T v T

[1999] 1 F.L.R. 679, Fam. Law 93

PARK J: This action seeks rectification of a settlement. My conclusion is that the action must fail. I am very sorry to reach that conclusion and I wish that my jurisdiction was wider than it is. If it was I would certainly desire to give some relief by way of putting right the problem which has arisen and which I will explain later. However, rectification can be a rather narrow remedy. I have thought about the matter very carefully but the more I have thought about it, the more convinced I have become that the law does not permit me to do what I am asked to do in this case.

The settlement was made on 27 March 1967 by Mr T who is the first plaintiff. It is a discretionary settlement for a wide class of beneficiaries. The class includes Mr T's daughters, various other individual beneficiaries, most of whom are relatives of his, and charities. I can go directly to the clause which creates the problem. It is cl 12:

> 'NOTWITHSTANDING anything to the contrary hereinbefore expressed or implied no discretion or power by this Settlement conferred on any person or on the Trustees or any of them shall be exercised and no provision of this Settlement shall operate so as to cause any part of the income or capital of the Trust Fund to become payable or applicable for the benefit of the Settlor his wife or any trustee for the time being hereof.'

The sting is in the tail in the words - 'or any trustee for the time being hereof'.

The power to appoint new trustees was conferred on Mr T, the settlor. The original trustees were two accountants. In December 1974 they retired and were replaced by four new trustees: the settlor's wife, the settlor's daughters and a partner in Victor Mishcon & Co, the eminent firm of solicitors which acted for the family. They are now Mishcon de Reya.

The effect of the final words of cl 12, which I quoted earlier, is that, because the settlor's daughters became trustees, no powers could be exercised so as to cause any part of the income or capital of the trust fund to become payable to or applicable for the benefit of either of them. Unfortunately no one realised that in 1974 or indeed at any time until very recently when a solicitor who was taking on responsibility for the settlement noticed the final words of the clause. Between 1974 and now a number of appointments have been made in favour of the settlor's daughters, either absolutely or on subtrusts. On the face of it these appointments were invalid. The amounts or values involved are large.

The practical implications of having to sort this out, if it needs to be sorted out, are depressing. It is not just a matter between the trustees and the entire class of beneficiaries. All or most of the appointments which may have been invalid were

thought to attract capital transfer tax or inheritance tax. The tax has been paid. There may also have been some payments of capital gains tax. So the Inland Revenue are inevitably involved. They have chosen not to take part in the proceedings before me. They asked counsel to draw my attention to a number of authorities, which he duly did. If I made an order for rectification, they (the Inland Revenue) would accept that it was effective for tax purposes, that is that the previous tax treatment would be left undisturbed. It is of course possible that if rectification is not obtained other tax liabilities, which might be greater than those already paid, could arise in their place. However, because I am not going to make an order for rectification, there are going to have to be further discussions with the Revenue.

I do not think that anyone relishes the idea of having to reopen appointments thought to have become final years ago. In the circumstances I am sure that it was right to try to avert the necessity by seeking an order of rectification. The fact that I do not feel able to make the order does not imply any criticism of the decision to attempt to obtain one. On the contrary, I agree with it.

This action was brought with a view to obtaining rectification. The plaintiffs are Mr T as settlor and the four present trustees. The defendant is a discretionary beneficiary, the settlor's brother, nominated to represent the class of beneficiaries generally. Counsel, Mr Rajah, appeared before me on behalf of the defendant and presented the case that it is not open to me to grant the relief sought. I think that he did this not so much out of a belief that there was likely to be any significant benefit to the defendant and the other discretionary beneficiaries if the previous appointments in favour of the settlor's daughters were invalid, but rather out of a sense of responsibility to the court. I much appreciate the attitude taken and I am very grateful to Mr Rajah for his assistance.

On behalf of the plaintiffs, Mr Topham said everything that possibly could be said in support of the claim for rectification, and said it in a most persuasive way. But, persuasive as he has been, I cannot bring myself to the conclusion that I can make the order requested. There is no policy reason on the facts of the case why I should be averse to ordering rectification. On the contrary, the policy arguments are in favour of it and I would do it if I could. In my judgment, however, the law does not permit it on the facts, and it would be wrong for me to bend the law or distort the facts in order to come to a more expedient conclusion.

It is clear that rectification is capable of being ordered in relation to the terms of the settlement. It is also clear that in such a case, in determining whether the document, as executed, fails by reason of a mistake to give effect to the true intentions of the parties, the intentions which matter are those of the settlor (see Re Butlin's Settlement Trusts; Butlin v Butlin [1976] Ch 251). Equally, however, rectification 'must be cautiously watched and jealously guarded' (Whiteside v Whiteside [1950] Ch 65, 71).

