2002/186

ROYAL COURT
(Samedi Division)

10th October, 2002

Before: M.C. St. J. Birt, Esq., Deputy Bailiff, and
Jurats Quérée and Clapham.

IN THE MATTER OF THE MJB/SJB AMETHYSTE TRUST

IN THE MATTER OF THE REPRESENTATION OF WALBROOK TRUSTEES (JERSEY) LIMITED

Advocate M. St. J O'Connell, appointed by the Court as representative of the issue and remoter lineal descendants of the presently excluded primary beneficiaries of the Trust.

Application to rectify a Trust Deed.

Advocate K.J. Lawrence for the Representor.
Advocate M. St. J O'Connell in person.

JUDGMENT

THE DEPUTY BAILIFF:

1. This is an application by Walbrook Trustees (Jersey) Limited for rectification of a Settlement known as the MJB/SJB Amethyste Trust, which we shall call the "Settlement". The Settlement was established on the 8th March 1999 by way of Declaration of Trust made by Walbrook as Trustee. The Settlement was established at the request of Mr Michael John Bentley who provided the funds for the Settlement and is defined in the Settlement as the "Settlor".

2. The Settlement is an accumulation and maintenance settlement. Clause 4(1) provides that the Trust Fund is to be held for such of the primary beneficiaries of the relevant class of primary beneficiaries as attain the age of 25 before the end of the trust period or are living and under that age at the end of the trust period and if more than one in equal shares. There are corresponding powers of maintenance and advancement. 'Primary beneficiary' is defined in Clause 1 (h) as

meaning the existing grandchildren of the Settlor named in Part 1 of the Third Schedule and every other grandchild of the Settlor born after the date of the settlement but before the first grandchild attains the age of twenty-five. The Third Schedule divides the primary beneficiaries into four classes by reference to the four children of the Settlor. The trust fund is to be divided into four equal shares, one for each class of beneficiaries.

3. Thus far the Settlement is quite clear. It is an accumulation and maintenance settlement in fairly conventional form for the grandchildren of the Settlor, with common place default provisions for more remote issue to take in the event of a grandchild dying under 25.

4. The difficulty arises because of the effect of Clause 21 of the Settlement read with the Fourth Schedule. Clause 21 provides :

> *"…that no Excluded Person shall be capable of taking any benefit of any kind by virtue or in consequence of this Settlement…".*

5. Excluded Persons are defined by the Fourth Schedule as follows:

> *"Any person being from time to time a defined person within the meaning of paragraph 2(3) of Schedule 5 of the Taxation of Chargeable Gains Act 1992 of the United Kingdom or any statutory modification or re-enactment of such paragraph".*

6. Unfortunately paragraph 2(3) of Schedule 5 of the Taxation of Chargeable Gains Act 1992 includes any grandchildren of a settlor. The consequence is that while the trust provisions establish the Settlor's grandchildren as the beneficiaries of the Settlement, they are then excluded from benefit by virtue of Clause 21 of the Settlement read with the Fourth Schedule. The result is clearly nonsensical. In these circumstances the Trustee applies to rectify the Settlement by deleting the existing wording of the Fourth Schedule and replacing it with the following wording:

> *"Save for any grandchild of the Settlor born before the first grandchild of the Settlor attains the age of 25, Excluded Persons shall be any person from time to time being a defined person within the meaning of paragraph 2(3) of Schedule 5 of the Taxation of Chargeable Gains Act 1992 of the United Kingdom or any statutory modification or re-enactment of such paragraph".*

7. The principles upon which the Court will grant rectification of a settlement are well established. The Court has to be satisfied that there has been a mistake such that the document does not

carry out the true intention of the parties to the document. We were referred to the case of In Re Westbury Settlement (26th March, 2001) Jersey Unreported, which set out a 4 stage test which the Representor must satisfy before rectification may be ordered namely:

> ***"(1) There must be sufficient evidence of the 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; and***
>
> ***(4) there should be no other remedy, that is to say no other practical remedy."***

8. We must confess that we do not see a great difference between 1 and 2 of that four-stage test, as they seem to us to say much the same thing. We would prefer to combine them so that the test becomes a three-stage test with the first stage being that the Court must be satisfied to the civil standard that a mistake has been made so that the Settlement does not carry out the true intention of the parties (and the Settlor in particular).

9. We turn therefore to consider the first question as we have formulated it. On this we have received affidavits from Mr Ross Badger, the accountant and financial adviser to the Settlor, from Mr Nicholas Cuttiford, a director of Walbrook, and Advocate Edward Garfield-Bennett, who is a partner of a firm of Jersey advocates, Bedell Cristin. It was not possible to have evidence from the Settlor as he died on the 26th March, 2001.

10. It is not necessary to review the evidence in detail. We are quite satisfied from the affidavit evidence and the contemporaneous correspondence that it was indeed the intention of all parties that the Settlement should be for the benefit of the Settlor's grandchildren, who were to be the primary beneficiaries. The error seems to have risen partly because of the speed with which the Settlement was established. This was because of a desire to complete matters before the United Kingdom budget for 1999 in case any tax changes were announced in that budget.

11. Mr Cuttiford was first approached by Mr Badger on behalf of the Settlor in early February, 1999, Mr Cuttiford gave written tax advice on the 15th February. Mr Badger wrote back on 1st March, giving instructions to proceed with the establishment of an accumulation and maintenance settlement for the benefit of the grandchildren. On 3rd March, Miss Campbell an employee of

Walbrook, instructed Advocate Garfield-Bennett to draft an appropriate deed. She asked for a draft by the 4th March. It is clear from Advocate Garfield-Bennett's affidavit that he took an existing precedent and amended it as necessary to reflect what was required. That precedent contained a fourth schedule in exactly the same terms as was contained in the Settlement as eventually executed. That fourth schedule was included therefore in the first draft which was sent to Walbrook on 4th March.

12. There was then a flurry of activity with amendments being made and further drafts prepared but no alteration was made at any stage to the terms of the Fourth Schedule. As we have said the Settlement was executed on the 8th March, 1999, a mere 5 days later, with the Fourth Schedule remaining in the terms initially drafted by Advocate Garfield-Bennett. It is asserted by all the deponents that the main intention of the Settlor and those advising him was to establish an accumulation and maintenance settlement for the benefit of the grandchildren; and that the effect of the Fourth Schedule is to exclude from benefit the very persons that the Settlor intended to benefit.

13. We are quite satisfied that that is the case and that the Fourth Schedule was included in the Settlement by error so that the Settlement does not therefore reflect the intentions of the Settlor. We are satisfied that full and frank disclosure has been made by way of the affidavits which we have seen and we see no alternative solution to rectification. Accordingly, the three-pronged test that we have outlined is satisfied. We note that it is over three years since the date of the Settlement and, as was stated in Westbury, the longer a matter takes to come to Court the greater the risk and the greater the burden which is on the Representor. We note that the error was only picked up during a review of the Trust file carried out by an employee of the Trustee in January, 2002, and accordingly, we are satisfied that nothing turns on that in this case.

14. We are therefore satisfied that the grounds for rectification have been made out and we exercise our discretion to order rectification as applied for. So far as costs are concerned we will adjourn the Trustee's costs *sine die* with liberty to restore; and order Mr O'Connell's costs out of the Trust Fund on an indemnity basis.

Authorities

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

In Re Westbury Settlement (26th March, 2001) Jersey Unreported; [2001/72]