Application under s.69(1) of the Trusts (Guernsey) Law, 2007 and/or "the inherent jurisdiction of the Court" for orders and directions to rectify a clause in a pension plan which was established by deed and has since been amended by a deed of amendment.

[2020]GRC019

[NOTE – THIS IS ANONYMISED AND IS THE DECISION OF THE COURT. IT CAN BE REPORTED OR PUBLISHED]

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

IN THE MATTER OF A PENSION PLAN

THE TRUSTEE OF THE PENSION PLAN

Applicant

Application considered on the Papers

Before: John Russell Finch, Esq., OBE, Lieutenant Bailiff

Decision handed down: 19 May, 2020

Counsel for the Applicant: Advocate N J Robison

Statute and cases referred to in decision:

The Trusts (Guernsey) Law, 2007, Section 69.

Credit Suisse Trust Ltd v Haggiag (Royal Court No. 17/2017);

In re Gamble, (Royal Court, February 6th 2003);

In re Pelican Trust 2005-6 GLR 20.

Allnutt v Wilding [2007] EWCA Civ. 412;

Ashcroft v Barnsdale [2012] EWHC 1948 (Ch);

Re B (Care Orders: Standard of Proof) [2008] UKHL 35;

Giles v Royal Institute for the Blind and Others [2014] BTC 24;

ICM Computer Group Limited and Others v Stribling and Others [2013] EWHC 2995 (Ch);

Racal Group Services Ltd v Ashmore [1995] BTC 406;

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

Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd [1981] 1 WLR 505;

Whiteside v Whiteside [1950] Ch 65.

DECISION

Introduction and Background

1. This is an application pursuant to section 69(1) of the Trusts (Guernsey) Law, 2007 and/or "the inherent jurisdiction of the Court" for orders and directions to rectify a clause in a pension plan established by deed on 22nd August, 2008 and amended by deed of amendment on 5th May 2009. These are referred to in the documents as the "2008 TDR" and the "2009 TDR" respectively. The rectification proposed would add three words to a clause of the 2009 TDR. The declaration would be that following this rectification of the TDR, the clause in question would enable the trustees to treat the 2009 TDR in such a way that this pension plan will qualify as a qualifying recognized overseas pension scheme ("QROPS") and a qualifying non-UK pension's scheme ("QNUPS"). Putting it as simply as possible, it is submitted that a basic drafting error in the 2009 TDR does not properly set-out the intentions of the establisher and trustee of the plan. This may result in tax liabilities of around £28,000,000 (see paragraph 10 below).

2. I agreed that the matter should be heard in camera due to the highly-sensitive nature of the evidence. This decision is shown in the Act of Court of 15th April, 2020 (Tab 3 of the bundle). I accepted that no other party need be joined. HMRC, by letter dated 8th August, 2019, indicated it did not want to be joined as a party to the application, but wanted certain cases to be drawn to the Court's attention (Tab 3, pp185-186), which has been done. It is understood that this is a common practice in such matters. The Applicant's advocates wrote to the Guernsey Revenue Service posing certain questions (Tab 3, p187). The affidavit signed by a director of the Applicant, at paragraphs 49-55, sets out what transpired. It became apparent that the answers, in the words used in paragraph 33 of the Applicant's skeleton "would not be forthcoming timeously", so the Applicant proceeded with the matter. An examination of the relevant part of the affidavit shows this to be correct. The queries were raised on 19th August 2019 and chased-up more than once. Nothing has been received and it is not unreasonable in these circumstances to proceed with the application. In view of the present emergency, it was decided that this should be considered on the papers. The bundle contains an explanatory affidavit, exhibits, a detailed skeleton argument, copies of legislation and the reports of leading cases. Having considered this I granted the application and reserved producing the reasons, which this decision now seeks to provide. I was satisfied the Applicant had power to make the Application by virtue of section 69(1) and (2) of the Trusts (Guernsey) Law in relation to the "execution, administration or enforcement of a trust".

The Faulty Wording

3. This can be boiled down to a quite simple base. The omission of the words "and the Non-Resident Scheme" from the savings provision at clause 21(d) of the amended 2009 TDR has dire consequences, it is suggested. The plan was designed to provide pension benefits for its members. It is divided into two sections. The first section, the "Resident Scheme", was designed for the benefit of Guernsey residents; the second section, the "Non-Resident Scheme", was to provide pension benefits to non-Guernsey residents. It was designed to qualify as a "QROPS" (see paragraph 1 above). Again, putting the matter as simply as

possible, (without wallowing in a sea of technical acronyms) Clause 21 is designed to be a "savings" clause that the Applicant may rely upon to construe other parts of the 2009 TDR in such a manner to ensure the plan is a valid QROPS. Because the Clause is limited to "the Resident Scheme", it only assists to benefit members of the Residents' Scheme, not all the members of the plan. Any inconsistent clauses cannot be "saved" under Clause 21(d) to assist Non-Resident Members. The Plan is therefore not a valid QROPS, contrary to the intentions of those involved, particularly the Applicant. In essence it was intended by way of Clause 21(d) that the Plan should at all times be operated in a manner consistent with the English legislation regarding QROPS. Any inconsistent provisions cannot therefore be saved for the benefit of the Non-Guernsey Residents, under the second section of the Plan. This simple drafting omission (apparently from English solicitors) therefore strikes at the heart of the whole scheme. It is submitted that adding the words "and the Non-Resident Scheme" will cure this fundamental defect.