I can only order it if I am satisfied that the document which was executed differed by reason of some mistake from that which the settlor intended should be executed. It is not enough for me to consider, as I do, that it would have been better if the settlor had executed a document which was from the outset in the form to which I am now requested to change it. Nor is it enough for me to conclude that if the settlor's intention had been drawn to the actual terms of the document which was executed, and he had been asked whether he would rather have them changed, he would have said that he would.

I ought to say a little more about the background to this settlement before I set out more specifically the reasons why I do not think that I can order rectification.

It was the second discretionary settlement which Mr T made. The first was made 2 years earlier in 1965. The 1965 settlement was a fairly conventional discretionary trust, but there are a few specific points which I should mention:

(1) The class of discretionary beneficiaries was quite narrow; further it did not include charities.
(2) The maximum duration of the settlement was only 22 years, which was unusual.
(3) There was a clause in standard form excluding the settlor and his wife from benefit. It was similar to cl 12 of the 1967 settlement which I have set out above, but there is one crucial difference. It does not contain the final words, 'or any trustee for the time being hereof '. It is those words which cause the problem for the 1967 settlement.
(4) Clause 17 provides that a beneficiary who is also a trustee may join in the exercise of discretions notwithstanding his or her personal interest. There is no such clause in the 1967 settlement.

The other point to mention about the 1965 settlement is that Mr T was advised upon it by a partner in Victor Mishcon & Co, Mr Winsor. Mr Winsor prepared the draft deed. He advised that Mr T should not himself be a trustee, but that there was no objection to his wife being appointed a trustee. Mr T, and after his death his wife, could have the power to appoint new trustees. Apart from the above he advised that there was no restriction in regard to the choice of trustees. It was submitted to me, and I accept, that as regards the 1965 settlement (i) Mr T's daughters could be appointed trustees; and (ii) if they were, they could participate in exercises of discretions in their own favour.

Within a year or so, Mr T concluded that it would have been better if the 1965 settlement had had a wider class of beneficiaries and if the trustees had been able to benefit charity. He therefore decided to create a new settlement which would not have those disadvantages. That is why the 1967 settlement was made. This time the matter was not handled by Mr Winsor. Instead Mr T instructed Mr Leon Simmons to deal

with it. Mr Simmons was an old friend and a trusted adviser of Mr and Mrs T. He was with Victor Mishcon & Co, but he was not himself a solicitor. He was an unqualified managing clerk. He was very experienced and Mr T had total confidence in him. However, Mr Winsor said in an affidavit:

> ‘It may be material that Leon Simmons, who died some years ago, was not a qualified solicitor. He was a very competent commercial and litigation managing clerk, but was not experienced in the drafting of trust documents. I can only surmise that the error of including the additional words in cl 12 was due to lack of experience in this field, either on the part of Leon Simmons himself or of someone else to whom he may have delegated the drafting of the settlement.’

There are no documentary records of any instructions from Mr T to Mr Simmons, or of correspondence between them. Mr T’s affidavit reads:

> ‘However, to the best of my recollection, my instructions to him were to prepare a new settlement which was to be on the same basis as the 1965 settlement with only two small changes, namely:
>
> (1) the inclusion of charitable organisations as objects of the trustees’ discretion; and
>
> (2) the further widening of the class of beneficiaries so as to include other members of my, and members of my wife’s, family as objects of the trustee’s discretion.’

Mr T gave evidence and was asked a number of questions about this. I should record the essence of his answers. I should first say that, from only a short period of listening to Mr T in the witness-box, it was abundantly clear to me that he is as upright and honourable a person as one could ever wish or hope to meet.

He could not remember the specific occasion when he instructed Mr Simmons to prepare the new settlement or the word which he had used. He left the precise wording and form of the settlement to Mr Simmons. He agreed that he was content to enter into a settlement in such form as Mr Simmons advised him. He relied upon Mr Simmons to provide him with the documents required.

There are some inferences which can reasonably be drawn from the terms of the 1967 settlement as executed. The first is that Mr Simmons did not use the 1965 settlement as a basis for his draft. The two settlements are both discretionary, but their detailed drafting and overall structures are very different from each other. In many respects the differences are ones of style and format not of substantive effect, but it is quite certain that when Mr Simmons was drafting the 1967 settlement, he did not use the 1965 settlement as a template. The second inference is that Mr Simmons compiled his draft

mostly from precedents. He did not take one precedent and use that. He appears to have constructed his draft as a compilation of selected passages from a number of precedents which he had consulted. It has to be said that he did not do this with a high level of skill. For example, he combined in one clause dispositive and administrative powers of the trustees in a manner which a more experienced draftsman would not have done. He even left a resulting trust to the settlor. This was against all principles of tax planning and had to be remedied, when it was noticed some years later, by an assignment of the resulting trust to charity.

