Judgment 24/2012

In the matter of the Colour Trusts and in the matter of The Trusts (Guernsey) Law, 2007, Wilson and Monaghan and Le Gallez
Royal Court
24th May 2012

Application to rectify the schedules in six separate settlements.

Approved Text
24.05.2012

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY
(ORDINARY DIVISION)

IN THE MATTER OF THE BLANCO SETTLEMENT, THE ROJO SETTLEMENT, THE AMARILLO SETTLEMENT, THE VERDE SETTLEMENT, THE AZUL SETTLEMENT AND THE NARANJA SETTLEMENT (together, "COLOUR TRUSTS")

AND

IN THE MATTER OF THE TRUSTS (GUERNSEY) LAW, 2007

Between: **HILARY LOUISE WILSON** **Applicant**

-and-

(1) LINDA ROSE MONAGHAN **Respondents**
(2) PATRICK LE GALLEZ

Hearing date: 24th April 2012
Judgment handed down: 24th May 2012

Before: **Richard James McMahon, Esq., Deputy Bailiff**
Jurats: **S E F Le Poidevin, P S T Girard & M A Spaargaren**

Advocate for the Applicant: **Advocate S H Davies**
Advocate for the Respondents: **Unrepresented**

Cases & legislation referred to:

The Royal Court Civil Rules, 2007
Racal v Ashmore [1995] STC 1151
Allnutt v Wilding [2007] EWCA Civ 412
The Trusts (Guernsey) Law, 2007
In re Gamble (unreported), 6 February 2003
In the Matter of the Pelican Trust 2005-06 GLR 20
In re Butlin's Settlement Trusts [1976] 1 Ch. 251
Gibbon v Mitchell [1990] 1 WLR 1304
Racal Group Services Ltd v Ashmore [1995] STC 1151

Whiteside v Whiteside [1950] Ch 65
Pitt v Holt [2011] 3 WLR 19
Re S Trust [2011] JRC 117
Re the A Trust [2009] JLR 447
Thomas Bates and Son Ltd v Wyndham's (Lingerie) Ltd [1981] 1 WLR 505

Introduction

1. Hilary Wilson ("the Applicant") is applying to rectify the Schedules to the six Deeds of Gift and Indemnity executed on 5 April 2008 in respect of six separate Settlements made by her on 4 April 2008 and which have been collectively described as "the Colour Trusts" as follows:

    (i) in respect of the Blanco Settlement, she applies to include the balance of the loan appointed and assigned to her and made by the Trustees of the Indigo Settlement to Tranquil Holdings Limited, a company incorporated in the British Virgin islands with number 371994, in the sum of £964,240.15;

    (ii) in respect of the Rojo Settlement, she applies to include the balance of the loan appointed and assigned to her and made by the Trustees of the Terracotta Settlement to YM Holdings Limited, a company incorporated in Guernsey with number 36059, in the sum of £1,040,029.32; and

    (iii) in respect of the Amarillo, Verde Azul and Naranja Settlements, the balance of the loans appointed and assigned to her and made by the Trustees of the Jet, Sapphire, Topaz and Amethyst Settlements to Elysium Holdings Limited, a company incorporated in the British Virgin Islands with number 387738, in aggregate in the sum of £2,977,710.18, such loans to be held in equal portion by each of those four Colour Trusts Settlements,

    all with retrospective effect as from 5 April 2008.

2. The Applicant's contention is that, due to a clerical error, those six Deeds of Gift and Indemnity did not include amongst the assets she intended to gift to the six Settlements the benefit of the loans to these companies she had, and continues to have, as the creditor. Her intention throughout had been to settle into the Colour Trusts all of the assets remaining in her personal ownership resulting from the appointments made to her on 9 February 2007 out of the six Settlements mentioned in the application and which have been collectively described as "the Jewel Trusts".

Parties to the application

3. The Trustees of the six Settlements comprising the Colour Trusts are Linda Monaghan and Patrick Le Gallez. They are the Respondents to the application, swore affidavit evidence indicating their support for the application and attended the Court hearing, but were not represented and did not play any active part in the proceedings themselves.

4. The beneficiaries of the Colour Trusts were not convened. Because the question of who should be a party to the application is a matter of procedure for determination by the Deputy Bailiff alone, he took into account r. 35 of the Royal Court Civil Rules, 2007:

    "*(1) An action may be brought by or against trustees, executors or administrators in that capacity without adding as parties any persons who have a beneficial interest in the trust or estate ('the beneficiaries').*
    (2) Any judgment or order given or made in the action is binding on the beneficiaries unless the Court orders otherwise in the same or other proceedings."

and concluded that, because the consequence of granting the application would be to increase the assets settled into each of the Colour Trusts, the beneficiaries, who are members of the Applicant's family, would gain rather than lose and would, therefore, inevitably support rather than oppose the application. In those circumstances, because both the Trustees had been involved in managing the affairs of the Applicant and her family for a number of years and there was evidence that the Applicant's sister, Frances Wilson-Barnes (hereafter referred to as "FWB"), had been kept fully informed about matters related to the Colour Trusts, the Deputy Bailiff ruled that there was no need for any of the beneficiaries to be joined to the application.