Applicable Legal Principles

4. Recourse has to be had first of all to relevant Guernsey cases. At tab 10 of the bundle the case of In re Pelican Trust 2005-6 GLR 20 is included. The judgment of Rowland DB stated that a trust could be rectified by the court, if, as a result of a mistake, it failed to express the real intention of the settlor. In the circumstances the court was satisfied "to the highest degree of civil probability" that genuine mistakes had been made by the draftsman and that the explicit intentions of the settlor had not been reflected in the deed. It was certainly no objection to rectification that the mistake had been made in a document legitimately designed to avoid the payment of tax – and the English case of Whiteside v Whiteside [1950] Ch 65 was cited in support of this proposition. On the facts there had been full disclosure and despite an 8 year delay, this was not undue. There was no other practical remedy. It was also mentioned that in Re Gamble, (Royal Court February 6th 2003), Carey B observed that "as a matter of law, this court should be applying English principles in deciding whether or not to order rectification".

5. In Whiteside the court had refused rectification because the parties (in a divorce settlement) had already executed a deed of rectification between themselves so there was no need for the court to exercise its jurisdiction and "no issue between the parties". The most comprehensive statement of the practice of the English courts was set-out by Graham J in Re Slocock's Will Trusts [1979] 1 All ER 358 (CTT Saving) at 363:

> "The true principles governing these matters I conceive 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 a 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 … (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."

Later cases have been in favour of taxpayers, apart from one referred to by HMRC, Allnutt v Wilding [2007] EWCA Civ 412 (Tab 13). There the Court of Appeal upheld the refusal of

the High Court to rectify a settlement where there was no evidence that the testator's true intention had been to execute a Settlement in a different form. As Mummery LJ put it in the Court of Appeal, there appeared to be no mistake by the Settlor in the recording of his intentions in the Settlement.

6. The other case referred to by HMRC was Racal Group Services Ltd v Ashmore [1995] BTC 406. All the parties had consented to a rectification, for fiscal purposes. But rectification was refused as it was necessary to prove that the specific intention of the grantor as to the means of achieving a particular fiscal effect had not been carried out in the deed. The case of Ashcroft v Barnsdale [2010] EWHC 1948 (Ch) shows that while there may be a tax issue which may be altered by the rectification, this will not prevent rectification if the other criteria are met. Here a deed of variation was defective in that it omitted the phrase "subject to inheritance tax", so that gifts to children had to be grossed up with an extra inheritance tax liability of £33,000. The judge held that:

> "… the function of rectification was to enable the court to put the record straight by correcting a mistake in the way in which the parties had chosen to record their transaction; it did not empower the court to change the substance of the transaction, or to correct an error in the transaction itself."

7. In Giles v The Royal Institute of the Blind and Others [2014] BTC 24, rectification was granted to resolve a tax issue. A deed of variation was executed to avoid inheritance tax accruing when an estate passed from one sister to another sister rather than directly to four named charities. The deed of variation had no effect on the inheritance tax chargeable and the court allowed rectification, so that, the four charities were able to receive the monies that would otherwise have been paid as inheritance tax. The court considered the Racal case (supra) as the leading authority on the grant of the discretionary remedy of rectification and set out the four relevant criteria. In summary these are:

    1. The Applicant's case had to be established by clear evidence of the true intention to which effect had not been given, and convincing proof to counteract the terms of the document itself, ie, "convincing proof of error".
    2. There had to be a flaw in the written document, so that it did not give effect to the parties' intentions. It was not enough for the error to be a mere misunderstanding as to the fiscal consequences of what had been done.
    3. It must be established what was actually intended, not that what was recorded was not what was intended.
    4. There must be an issue capable of being contested which affected the rights of beneficiaries; rectification would not be ordered if the only effect was to secure a fiscal benefit. In Giles the Court accepted that there was an issue that affected the rights of those concerned and their entitlements, as well as a possible negligence claim in respect of the bad drafting.

Two specific issues need to be discussed as a result of the more recent leading cases: (i) the nature of the burden of proof; and (ii) the existence of an "issue" capable of being contested.

8. In the Pelican Trust case (supra) it was stated, it will be recollected that (paragraph 42): "It must be established to the highest degree of civil probability that a genuine mistake has been made." The Racal case refers to the guidance given by Brightman LJ in Thomas Bates & Son Ltd v Wyndam's (Lingerie) Ltd [1981] 1 WLR 505 at 521. The standard of proof is the normal civil one of balance of probability. However, since 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". Brightman LJ plainly stated that this does not differ from the "normal civil standard", but stressed the "evidential requirement" needed to contradict the terms of the written document.