The third inference, which is agreed by both counsel, is that the clause which causes all the trouble comes from a precedent in Potter and Monroe's Tax Planning with Precedents. In the 5th edition at p 212 there is a draft clause with the side note 'persons excluded'. It is the same as cl 12 of Mr T's settlement, except for an irrelevant minor difference of wording. Clause 12 ends with the words 'the settlor, his wife or any trustee for the time being hereof '. The Potter and Monroe precedent reads 'the settlor, or any wife of the settlor, or [for] any person for the time being a trustee of this settlement'. This is only a minute difference of wording and it is clear from surrounding clauses in Mr T's settlement and the Potter and Monroe precedent that Mr Simmons took his cl 12 from Potter and Monroe either directly or via a precedent which he may have had in the office and which itself had been derived from Potter and Monroe.

The editors of Potter and Monroe add a note explaining the purpose of excluding a trustee from benefiting. It related to an obscure point on estate duty connected with Re Penrose [1933] Ch 793. Many settlements did not have that particular exclusion, including other precedents in Potter and Monroe itself. Speaking for myself I used to consider it unnecessary and overly restrictive, as what has happened in this case vividly demonstrates.
However, the provision is in no sense a maverick abberation of Mr Simmons' own devising. It derives from a much respected and widely used book of precedents.

I am asked to rectify the 1967 settlement in two ways. First, I am asked to delete the final words of cl 12. Secondly, I am asked to insert a clause worded identically to cl 17 of the 1965 settlement which provides that a beneficiary, who is also a trustee, can join in the exercise of discretions notwithstanding his or her personal interest.

I regret, however, that in the circumstances which I have described, I cannot do either of these things. I can only conclude that the evidence stops far short of what would be required for me to make the order of rectification. It would be different if there was evidence that Mr Simmons was instructed to make a settlement which was the same as Mr T's 1965 settlement except that it was to have a class of discretionary beneficiaries which included a wider range of persons and charities. There is no evidence that those were Mr Simmons' instructions and the inference from what he actually did is that

they were not. It would be different if there was evidence that Mr Simmons was instructed in specific terms to draft a settlement under which beneficiaries like Mr T's daughters could be trustees and continue to receive benefits. There is no such evidence.

It might be different (although I am not sure about this) if the provision, excluding trustees from benefiting was, in the expression which I used a few paragraphs ago, 'a maverick abberation of Mr Simmons' own devising'. The fact that it is drawn from a Potter and Monroe precedent makes it clear that it was not. Mr Rajah referred me to the following passage from the judgment of Kekewich J in Bonhote v Henderson [1895] 1 Ch 742, 751-752:

> 'Is it possible for me to say that the plaintiffs did not assent to the settlement as altered by the Defendant, or to hold that they are now entitled to have it rectified according to what they state their intention to have then been, though it was in nowise expressed? It is possible, and indeed probable, that they did not thoroughly understand how the provisions of the settlement would or might work out, and even careful explanation might have failed to make them grasp the possible results. What I think most likely is, that they were content to adopt and act on Mr Henderson's advice and to believe that the settlement was best in the form into which he had altered it.
>
> At any rate, I do not see my way to reforming a deed on these the only available materials, notwithstanding that now it operates otherwise than is wished and even though, as was strongly urged, the proposed rectification would bring the settlement more into harmony with recognised precedents, and the reasonable views of ladies desiring to make provision for unmarried nieces.'

Mr Rajah also referred me to observations of Bennett J in Fredensen v Rothschild [1941] 1 All ER 430, 434-435, about the difficulty of obtaining rectification when the evidence of the settlor is based on an inevitably hazy recollection of matters which had happened over 30 years ago.

Given these authorities, and the other matters to which I have referred, my regretful conclusion is that the law does not permit me to grant to the plaintiffs the order of rectification which they seek.

There is one other matter which I should mention. Mr Topham pointed out that there could be an inconsistency between two provisions of the settlement: the trustee charging clause which permits a professional trustee to charge for work done by him as trustee, and the concluding words of cl 12, which prevent a trustee receiving any benefit. There is a point here, but I do not think that it demonstrates that the claim for

rectification must be well-founded. It happens from time to time that one document contains two provisions which appear to be in conflict with each other. That situation gives rise to questions, often difficult questions of construction. It is not usually the case that where two provisions are difficult to reconcile, one of them must be changed by rectification. In any case, if this settlement was to be rectified in a way which would solve that problem, it seems to me more likely that it would be done by providing that cl 12 is not to prevent payment to a professional trustee under the trustee charging clause than by eliminating the final words of cl 12.

Application for rectification dismissed

Solicitors: S. J. Berwin & Co for the plaintiffs

Leigh Favis & Co for the defendant

PHILIPPA JOHNSON
Barrister

Here is information on how to order *Drafting Trusts and Will Trusts* and other books by James Kessler QC.