5. HM Revenue & Customs ("HMRC") was informed by letter dated 18 November 2011 sent by the Applicant's English solicitors, Lawrence Graham LLP, that these proceedings had been commenced. If the Deeds of Gift and Indemnity are rectified in the manner proposed, the Applicant's personal estate will become significantly smaller with effect from 5 April 2008, which will result in reduced UK tax liabilities. Having been provided with the documentation submitted to the Court, HMRC eventually replied by letter dated 3 February 2012 confirming that "*HMRC does not wish to be joined as a party to the proceedings*", but asked that Racal v Ashmore [1995] STC 1151 (and the authorities discussed by the English Court of Appeal therein) and Allnutt v Wilding [2007] EWCA Civ 412 be drawn to the Court's attention. That request has been complied with. The Court was also informed that the affidavit of Sian Le Cocq, sworn on 11 April 2012, had been supplied to HMRC, but that no further comments had been made prior to the hearing.

6. As a result, the only party before the Court is the Applicant, represented by Advocate Davies. The Court has put the Applicant to strict proof of her application to rectify the Deeds of Gift and Indemnity, adopting a critical and robust approach to her contentions. The Court is grateful to Advocate Davies for his clear exposition on the evidence and the legal principles, both as set out in the Applicant's Skeleton Argument dated 17 April 2012 and orally, and for the promptness with which additional documentation was supplied at the Court's request during the course of the hearing.

Jurisdiction

7. Although the proper law of the Colour Trusts themselves is uniformly expressed in Clause 15 of each of the Settlement Instruments to be the law of the Island of Jersey, clause (7) of each of the Deeds of Gift and Indemnity provides that:

> "*This Deed shall be governed by and construed in accordance with the laws of the Island of Guernsey and the parties hereto irrevocably submit to the non-exclusive jurisdiction of the courts of the said Island.*"

By virtue of those clauses and section 4(1)(b)(i) of the Trusts (Guernsey) Law, 2007, which confers jurisdiction on the Royal Court sitting as an Ordinary Court in respect of any non-Guernsey trust where a trustee is resident in Guernsey, which applies to both the Trustees of the Colour Trusts, this Court clearly has jurisdiction to determine this application. Further, the Court can properly exercise its jurisdiction to consider rectifying documents that do not accord with the intention of the parties.

8. The application has been made pursuant to section 69 of the 2007 Law. In accordance with subsection (2)(c), it is made by the Applicant as settlor of the Colour Trusts. Advocate Davies submitted that the Court is being invited to make an order in respect of "*the execution, administration or enforcement of a trust*" (subsection (1)(a)(i)) or, in the alternative, in respect of "*any trust property, including an order as to the vesting ... thereof*" (subsection (1)(a)(iv)). In support of his submission, he drew an analogy with the situation where one or both of the Trustees may have made an application under section 69 against the settlor to compel her to

gift to the Colour Trusts the property that the Trustees understood it had been her clear intention to settle into those trusts. The Court is satisfied that the application is properly made under section 69 of the 2007 Law and that the rectification sought is either an order for the administration of the trust or has the consequence of affecting the vesting trust property.

Evidence

9. The Court did not hear any oral evidence, but had the benefit of affidavits lodged in support of the application, exhibiting documentation relevant to the issues to be determined. Those affidavits are from:

    (i) the Applicant, sworn on 18 January 2011;

    (ii) Linda Monaghan, one of the Trustees and also a director of Kleinwort Benson (Guernsey) Trustees Limited, sworn on 21 January 2011;

    (iii) Patrick Le Gallez, the second Trustee, who is also a director of Kleinwort Benson (Guernsey) Trustees Limited, sworn on 21 January 2011;

    (iv) Nicholas Jacob, a partner at Lawrence Graham LLP, the Applicant's English solicitors, who swore his first, substantive affidavit on 12 August 2011, and formally exhibited certain documentation relating to the Colour Trusts to his second affidavit sworn on 20 December 2011;

    (v) Alexandra Ruffel, now a partner at Berkeley Law Ltd, but previously a solicitor at Lawrence Graham LLP working under the supervision of Mr Jacob, sworn on 16 November 2011;

    (vi) Advocate Steven Meiklejohn, a partner in Ogier in Jersey since 1988, sworn on 15 November 2011; and

    (vii) Advocate Sian Le Cocq, now of Tremoceiro Advocates in Jersey, but previously an associate at Ogier in Jersey, working under the supervision of Advocate Meiklejohn, sworn on 11 April 2012.

    The Court has extracted the following history from this evidence.

10. The Applicant and FWB are two of the four daughters of Mr and Mrs Peter Wilson (hereafter collectively referred to as "the Wilson family"). The Wilson family's professional advisers have been acting for them for a good number of years and relations between them are based on the length and strength of those relationships. The Applicant is divorced and some of the documentation was produced when she used her married surname "Carne".

11. Kleinwort Benson (Guernsey) Trustees Limited is an entity in the wider Kleinwort Benson Group (hereafter referred to as "KB") and has been responsible for the affairs of the Wilson family for many years, including trusts held for the benefit of the Applicant and her sister, FWB. Linda Monaghan and Patrick Le Gallez have both worked for KB for many years, during which they have had management of Wilson family matters.

12. The Applicant has been a client of Nicholas Jacob's for over 15 years, extending back through his decade as a partner at Lawrence Graham LLP to the time when he was a partner at Rooks Rider. He has also advised other members of the Wilson family for many years. He specialises in tax and estate planning and family governance work for high net worth individuals, particularly those who are not domiciled in the UK.

13. In 2000, FWB settled the Jewel Trusts for the benefit of various combinations of her nephews and nieces, her godson and named charities. At that time, FWB was resident and domiciled in Guernsey and the Applicant was resident and domiciled in Jersey. Later in that decade, FWB proposed to leave Guernsey and move to Spain. From the middle of 2006, the Applicant proposed to leave Jersey and return to the UK. Legal and tax advice was sought in relation to both proposed moves. This resulted in a proposal that the assets held in the Jewel Trusts be distributed to the Applicant. Because the Applicant was not at that time a beneficiary of the Jewel Trusts, deeds of addition were executed adding the Applicant as a beneficiary of the Terracotta Settlement on 20 October 2006 and of the other five of the Jewel Trusts on 29 January 2007.

