

**Judgment 30/2003**

**In re the estate of  
Anthony Quentin Gamble (deceased)  
Royal Court  
(Civil action file 676)  
6<sup>th</sup> February 2003**

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**Trusts (Guernsey) Law, 1989 – rectification of the original deed of variation of will – principles to be applied.**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

The 6th day of February, 2003 before Sir de Vic Carey, Bailiff; present:- Laurence Lenfestey Guille, David Michael Jory, and Michael Henry De La Mare, Esquires, Jurats.

**IN THE MATTER OF THE ESTATE OF MR. A. GAMBLE DECEASED**

(1) PRAXIS FIDUCIARIES LIMITED (TRUSTEES)

("the applicant")

On the application of PRAXIS FIDUCIARIES LIMITED, Trustees of the Estate of Mr. A. Gamble, deceased ("the Applicant") in the terms attached hereto

THE COURT having heard Advocate St J. Robilliard and the Bailiff having directed the Jurats in the terms attached hereto GRANTED the application as sought and

1. VARIED the will of the late Anthony Quentin Gamble in accordance with the underlined changes signified in the Annex hereto
2. DECLINED to make an order for costs in this matter other than to say that these should not be met from the Trust Fund but be borne by the Trustee personally.

S. M. D. ROSS  
Her Majesty's Deputy Greffier

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

**ORDINARY DIVISION**

**IN THE MATTER OF AN APPLICATION  
BY PRAXIS FIDUCIARIES LIMITED AS TRUSTEES**

**IN THE MATTER OF THE ESTATE OF  
MR. ANTHONY QUENTIN GAMBLE, DECEASED**

**DIRECTIONS OF THE BAILIFF AND JURATS**

**Date of Preliminary Hearing: 3<sup>rd</sup> February, 2003**

**Date of Hearing before Jurats: 6<sup>th</sup> February, 2003**

1. Mr. Anthony Quentin Gamble was an Englishman who died in 1995. He left his not insubstantial Estate to his widow, Mrs. Rosemary Elizabeth Gamble. Following his death his widow thought she would like to go and live in Australia to be close to her daughter and two granddaughters Emma and Jane. Mrs. Gamble already had enough money to live on for the rest of her days and she decided that part of the assets left to her by her late husband should be put into a trust in favour of her granddaughters. Mrs. Gamble who naturally knew little about saving tax went to consult the family solicitor and he wisely took advice from Pannell Kerr Foster who is a well-known firm of international chartered accountants whose Guernsey partnership manages the applicant company. Advice was given, I need not trouble you with the details of the advice but basically the upshot was that Mrs. Gamble should enter into a deed of arrangement with the trustees of her late husband's Estate to enable the funds which were to be earmarked for the granddaughters to be settled in a Guernsey trust for their benefit. Unfortunately there was an error by the lawyer who was involved in drafting the somewhat complicated trust instrument. I say complicated because Mrs. Gamble wanted her grandchildren to be entitled to benefit from the trust when they reach the age of 25. By the time the trust was established Emma had reached that age whereas Jane had not and part of the advice that Mrs. Gamble was given was concerning the avoidance of liability for her estate to capital transfer tax. In order to achieve this lawfully she had to insure that both granddaughters became entitled to an interest in the trust assets on or before their 25<sup>th</sup> birthdays. So far as Jane was concerned the trustees were given discretionary powers which meant that in theory Jane might not have become entitled to a qualifying interest for the purpose of avoiding

U.K. tax. No one intended this. The U.K. tax was properly avoidable if the document was properly drafted. As it is currently drafted the trustees will be required to pay in the region of a £100,000 in tax. It so happens that the professional advisers here accept responsibility for the mistake and that if this application fails neither Emma or Jane will lose. The bill will be met by the indemnity insurers of the professionals involved. To that extent therefore the outcome of this application is of only limited interest to the original settlor Mrs. Gamble or her two granddaughters.

2. It is for that reason that I have not had to trouble you to the extent that you would be troubled if there were conflicting interests of different beneficiaries to be appraised. The application that is before the Court today is for rectification of the original deed of variation of the late Mr. Gamble's Will by amending the form of settlement so as to correct the erroneous provisions, the inclusion of which gives rise the liability to tax.
3. I think I should at the outset say something about applications for rectification. In English law rectification was a remedy given by the Courts of Equity. In Guernsey there has never been the same distinction between the Courts of common law and equity and this Court has always recognised trusts which are in England creatures of equity. The more sophisticated rules relating to trusts borrowed in part from the Courts of Equity in England are to be found in the Trusts (Guernsey) Law, 1989 which law is of great importance to people from outside this island who come to make use of the local financial services industry and put assets here for reasons of security and prudent financial planning. This Court has imperceptibly perhaps accepted that along with the trusts regime incorporated into our law by the Law of 1989 there is a power for this Court to rectify trust instruments in the same way as courts in other jurisdictions where there is an established law of trusts have power to do so. For what it is worth the Royal Court of Jersey has in a number of cases allowed rectification.
4. What is rectification if a written instrument does not accord with the true agreement between the parties the Court has power to reform or rectify that instrument so as to make it accord with the true agreement. What is rectified is not a mistake in the transaction itself but a mistake in the way in which that transaction has been expressed in writing.

