] JRC071 at para 8, where the Royal Court stated:

"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

7. The detailed approach that this Court should take was set out by the Deputy Bailiff in *In Re The P Trust (Royal Court, 17th January, 2005)* starting at para 30:

“Applying the principles of rectification established by the Courts of England the Royal Court must be satisfied on a number of points.”

These are (in summary):

- 1) There must be sufficient evidence of this 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.
 - 4) There must be no other practical remedy.
 - 5) There should be no undue delay.
8. The error is very clear from the materials submitted and it is accepted a drafting mistake was made, indeed the papers show that is the only explanation. The disclosure has been considerable, not only the documentation involved, but preparatory documents, e-mails and notes of meetings. No other effective remedy appears suitable and the time period from the discovery of the error to an application being made was reasonable. It was necessary to take advice in England and in Guernsey. As indicated, counsel for the minor and unborn beneficiaries is in full support of the rectification.

Conclusion

9. I indicated at the end of the hearing that the application was successful and that my decision would follow, which this is.

Costs

10. No Order.

J R FINCH