14. Deeds of Appointment were executed on 9 February 2007. The parties were Kleinwort Benson (Guernsey) Trustees Limited, the corporate trustee of each of the Jewel Trusts, the Applicant and Lawrence Graham Trust Corporation, the Protector of each of the Jewel Trusts. The Court has seen a copy of the Deed of Appointment in respect of the Indigo Settlement by way of example. Each appointment was in respect of the entirety of the Trust Fund held in each of the Jewel Trusts. The Jewel Trusts were, therefore, terminated with effect from 9 February 2007 and the Applicant became the legal and beneficial owner of the assets representing those Trust Funds (hereafter collectively referred to as "the Assets").

15. In the knowledge that the Assets from the Jewel Trusts were to be appointed to her, the Applicant was anxious to ensure that the position of FWB and FWB's family was protected whilst she owned the Assets and sought to keep the Assets separate from her other assets. After speaking to Linda Monaghan, the Applicant sought advice from Lawrence Graham LLP and from Advocate Clyde-Smith, a partner at that time in Ogier in Jersey. On 21 December 2006, the Applicant created a First Codicil to her will of personalty dated 13 April 1999, under which she bequeathed to the trustees for the time being of the Larkspur Trust *inter alia* the whole of her interest in the three companies mentioned in her application to this Court "*including the benefit of any loans due by any of the Companies to me at the date of my death*".

16. The Larkspur Trust was a Guernsey discretionary settlement settled by the Applicant on 21 December 2006, the original trustee of which was Kleinwort Benson (Guernsey) Trustees Limited. The Applicant provided a Letter of Wishes dated 21 December 2006 to the trustee, which set out the expected value of the Assets at £8 million and that "*it is my wish that the Assets should devolve for the benefit of my sister, Frances Jane Wilson-Barnes (née Wilson) and her family and I may at some stage in the future settle the same upon a new trust (the "New Trust") for her and her family.*"

17. Bearing in mind the Jersey inheritance law rules on forced heirship entitling the Applicant's children to two-thirds of her Jersey personal estate, which might frustrate the intended bequest being effected by that First Codicil, the Applicant proceeded to insure her life with effect from 10 January 2007 in the sum of £8 million. That policy of assurance was to be effective only for one year and the benefit was assigned to the trustee of the Larkspur Trust by way of a Deed of Assignment executed on 29 January 2007. As confirmed by Advocate Le Cocq, who commenced her work on these matters and first met the Applicant at this time, the sum of £8 million was chosen because that was intended to cover the full the value of the Assets to be appointed to the Applicant shortly thereafter. Advocate Le Cocq further explained that because the Applicant's intended settlement of the Assets was not completed within a year of the original life assurance policy, a second policy on broadly similar terms was obtained and dealt with similarly in 2008.

18. As Linda Monaghan explained, during the period when the Applicant held the Assets, the three companies made certain partial repayments of the loans. The value of the loan made by the Terracotta Settlement to YM Holdings Limited received by the Applicant on 9 February 2007 was £1,767,108.76. By 5 April 2008, the amount owed by YM Holdings Limited to the

Applicant had reduced to £1,040,029.32. The value of the loan made by the Indigo Settlement to Tranquil Holdings Limited received by the Applicant on 9 February 2007 was £1,240,594.76. By 5 April 2008, the amount owed by Tranquil Holdings Limited to the Applicant had reduced to £964,240.15. The aggregate value of the loans made by the Jet, Amethyst, Topaz and Sapphire Settlements to Elysium Holdings Limited received by the Applicant on 9 February 2007 was £3,851,376.40. By 5 April 2008, the amount owed by Elysium Holdings Limited to the Applicant had reduced to £2,977,850.18.

19. On 13 November 2007, Nicholas Jacob wrote to the Applicant advising on what might be done in preparation for her return to the UK. The advice tendered covered the Applicant's overall situation, and so touched on the Assets, as appointed to her from the Jewel Trusts earlier that year. Because of the tax consequences that would flow from continuing to own the Assets if the Applicant became UK resident and domiciled, planning, possibly using trusts, before the Applicant's return to the UK was suggested, with advice from Ogier and input from Lawrence Graham LLP as required.

20. Nicholas Jacob visited Jersey on 4 December 2007 to meet with the Applicant. Although the exact date of the Applicant's intended return to the UK was unknown, planning would proceed on the basis that she might wish to return during the following tax year (2008/9). From the note of that meeting, it is apparent that the Applicant confirmed that she was "*considering putting certain of [her] assets into trust for [FWB] and her children*".

21. The main work of putting into effect the Applicant's wishes for a tax-efficient solution was undertaken in the following months by Alex Ruffel and Advocate Le Cocq. Alex Ruffel exhibited an Attendance Note recording that, if the Applicant did intend to move back to the UK, it would be advisable that the Applicant's "*personal assets are settled where appropriate ... to allow non-domiciled members of her family to benefit from them.*"

22. Alex Ruffel telephoned Advocate Le Cocq on 15 January 2008 to discuss the list of assets held by the Applicant with which they were to be dealing. A full list of the Assets, as appointed from the Jewel Trusts, was unavailable at Ogier, but should be available from KB. However, during 2007 and into early 2008, the Applicant made various loans to FWB and to Kleinwort Benson (Guernsey) Trustees Limited as trustee of the Angelina Settlement, totalling £2.35 million and €100,000. The relevance here is that the benefit of these loans was properly gifted by the Applicant to the Blanco Trust under the specific Deed of Gift and Indemnity executed on 5 April 2008. Before that gift took effect, the Applicant had created a Second Codicil to her will of personalty on 30 January 2008 bequeathing the benefit of those loans to the trustee of the Larkspur Trust, which was the vehicle being used to separate from what would otherwise be her personal assets those assets representing aspects of the Assets appointed out of the Jewel Trusts.

