In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017: 40

CHURCH BAY TRUST CO. LTD.

Plaintiff

-v-

HER MAJESTY'S ATTORNEY GENERAL FOR BERMUDA

Defendant

EX TEMPORE JUDGMENT

(in Court)

Trust Deed-rectification-governing legal principles

Date of hearing: May 1, 2017

Mr Keith Robinson, Appleby (Bermuda) Limited, for the Plaintiff

The Defendant did not appear

Introductory: relief sought

1. In this matter the Plaintiff Trustees apply by Originating Summons for an "*Order that a Settlement by the Plaintiff made on 13 December 2010 be rectified on the grounds of mistake so that the words 'during the life of the Settlor' are deleted from clauses 9(1) and (2)*" of the Trust Deed.

The evidence

2. The background to the settlement was explained by the Trustees' Affidavit which, most significantly, exhibited correspondence which took place between the Trustees and the Settlor in the period immediately preceding the execution of the Trust Deed. It was also deposed that, having carried out a search of various trust forms in the files of the Trustees, the Trustees found that the relevant clause was an extremely unusual one which had only been used in one other trust.

3. The problem arises because the relevant clause in the Trust Deed confers a power to add and exclude beneficiaries on the Trustees which, by its terms, can only be exercised during the life of the Settlor. The very clear instructions from the Settlor to the Trustees before the settlement was drafted reflected the desire for a chain of beneficiaries who would be appointed from time to time, including appointments being made after the Settlor's death.

4. The position is that the Attorney-General on behalf of charity is the only remaining beneficiary in circumstances where the Settlor had envisaged that after his death and the death of his aunt that his close friend and his children would be added as beneficiaries of the Trust. That was made plain in his Letter of Wishes. Email correspondence was also exhibited which made it clear that rather than fixing the beneficiaries and defining them comprehensively in the Trust Deed, it was envisaged that the class would change from time to time, with the persons being identified by the Settlor having the 'main say'[1] after the Settlor's death.

5. The Attorney-General has not appeared and by email dated February 6, 2017 said this to the attorneys for the Trustee:

> "*As you are aware, it is well established that a settlement can be rectified where there has been a mistake and the court can intervene if it is proved that the settlement fails to express the real intention of the Settlor.*
>
> *It appears that the Letter of Wishes and the contemporaneous emails reveal the true intentions of the Settlor i.e. that the* [named family] *were to be added as beneficiaries following the death of the Settlors aunt.*"

6. That position being adopted by the Attorney-General does give considerable support to the present application.

[1] I.e. being the main parties to be consulted by the Trustees in relation to the administration of the Trust.

Governing legal principles

7. Mr Robinson referred the Court to various authorities to explain the legal jurisdiction which the Court was being asked to exercise. And that was the equitable jurisdiction to rectify a trust deed. The authorities that he referred the Court to were as follows.

8. Firstly, *In re Butlin's Settlement Trusts* [1975] 1 Ch. 251, a decision of Brightman J (as he then was). At pages 260F-H-261D-F he said this:

> "*I turn now to the law. There is, in my judgment, no doubt that court has power to rectify a settlement notwithstanding that it is a voluntary settlement and not the result of a bargain, such as an ante-nuptial settlement…*
>
> *Furthermore, rectification is available not only in a case where particular words have been added, omitted or wrongly written as a result of careless copying or the like. It is also available where the words of a document were purposely used but it was mistakenly considered that they bore a different meaning from their correct meaning as a matter of true construction. In such a case, which is the present case, the court will rectify the wording of the document so that it expresses the true intention…*
>
> *I am therefore faced with the question which is not adequately covered by any authority to which I have been referred, to what extent does a settlor, seeking rectification of a voluntary settlement to which trustees are parties, have to establish that the mistake was mutual? Is it enough for the settlor to prove that he is not alone in the mistake? A similar question can arise in the case of a settlement for value, as to whether a mistake on the part of the trustees needs to be proved as well a mistake on the part of the contracting parties.*
>
> *If a settlement involves an actual bargain between the settlor and the trustees, it would be surprising if the settlement could be rectified quoad that bargain unless the mistake was mutual. That point does not seem to call for elaboration. It does not arise here. I am dealing with the more ordinary case where the trustees are cognisant of the terms of the terms of the proposed settlement before execution but do not strike any bargain with the settlor as to those terms. There are cases which say in general terms that a document cannot be rectified unless all the parties thereto have acted by mistake; see for example, Fowler v Fowler (1859) 4 De G. & J. 250, and the cases therein cited. But in none of those cases was the court concerned to consider the position of persons who were parties to the document only in the capacity of trustees…*"

9. And (at page 262F-G), I was referred to the following further short statement:

> "*It seems to me that the solution to the problem lies in the fact that rectification is a discretionary remedy. In other words, 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.*"

10. Further support for this general approach was found in an earlier case, *Lister-v-Hodgson* (1867) LR IV Equity Cases 30. And in that case Lord Romilly MR (at page 34) said this:

> "*Then, supposing this to be a voluntary deed, it is admitted that it does not carry out the intentions of the Plaintiff; but it is said that you may reform it. But there is this distinction to be taken. If a man executes a voluntary deed in his lifetime declaring certain trusts, and happens to die, and it is afterwards proved, from the instructions or otherwise, that beyond all doubt the deed was not prepared in the exact manner which he intended, then the deed may be reformed, and those particular provisions necessary to carry his intention into effect may be introduced…*"

11. That case was cited to illustrate the proposition that trustees can seek this remedy after the settlor's death and it is not necessary for the settlor himself to support the application.

12. In *Bonhote-v-Henderson* [1895] Ch D 742, Kekewich J said (at 748):

> "*The jurisdiction of the Court to reform, or, as the phrase generally goes, to rectify, deeds, is ancient and original. The principles upon which it depends, and according to which it is exercised, have been so often and so fully stated, and moreover are so familiar to all practitioners, that it would be a waste of time to attempt exposition here. Suffice it to say, that a judgment reforming a deed proceeds on the basis that the deed as it stands does not express the real bargain between the parties, of which real bargain the Court has satisfactory evidence. This, of course, is not directly applicable to voluntary deeds; that is deeds made without valuable consideration, where, therefore, there is no bargain capable of proof. It is within my knowledge that the extension of the jurisdiction to deeds of this character was not always*

regarded with favour or as sound, but it was upheld by the Court of Appeal in Walker v. Armstrong[2]…"

13. And, finally, reference was made to the case of *Thomas Bates & Son Ltd.-v-Wyndham's (Lingerie)Ltd.*[1981] 1 W.L.R. 505 where Brightman LJ (at 521F-G) explained that the ordinary civil burden of proof applied to an application of this nature.

Findings

14. The position in the present case is, it seems to me, that the quality of the evidence supporting the mistake is very high because it derives from prior to the execution of the Deed and is based on communications between the Trustees and the Settlor. Having regard to events as they have subsequently evolved it is quite clear that it was not intended by the Settlor that the Trust property should all go to charity in circumstances where persons whom he had identified as beneficiaries he wanted to have added at this juncture are available to be added, even though (I am told) they are not aware of the Trust.

15. This fortifies the case for this Court to seek to give effect to the true intentions of the Settlor by granting the application to rectify the Trust Deed in the terms prayed.

Dated this 1st day of May 2017 _____
IAN RC KAWALEY CJ

[2] 8 D. M. & G. 531.