9. This explanation must, with respect, be correct. There are only two burdens of proof in legal proceedings – the criminal one and the civil one. The death-knell of enhanced civil burdens was in an entirely different area of law, namely child-care cases. The House of Lords decision there is of general application. Hence there is "no heightened civil standard", and no legal rule that "the more serious the allegation the more cogent the evidence needed to prove it". Regard should be had to inherent probabilities. Indeed there was only one civil standard of proof and neither the seriousness of the allegation, nor the seriousness of the consequences should make any difference (Re B (Care Orders: Standard of Proof) [2008] UKHL 35). Accordingly, the existence of an enhanced burden of proof in rectification cases cannot be supported on the authorities.

10. The question of an "issue between the parties" has been touched on in paragraph 5 above when considering the Whiteside case. There it was found that "there was no issue between the parties that the judge could determine". This was because, as noted, a rectification deed had remedied the legal position between them. The question was considered in the Racal case where Peter Gibson LJ accepted the summary given by the trial judge in the following words; noting that the court must be satisfied:

> "… that there is an issue, capable of being contested between the parties, or between a covenantor or a grantor and the person he intended to benefit, it being irrelevant first that rectification of the document is sought or consented by them all, and secondly that rectification is desired because it has beneficial fiscal consequences."

There is such an issue on the facts of the present application (as indeed there was in the Racal case). As paragraph 4 of the Application puts it, the failure to qualify as a "QROPS" or "QNUPS" may result in £28,000,000 tax liabilities for the members of the plan. There would likely be a lively issue between members so affected and the Applicant, together with the ability to seek recompense from the erring draftsman. Accordingly this aspect of the law does not, on the facts put forward, inhibit the granting of rectification.

11. The next question is the declaration sought in Paragraph 4 of the Application that following rectification (which is granted) of Clause 21(d) this clause is "as valid and efficacious general savings provision" which enables the Applicant trustee "to construe the 2009 TDR, such that the Plan will qualify as a QROPS and subsequently as a QNUPS". By virtue of section 69(1)(b) of the Trusts (Guernsey) Law, 2007 a trustee can apply for the Royal Court to "make a declaration as to the validity or enforceability of a trust". As is submitted in support of the Application, the Royal Court has jurisdiction to make declarations, as shown in, e.g. Credit Suisse Trust Ltd v Haggiag (Royal Court No. 17/2017, tab 11). This exists even where the matter is not contested. This case helpfully sets out the factors that have to be considered when deciding whether a declaration should be made. These can be summarized as doing justice to the Applicant (or Respondent should there be one); serving a useful purpose; and if any special reasons exist for not making the declaration. In view of what has been decided on the rectification point, where the requirements have, on the view of the facts taken, been met, these pose no obstacle in the present case to the relief sought. The case of ICM Computer Group Ltd and Others v Stribling and Others [2013] EWHC 2995 (Ch) (tab 14) was also cited on behalf of the Applicant: Paragraph 14 of Asplin J's judgment is relevant. In particular:

> "Further, once it has been determined that something has gone wrong with the language of the document and it is clear from the admissible background evidence

what the intended meaning of the document is, there is no conceptual limit to the correction that can be made as part of the process of construction."

This is of particular relevance when considering what the intentions were when setting-up the plan and enables a (in the words of paragraph 53 of the skeleton argument) "practical and purposive interpretation" that would "achieve the intended aim". A declaration would therefore be effective to mirror what was granted by way of rectification.

12. The Applicant proposed (paragraph 5 of what was sought) an alternative form of relief should the primary submissions not meet with success; see paragraphs 24 of the body of the Application and 2-3 of the skeleton argument. This would necessitate rectifying definitions, clauses and rules. Should this have been the view of the Court, additional submissions and, if necessary, evidence would be put in. As is apparent from what has been decided, this is not necessary on the facts and, indeed, would be an undesirably cumbersome way of trying to achieve the same sort of result.

Costs

13. Clause 27 of the Plan provides that costs, etc incurred in connection with the administration and management of the Plan may be paid from the Plan, unless the establisher decides that such costs, etc should be paid by it. The establisher and the trustee are the same person: the Applicant. Looking at the terms of clause 27, it is accepted that the Applicant may not be prohibited from exercising its powers and being indemnified from the Plan. The view is expressed that this should, in the circumstances, be done in a professional manner. This case rests upon a drafting error that is not the fault of the members.

Conclusion

14. As already intimated to the Applicant's Advocate, the Application succeeds in accordance with what was sought in paragraphs 3 and 4 thereof and it is requested that a draft order be prepared giving effect to the decision. I am grateful for the helpful and comprehensive bundle that was prepared.

J R Finch, OBE,
Lieutenant Bailiff

19 May, 2020