23. On 25 January 2008, Alex Ruffel e-mailed Linda Monaghan, copied to Nicholas Jacob, asking for "*confirmation of the nature of the assets and underlying assets that [the Applicant] proposes to settle.*" Her understanding was that "*these assets consisted of the entire share capital of [the three companies] and various loans made by those companies.*" A reply was sent by Jane Clarke, a colleague of Linda Monaghan's, on 30 January 2008, who confirmed that the value of the loans due by the three companies to the Applicant was at that date almost exactly in the amounts set out above as at 5 April 2008 and that no other assets formed part of the property appointed from the Jewel Trusts.

24. On 19 February 2008, Alex Ruffel e-mailed Advocate Le Cocq explaining that "*the assets that [the Applicant] will settle in are likely to include some of which were transferred to her from the [Jewel Trusts] last year*". On 21 February 2008, Alex Ruffel sent a further e-mail to Advocate Le Cocq. In the body of this e-mail, a diagram of the Applicant's ownership of the Assets was set out. Beneath the diagram there were lists of the loans made by the Applicant to FWB and to the Angelina Settlement. The evidence from the two sets of legal advisers

concentrates heavily on how this e-mail displays on-screen and when printed. Alex Ruffel had originally prepared the diagram in Microsoft Excel. Subsequent e-mails sent by her had the Excel document attached and the attachment, when printed, shows the debts due by the three companies to the Applicant (as described above). A print-out of a recreated "screen dump" shows that on-screen the debts due were visible. However, in the printed version of the 21 February 2008 e-mail, taken from Alex Ruffel's mailbox, the references to those three debts have disappeared. Alex Ruffel further explains that she may have relied on the hard copy of this e-mailed diagram when subsequently providing information about what assets to include in the Schedules to the Deeds of Gift and Indemnity.

25. Also on 19 February 2008, as part of an ongoing process of seeking advice from Cuatrecasas, advisers on Spanish law, who were being used to ensure that the consequences of FWB's move to Spain was fully understood by the Applicant and FWB, Alex Ruffel e-mailed Carlos Ferrer. That e-mail explained that the assets to be held by the trusts the Applicant was intending to settle for the benefit of FWB and members of her family would consist *inter alia* of "*the benefit of loans payable by [FWB] and companies owned by the trusts of which she may be a beneficiary*". It had been advice from Cuatrecasas that the intended settlements by the Applicant should have personal trustees rather than corporate trustees that had led to the Applicant asking Linda Monaghan to act in her personal capacity, even though that is unusual for an employee of KB, and Linda Monaghan suggested doing so jointly with her colleague, Patrick Le Gallez. They agreed to become the Trustees because they had worked with and knew the Wilson family so well.

26. On 11 March 2008, Alex Ruffel sent an e-mail to Nicholas Jacob, attaching a copy of the Excel spreadsheet diagram showing the benefit of the loans to the three companies. On 20 March 2008, Alex Ruffel attached a copy of the diagram in Excel relating to "*the assets we understand [the Applicant] intends to transfer to the new settlements*" and two other documents to an e-mail sent to Linda Monaghan, which was also copied to Advocate Le Cocq and Nicholas Jacob. Advocate Le Cocq cannot say whether, when she received this e-mail, she looked at the attachment. In the body of the e-mail, Alex Ruffel referred to the planned structure of six settlements, reflecting the approach that had been adopted under the Jewel Trusts. There is no express reference to the loans from the three companies and only one of the intended trusts has any reference to loans: "*1 trust to hold the Tranquil holdings shares and the benefit of any loans due*".

27. Later on 20 March 2008, Alex Ruffel sent an e-mail to Advocate Le Cocq attaching a different diagram showing the FWB structures. This related to the position in relation to the six Jewel Trusts and the Angelina Settlement. None of the entries relates to the loans made to the three companies by the Jewel Trusts. The explanation offered was that the benefit of the loans to the Trusts (and subsequently to the Applicant) equalled, and so cancelled out, the liabilities of the companies and so the value of those companies.

28. On 25 March 2008, Alex Ruffel's Attendance Note of a telephone conversation with Linda Monaghan records the latter's confirmation that "*the list of loans attached to [Alex Ruffel's] structure diagram for [the Applicant] is correct.*"

29. On 29 March 2008, Alex Ruffel, conscious of the need to conclude matters during the following week, offered some draft documentation to Advocate Le Cocq to enable the Applicant to settle assets for FWB's benefit. There was no mention of the debts due from the three companies and the documentation prepared did not include any draft deed of assignment of the benefit of the loans made to the three companies.

30. On 1 April 2008, Alex Ruffel e-mailed a document "*regarding the trusts that [the Applicant] wishes to establish for the benefit of [FWB] and her family*" to Linda Monaghan and Advocate Le Cocq. That document explained that "*certain of the assets [from the Jewel Trusts] will be transferred into the new trusts and indemnities are therefore required*". There

was no explicit reference to the debts due from the three companies but there was reference to the need for "*a deed of assignment for the debts due from the Angelina Settlement and [FWB] and deed of settlement of the share portfolio.*"

31. During the evening 2 April 2008, Alex Ruffel e-mailed Advocate Le Cocq several times, copying in Linda Monaghan, attaching draft documentation for execution by the Applicant and others. Some of the documentation drafted quickly became redundant because of the intention to use deeds of gift and indemnity rather than vest property in the Trustees by way of separate deeds of gift.