5. The real issue in this case seems to me whether this Court should be sanctioning rectification in circumstances where the sole beneficiary are the professional indemnity insurers of professional advisers concerned and the sole loser is the Inland Revenue. The Inland Revenue have indicated they do not wish to be but they do wish certain cases which I will go through in a minute to be drawn to this Court's attention. My view is that this Court should be applying English principles in deciding whether or not to order rectification and accordingly we can draw considerable comfort on this rather sensitive area of making an order that will be to the detriment of the revenue of the United Kingdom if we can be satisfied that an English Court faced with a similar application would make an order against the interests of the Revenue in the way that we are being asked to make an order today. It may be argued that this Court has got a wider power to order rectification in cases where the Revenue are to be disadvantaged than an English Court would have. This would be on the basis the public policy in Guernsey does not require the Court to protect the interests of a foreign revenue in the same way as it might feel that it should protect the interests of the domestic revenue. It will become apparent from what I am going to say that that issue does not arise it will be for this Court to consider on another day when such considerations may be relevant.
6. I can therefore go straight into the cases which the Revenue have asked to be taken into account. The starting point is the case of *Re Colebrooks Conveyances* [1972] 1 WLR 1397 a decision of Mr. Justice Graham. There rectification was ordered as some conveyances which had been made to the plaintiff and his son some twenty years previously. The conveyances had provided that the property was to be conveyed to the plaintiff and his son as joint tenants, that is to say jointly and after the death of the first for the survivor of them rather than what was apparently intended that they should be tenants in common that is to say on the death of the first of the two of them the share of the deceased should pass to his personal representatives. A consequence of this rectification was that there was some incidental tax advantage as the amount of estate duty payable would be less. The judge held that that was not in itself a bar to relief. A more helpful case is perhaps in *Re Slococks Will Trusts* [1979] 1 All ER 358. Again we have a judgment of Mr. Justice Graham who prior to his elevation had been a respected member of the Revenue Bar. He again reiterated his decision in *Colebrooks Conveyances* and further distinguished a case to which

he had previously referred of *Whiteside v. Whiteside & Others* [1949] 2 All ER 913 where rectification had been refused in very different circumstances in a matrimonial settlement where the husband had expressly altered the original document so that it would not contain the words which were now being sought to be included. Clearly there the circumstances were very different. Mr. Justice Graham towards the end of his judgment sets out what he considers to be the true principle governing the approach of the Court in matters such as these:-

"(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, are 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."

7. The revenue also asked me to look at the case of *Sherdley v. Sherdley* [1986] 2 All ER 202. This was rather a difficult case which resulted in all three refusing rectification. The brief facts were that this was an application by a father who had been granted custody and care and control of his three children to ask the Court to make a periodical payments order against him requiring to pay to each of the children an amount equivalent to the sum which after the deduction of tax at the basic rate equalled each child's school fees. The effect of the order would have been to provide that the amounts would become the separate income of the children for tax purposes thus reducing the father's taxable income. I do not need to recite the various arguments that were adopted in the judgments. Basically the judges all balked at the idea that the provisions relating to matrimonial maintenance which would normally be settled in a contested application between the parent having care and control and the parent providing the maintenance could be artificially stretched for the sole purposes of engineering a tax advantage to the maintaining parent. Mention was made in the judgments of the arrangement amounting to a sham and being a transaction for which there was no independent justification save for the solely fiscal purpose. This decision can be clearly differentiated from the situation that existed in the case before me and the cases decided by Mr.

Justice Graham to which I have referred. The further cases which the Revenue wanted me to look at were *Thomas Bates & Son Ltd. v. Wyndham's (Lingerie) Ltd.* [1981] 1 WLR 505 and *Racal Group Services v. Ashmore and Others* [1995] STC 1151 CA. *Thomas Bates* is relevant for one purpose and that is the statement in the judgment of Lord Justice Buckley at page 514 concerning burden of proof in civil cases he said this:-

"The requisite degree of cogency of proof will vary with the nature of the facts to be established and the circumstances of the case. I would say that in civil proceedings a fact must be proved with that degree of certainty which justice requires in the circumstances of the particular case. In every case the balance of probability must be discharged, but in some cases that balance may be more easily tipped than in others."

8. This will be a factor that we will have to consider when we look briefly at what Mrs. Gamble says. *Racal* was a case with simple facts but where the evidence of what was really intended between the parties was not sufficiently clear to justify the rectification. A company made a covenant in favour of a charity but rather remarkably made the covenant for less than three years so obviating the possibility of the donee getting tax relief on the payment. The case decided two points, firstly, that the desire of the applicant to secure a fiscal advantage by rectification was immaterial if there was an issue capable of being contested between the parties to the instrument which there was in this case namely whether the company was entitled to deduct tax from the covenanted payments. However, the Court decided as a second limb of its decision that it could not rectify a document merely on the ground that it failed to achieve the grantors fiscal objective evidence was required clearly showing what the original intention was and in this particular case the Court was not satisfied to the required standard that the covenant did not give effect to the company's original intention.
9. What then are the issues for you to consider when we retire to decide whether or not to grant this application? First we must be satisfied that Mrs. Gamble intended that the document should not been in the form that it was and should be in the form that is now the subject of the application. Of course Mrs. Gamble was not a tax expert. Further you may think that her whole attitude to this transaction was somewhat altruistic and that therefore she may not have given it the careful attention that she would have done if she were to receive personally some benefit particularly if

the result and benefit had been to save her from some financial disaster. That is not however to suggest that she was indifferent to whether or not capital transfer tax was going to be payable on the monies that she was giving to her granddaughter. She went off to see her solicitor and through him get what was thought to be the best advice as to the most tax efficient way in which her objectives could be achieved. Her affidavit is clear and whilst it is a matter for you as well as for me you may think that her evidence is sufficient to trigger rectification.