32. At 21:55 on 3 April 2008, Alex Ruffel sent an e-mail to Advocate Le Cocq, copied to Linda Monaghan and Nicholas Jacob, confirming the list of the Applicant's gifts. In relation to the Colour Trusts, the shareholdings in the three companies are set out and the benefit of the loans made to FWB and the Angelina Settlement are mentioned in respect of the Blanco Settlement. There was no mention of the debts due from the three companies to the Applicant. On the basis of the information in this e-mail, Advocate Le Cocq finalised the content of the Schedules to the Deeds of Gift and Indemnity that had been prepared and sent them by e-mail to Alex Ruffel for checking. At 11:54 on 4 April 2008, Alex Ruffel replied indicating that "*she had not rechecked the whole of each document but only the schedules showing the assets subject to each of them*". She had no comments other than to point out that "*Elysium is not given its full name*", but she did not think that mattered because the company's number and place of incorporation were specified.

33. On 4 April 2008, the six Settlement Instruments for the Colour Trusts were executed by Linda Monaghan, Patrick Le Gallez and the Applicant. On 5 April 2008, the six Deeds of Gift and Indemnity were executed by the Applicant, Kleinwort Benson International Trustees Limited, Linda Monaghan and Patrick Le Gallez.

34. On 28 May 2008, Alex Ruffel e-mailed to Advocate Le Cocq a document containing a summary of the Colour Trusts. There was no mention of the debts due from the three companies.

35. On 7 April 2009, Linda Monaghan's e-mail to Alex Ruffel included some queries arising from a review she had undertaken of draft accounts prepared by KB for the three companies as at their normal 31 December 2008 year-end. She noted that the benefit of the outstanding loans to the companies appointed to the Applicant from the Jewel Trusts appeared not to have been waived or assigned, causing her to question whether they still existed. The draft accounts show the creditor for the three companies' loans as the Applicant. This enquiry was the first occasion on which the absence of the loans to the three companies from the Applicant's gifts to the Colour Trusts was spotted. Until that time, the Trustees had operated the Colour Trusts in the normal way and had proceeded on the basis that the benefit of those loans had been in the Colour Trusts.

36. Once this oversight came to light, Nicholas Jacob contacted the Applicant and FWB to explain what had happened. The Applicant was surprised at this information as she "*had intended that all the Assets should be settled into the Colour Trusts.*" The Applicant herself is unable to shed any light on how this error occurred and explained; she trusted her legal advisors to ensure that all the documents she signed were correct. Her concern now is that the mistake made by her lawyers is corrected.

37. Linda Monaghan acknowledges that she reviewed the draft documents provided by Alex Ruffel and read the Schedules at the back of the Deeds of Gift and Indemnity but did not at that point notice that the loans to the three companies were not included. Alex Ruffel had admitted that she made a genuine mistake and that it was an oversight on her part that the loans to the three companies were not included in the final Schedules. She attributes that error to the computer "glitch" by which the hard copy of the e-mail containing the diagram of

the Assets did not show those loans. She was also busy, being involved in a lot of work in the run-up to the end of the UK tax year. In particular, all of the four lawyers involved and the two Trustees confirm that the error was not caused by the Applicant and that the outcome is contrary to the instructions they had received from the Applicant.

Rectification for mistake – legal principles

38. As noted in Advocate Davies' Skeleton Argument, this Court has previously determined that it is appropriate to apply English principles in deciding whether or not to order rectification (In re Gamble (unreported), 6 February 2003). Accordingly, as set out in In the Matter of the Pelican Trust 2005-06 GLR 20, the Court must be satisfied on the following five requirements:

    (i) there must be sufficient evidence of the error;

    (ii) it must be established to the highest degree of civil probability that a genuine mistake has been made;

    (iii) there must be full and frank disclosure;

    (iv) there must be no other practical remedy; and

    (v) there should be no undue delay.

    There is no reason in this case to depart from the Court's established approach to rectification applications.

39. The basis of the application is that the Schedules to the Deeds of Gift and Indemnity do not accurately record the Applicant's true intentions. It is permissible to order rectification by inserting wording that has mistakenly been omitted from a document. Further guidance on the approach to be taken in a case where a settlor such as the Applicant wishes to vest additional property in the Trustees is provided in the judgment of Brightman J in In re Butlin's Settlement Trusts [1976] 1 Ch. 251, 262F:

    "*... in the absence of an actual bargain between the settlor and the trustees, (i) a settlor may seek rectification by proving that the settlement does not express his true intention, or the true intention of himself and any party with whom he has bargained, such as a spouse in the case of an ante-nuptial settlement; (ii) it is not essential for him to prove that the settlement fails to express the true intention of the trustees if they have not bargained; but (iii) the court may in its discretion decline to rectify a settlement against a protesting trustee who objects to rectification.*"

40. The cases mentioned by HMRC were helpfully analysed by Advocate Davies and deserve attention. In Allnutt v Wilding [2007] EWCA Civ 412, described by Mummery LJ (at [2]) as "*an unusual claim*", the settlor had intended to make a Potentially Exempt Transfer ("PET") to reduce the amount of inheritance tax payable on his death but discovered more than seven years later that the terms of the settlement did not achieve that saving because the funds transferred to the trustees were not a PET. Unlike in Gibbon v Mitchell [1990] 1 WLR 1304, where Millett J opined that it was not a case for rectification but for setting aside, here the learned Lord Justice recognised (at [8]) that it was "*impossible for any new settlement to be executed, which would have the tax advantages that the settlor and his advisors hoped to achieve.*" That factor is similarly applicable to the instant application.

41. Mummery LJ then offered the following guidance about the need to focus on the true intentions of the settlor (at [11]):

    "*... rectification is about putting the record straight. In the case of a voluntary settlement, rectification involves bringing the trust document into line with the true intentions of the settlor as held by him at the date when he executed the 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. The mistake may, for example, consist of leaving out words that were intended to be put into the document; ... Mistakes of this kind have the effect that the document, as executed, is not a true record of the settlor's intentions.*"

42. Applying that general guidance, the learned Lord Justice then sought to identify what the settlor actually executed and what mistake was made. He concluded that the settlement correctly recorded the settlor's intention to use a trust structure rather than direct gifts in order to confer benefits on his children and, as regards the mistake involved, concluded (at [19] and [20]):

> "*The mistake of the settlor and his advisers was in believing that the nature of the trusts declared in the settlement for the three children created a situation in which the subsequent transfer of funds by him to the trustees would qualify as a PET and could, if he survived long enough, result in the saving of inheritance tax.*
> *That sort of mistake about the potential fiscal effects of a payment following the execution of the settlement does not, in my judgment, satisfy the necessary conditions for the grant of rectification.*"

43. The Court acknowledges the importance of ascertaining what the settlor's or, as in this case, the donor's true intentions were. But there is a difference in the nature of the mistake in Allnutt v Wilding and the mistake that is being relied upon by the Applicant. The mistake made by her advisors on which the Applicant relies is not about the fiscal consequences of something done, but rather whether the gifts of the benefit of the loans to the three companies were included or omitted. The potential fiscal consequences are ancillary to whether or not the Applicant's advisors properly gave effect to her instructions. Accordingly, following the example from In re Gamble, the Court can have due regard to the English law guidance from Allnutt v Wilding, but the outcome of that case is capable of being distinguished.

44. Turning to Racal Group Services Ltd v Ashmore [1995] STC 1151, the key passage from the judgment of Peter Gibson LJ, which supports the conclusion just drawn from Allnutt v Wilding, is (at 1158g):

> "*... the court cannot rectify a document merely on the ground that it failed to achieve the grantor's fiscal objective. The specific intention of the grantor as to how the objective was to be achieved must be shown if the court is to order rectification.*"

As the Court has already pointed out, the Applicant is not seeking rectification merely because it has now been realised that there are potential adverse tax implications from the failure to gift the benefit of the loans made to the three companies to the six Colour Trusts. Her contention is that, admittedly bearing in mind the tax consequences, her stated intention throughout was that the entirety of the Assets appointed to her from the Jewel Trusts remaining at the time of settling the Colour Trusts would be vested in the Trustees.

45. In the *Racal Group* case, the company regularly donated money to a charitable trust and resolved in 1988 to make a payment of £70,000 annually for four years because it would be tax-efficient. A draft deed of covenant was prepared but then amended so that the final payment would be on 1 April 1991 rather than 1 April 1992. The deed was executed on 19 July 1988, at which time the first payment was made. However, because the period during which the payments would be made did not exceed three years, there was no right for the company to deduct tax on making the payments, as it was argued had been the expectation. The conclusion of the English Court of Appeal, dismissing the appeal and upholding the rejection of the application to rectify, was that ascertaining the intention of the covenantor "*was crucial*", but the evidence overall did not demonstrate that the real intention when the deed was executed was that the dates on which payments were to be made were to be annually from the date of execution of the deed, which was the form of rectification sought.

46. In the course of his judgment, Peter Gibson LJ also helpfully made some general observations on the doctrine of rectification (at 1154 g), which this Court can also sensibly take into account:

> "*Equity has power to rectify a written instrument to make it accord with the true intention of the maker of that instrument. As it is put in Snell's Principles of Equity (29th edn, 1990) p 626: 'What is rectified is not a mistake in the transaction itself, but a mistake in the way that transaction has been expressed in writing.' But rectification is a discretionary remedy. It 'must be cautiously watched and jealously guarded' (Whiteside v Whiteside [1950] Ch 65 at 71 per Sir Raymond Evershed MR).*
> *One aspect of that caution is the court's insistence that the applicant for rectification should establish his case by clear evidence. Foremost in what must be shown is the true intention to which effect has not been given in the instrument. The evidential standard which the court requires has from time to time been expressed in different ways, but the judge, correctly in my view, directed himself by reference to the guidance given by Brightman LJ in Thomas Bates and Son Ltd v Wyndham's (Lingerie) Ltd [1981] 1 WLR 505 at 521:*
>
> > *'The standard of proof required in an action of rectification to establish the common intention of the parties is, in my view, the civil standard of balance of probability. But as the alleged common intention ex hypothesi contradicts the written instrument, convincing proof is required in order to counteract the cogent evidence of the parties' intention displayed by the instrument itself. It is not, I think, the standard of proof which is high, so differing from the normal civil standard, but the evidential requirement needed to counteract the inherent probability that the written instrument truly represents the parties intention because it is a document signed by the parties.'*
>
> *Where the transaction is unilateral, proof that the intention of the grantor is not accurately reflected in the document may allow rectification to be granted.*"

47. The final matter from Racal Group Services Ltd v Ashmore that HMRC may have had in mind when requesting that it be drawn to the Court's attention is the way in which the Court of Appeal commented on Whiteside v Whiteside [1950] Ch 65 and subsequent cases on the same issue. Peter Gibson LJ expressly accepted the summary given by Vinelott J at first instance ([1994] STC 416 at 425):

> "*In my judgment the principle established by these cases is that the court will make an order for the rectification of a document if satisfied that it does not give effect to the true agreement or arrangement between the parties, or to the true intention of a grantor or covenantor and if satisfied that there is an issue, capable of being contested, between the parties or between the covenantor or a grantor and the person intended to be benefit, it being irrelevant first that rectification of the document is sought or consented to by them all, and second that rectification is desired because it has beneficial consequences. On the other hand, the court will not order rectification of a document as between the parties or as between a grantor or covenantor and an intended beneficiary, if their right will be unaffected and if the only effect of the order will be to secure a fiscal benefit.*"

Although no one is opposing the relief sought by the Applicant, the value of the property vested in the Trustees is significantly affected by the failure to gift to them the benefit of the loans made to the three companies. The beneficiaries are potentially disadvantaged by that failure. Accordingly, there exists an issue capable of being contested and, subject always to ascertaining the true intention of the Applicant, the beneficial consequences for her are irrelevant.

48. Although Advocate Davies sought to address the divergence of authorities between English law, as now set out in the English Court of Appeal's decision in Pitt v Holt [2011] 3 WLR 19, and the position of the Royal Court of Jersey, as set out in Re S Trust [2011] JRC 117, rejecting the decision in Pitt v Holt and affirming the approach established in Re the A Trust [2009] JLR 447, those cases all involved applications relying on the equitable jurisdiction to set aside a voluntary disposition for mistake. The Applicant is not seeking to set aside

anything here. Unlike the facts in those cases, where the outcome of a successful application to the respective courts would be undoing a disposition and recovering ownership of the property, the Applicant's position is the converse, in that she wishes to give effect to her true intention to divest herself of assets that will otherwise continue to form part of her personal estate. Accordingly, the Court does not have to attempt to determine how Guernsey law will resolve the divergence of approach between English and Jersey law.

49. At para. 39 of the judgment of the Royal Court of Jersey in Re S Trust, commenting on Pitt v Holt, it was stated that:

> "*We entirely accept that it is open to the courts of any country to lay down their own judicial policy in relation to the exercise of an equitable jurisdiction. The preference accorded to the interests of the tax authority in the UK is not one, however, with which we are sympathetic. ... in Jersey it is still open to citizens to arrange their affairs so long as the arrangement is transparent and within the law, as to involve the lowest possible arrangement to the tax authority. We see no vice in this approach. We accordingly see no reason for adopting a judicial policy in this country which favours the position of the tax authority to the prejudice of the individual citizen, and excludes from the ambit of discretionary equitable relief mistakes giving rise to unforeseen fiscal liabilities.*"

That passage can be adopted *mutatis mutandis* as an accurate description relating to Guernsey.

Decision of Jurats

50. The Deputy Bailiff directed the Jurats that the approach they should adopt in deciding whether to grant the rectification sought by the Applicant of the Schedules to the six Deeds of Gift and Indemnity of 5 April 2008 is to determine what the true intentions of the Applicant were at the date she executed those instruments and to work through the five requirements for rectification as adopted in Guernsey law from English law principles and set out in the Court's decision in In the matter of the Pelican Trust (supra). He reminded them that the burden of proof rests on the Applicant and that the standard of proof required is the civil standard of the balance of probabilities.

51. The Court has set out in considerable detail the steps taken by the Applicant's advisers to give effect to the Applicant's wish to settle property into the Colour Trusts. The documentation produced from time to time before the relevant instruments were completed needed to be subjected to close scrutiny to ascertain whether there are any inconsistencies that would lead the Jurats to conclude that something other than the settlement of all the property remaining from the Assets appointed to the Applicant was her real intention. The Jurats were unanimous in making the following findings.

There must be sufficient evidence of the error

52. The Jurats noted that the six Deeds of Gift and Indemnity were executed by the Applicant on 5 April 2008 and that she signed those instruments immediately below the Schedule of each. They took into account her expressed intention to deal with all the Assets appointed to her out of the Jewel Trusts in the tax year before her planned return to the UK. The chronology set out earlier in this judgment shows that steps were taken by the Applicant before and following the appointment of the Assets to her out of the Jewel Trusts to give effect to her wishes that her sister, FWB, and her sister's family should continue to benefit from those Assets, or property of an equivalent value, in the event of her death whilst she owned the Assets. The Jurats concluded that these steps supported the Applicant's intention to deal subsequently with the Assets in a manner that would benefit FWB and her family.

53. Although there are references in some of the documentation to "some" or "certain" of the Assets being settled into trust, the Jurats accepted Advocate Davies' explanation that this

reflected the fact that there had been some variations in the Assets between the time when they were appointed to the Applicant on 9 February 2007 and when those documents were created in the run-up to establishing the Colour Trusts before the end of the UK tax year on 5 April 2008. In particular, the Jurats did not find that those references displaced the intention of the Applicant to gift to the Colour Trusts the benefit of the loans made to the three companies.

54. The Jurats further noted that the omission of references to the loans to the three companies in the Schedules to the Deeds of Gift and Indemnity arose as a result of the mistake admitted by Alex Ruffel. The documents she produced in March and early April 2008 confirming the list of assets to be covered by the Deeds of Gift and Indemnity did not refer to the loans because of her mistake. All the professional advisers of the Applicant have acknowledged that it was their shared understanding that the Applicant intended to include the benefit of the loans to the three companies. Unfortunately, none of them spotted the omissions from the six Schedules of references to the loans before the instruments were executed. The Jurats accept that everyone involved was operating under the time pressures commonly experienced in the days immediately preceding the end of the UK tax year. Further, the Jurats accept that those swearing affidavits in support of the application benefit from a presumption of good faith and concluded there was no evidence before the Court that it had been rebutted.

55. Having regard to the evidence before the Court, the Jurats were satisfied that the Applicant's true intention, which she held up to and including 5 April 2008 (and indeed beyond), was to gift the benefit of the loans to the three companies to the Trustees of the Colour Trusts. They were further satisfied that Alex Ruffel made a genuine human error by not listing the loans as part of the property to be settled into the Colour Trusts. Accordingly, having determined the Applicant's true intention, the Deeds of Gift and Indemnity did not reflect that intention and there was sufficient evidence of this error.

    It must be established to the highest degree of civil probability that a genuine mistake has been made

56. Having been reminded by the Deputy Bailiff of the passage from Brightman LJ's judgment in Thomas Bates and Son Ltd v Wyndham's (Lingerie) Ltd (supra), the Jurats were satisfied that there was convincing proof contained in the affidavit evidence to demonstrate that the mistake was a genuine one. The documentation exhibited by the witnesses contained a considerable number of items pointing towards a shared understanding of what the Applicant wished to achieve. Some of the more relevant items were those exchanged with third parties, such as the Spanish law advisers, e.g., Cuatrecasas.

    There must be full and frank disclosure

57. Advocate Davies assured the Court that a thorough trawl of everyone's files had been undertaken and that all relevant documentation was before the Court. The Jurats were satisfied that they had been provided with full and frank disclosure and that relevant avenues of enquiry had been explored during the hearing. In particular, they regarded the frank admission of error by Alex Ruffel and the acknowledgement by all the professional advisers that they had overlooked the failure to refer to the loans as being significant to show that there had been no attempt to hide anything.

    There must be no other practical remedy

58. The Jurats recognised that the situation in which the Applicant finds herself is similar to that encountered in Allnutt v Wilding and that the need to give effect to the intended gift of the benefit of the loans with retrospective effect is a relevant consideration. Advocate Davies submitted that there would be too many uncertainties involved in the Applicant pursuing other remedies theoretically available. The Deputy Bailiff directed the Jurats that, in this context, they could disregard the possibility of some action being taken by the Applicant against her advisers. Her obligation to mitigate her losses, which is effectively how to regard what was

being sought through her rectification application, needed to be pursued first. Accordingly, the Jurats were satisfied that no other practical remedy is available to the Applicant.

There should be no undue delay

59. The error was identified in April 2009. The application to the Court was made on 11 November 2011. As Advocate Davies explained, the intervening period was spent trying to work out how the error arose and obtaining evidence in support of an application to rectify. The Jurats noted that the Applicant's affidavit had been sworn as long ago as 18 January 2011. In all the circumstances of the case, the Jurats were satisfied that there was no undue delay in progressing the matter towards making the application.

Exercise of discretion

60. The Deputy Bailiff further directed the Jurats that, even if they concluded that the Applicant's true intentions at the time had not been accurately reflected in the written instruments executed by her, rectification remains a discretionary remedy and reminded them that it "*must be cautiously watched and jealously guarded.*" The Court should consider the justice and fairness of what has happened. But for the genuine human error made by Alex Ruffel, the Jurats were satisfied that those loans would have been included in the Schedules to the Deeds of Gift and Indemnity. As she had been entitled to, the Applicant had relied on the advice of her professional advisers. She would suffer injustice and unfairness if her true intentions as at 5 April 2008, as accepted by the Jurats, were not given effect. It was, therefore, an appropriate case for the Court to exercise its discretion to rectify the six Deeds to include the references to the loans that had been omitted as a result of that mistake.

Conclusion

61. The Court grants the application to vary the Schedules to the Deeds of Gift and Indemnity to the Colour Trusts with retrospective effect as from 5 April 2008 as follows:

    (i) in respect of the Deed relating to the Blanco Settlement, the Schedule shall include the additional wording: "The balance of the loan due and owing to the Appointor from Tranquil Holdings Limited (a company incorporated in the British Virgin Islands with number 371994) in the sum of £964,240.15";

    (ii) in respect of the Deed relating to the Rojo Settlement, the Schedule shall include the additional wording: "The balance of the loan due and owing to the Appointor from YM Holdings Limited (a company incorporated in Guernsey with number 36059) in the sum of £1,040,029.32";

    (iii) in respect of the Deeds relating to the Amarillo and Verde Settlements, the Schedules shall include the additional wording: "One quarter share in the balance of the loan due and owing to the Appointor from Elysium Holdings Limited (a company incorporated in the British Virgin Islands with number 387738) in the aggregate sum of £2,977,710.18, being an amount in the sum of £744,427.55"; and

    (iv) in respect of the Deeds relating to the Azul and Naranja Settlements, the Schedules shall include the additional wording: "One quarter share in the balance of the loan due and owing to the Appointor from Elysium Holdings Limited (a company incorporated in the British Virgin Islands with number 387738) in the aggregate sum of £2,977,710.18, being an amount in the sum of £744,427.54".

62. In order to assist clarity for the future, the Court proposes that a separate Act of Court should be produced in respect of each of the six Settlements and directs that a copy of the Act of Court be attached to the corresponding Deed of Gift and Indemnity by the Trustees. The consequence is that this trust property will be treated as having been vested in them in accordance with section 69(1)(a)(iv) with effect from 5 April 2008.

Costs

63. At the conclusion of the hearing Advocate Davies confirmed that there was no application for a costs order. Accordingly, there will be no order as to costs.