Neutral Citation Number: [2015] EWHC 2480 (Ch)

Case No: HC-2015-001268

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 18/8/2015

Before:

MASTER CLARK

Between:

(1) PROWTING 1968 TRUSTEE ONE LIMITED
(2) PROWTING 1968 TRUSTEE TWO LIMITED
(as trustees of the Peter Prowting Settlement 1968)
(3) PROWTING 1987 TRUSTEE ONE LIMITED
(4) PROWTING 1987 TRUSTEE TWO LIMITED
(as trustees of the Peter Prowting Settlement 1987)

Claimants

-and-

(1) BARRY PETER AMOS-YEO
(2) KEVIN RICHARD AMOS-YEO

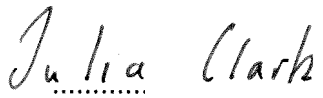
Defendants

Andrew Cosedge (instructed by Bristows LLP) for the Claimants
Francis Moraes (instructed by Pennington Manches LLP) for the Defendants

Hearing date: 28 July 2015

Approved Judgment

I direct that pursuant to CPR PO 39A para 6.1no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



MASTER CLARK

Master Clark:

1. This is my judgment following the trial of this claim for rectification made by Part 8 claim form dated 24 March 2015.

The claim and the parties

2. The claim is to rectify two share acquisition agreements both dated 3 October 2012 ("the agreements") to increase the number of shares transferred by them. The sellers in both agreements were the then trustees of a settlement made on 11 March 1968 r'the 1968 settlement") by Peter Brian Prowting ("the settlor"). The buyers were the defendants. By each agreement the 1968 settlement sold to each of them 25,000 shares in Banner Homes Group Pic ("Banner") for the sum of £500,000. If rectified as sought, the agreements would transfer 30,000 shares to each of the defendants for an additional consideration of £100,000.

3. The first and second claimants are the current trustees ofthe 1968 settlement. The third and fourth claimants are the current trustees of a later settlement made by the settlor on 23 October 1987 ("the 1987 settlement") (I refer to the two settlements together as "the settlements"). The third and fourth claimants do not seek to rectify any agreement to which they were a party; nor in the factual circumstances as they now exist will the 1987 settlement obtain any benefit from the claim. There seems to be no basis for their being claimants. The trustees of both settlements at the date of the agreements were David Cull, Richard Oury and Wendy Amos-Yeo (who sadly died in 2014), the daughter of the settlor.

4. The defendants, Barry Amos-Yeo and Kevin Amos-Yeo (to whom for ease of reference I shall refer by their first names), in addition to being the buyers under the agreements, are life tenants of both settlements, the sons of Mrs Amos-Yeo and thus the grandsons of the settlor. They also seek to rectify the agreements and I was addressed by counsel on their behalf to support the claimants' claim.

5. If rectification is ordered, there will be substantial CGT benefits for the first and second claimants and the defendants, as the agreements will qualify for a relief called "entrepreneur's relief" (see below). For this reason, the claimants' solicitors wrote to HMRC on 6 March 2015 with drafts of the documents filed in these proceedings. They asked HMRC whether it wished to be joined as a party to these proceedings, would like any materials to be presented to the Court, or was content not to be involved. On 24 March 2015 HMRC sent an email stating that it did not wish to be involved as a party to this application for rectification and was happy for the claimants to proceed without its involvement.

The evidence

6. The evidence before me consisted of the following witness statements:
   (1) Mr Cull's statement dated 2 March 2015;
   (2) Mr Oury's statement dated 27 February 2015;
   (3) Barry's statement dated 30 March 2015;
   (4) Kevin's statement dated 30 March 2015.

   There has been no cross examination ofthese witnesses. My task therefore is to summarise and evaluate the evidence, and conclude whether it supports a case for rectification *(Allnutt v Wilding* [2007] EWCA Civ 412 at [23]). In doing so, I of course place particular weight on the contemporaneous written documents exhibited to the statements.

7. Mr Cull is a qualified accountant and was a company director by profession, though he is now retired. During the relevant period, he acted as financial advisor and investment manager for the Prowting family and its trusts. As will be seen, he

was the moving force in the plans that led to the agreements and he decided on the precise number of shares to be transferred by the agreements.

8. Mr Oury is also a qualified chartered accountant and the Senior Partner in Oury Clark, Chartered Accountants, who are the Prowting family accountants. He is the current director of each of the claimants. He had no direct involvement in the preparation or implementation of the plan that led to the agreements.

Factual background

9. Before the agreements were entered into, the majority of the shares (1,200,000 in total) in Banner were beneficially owned by the settlements and the settlor, Mr Prowting, as follows:

1968 settlement	600,000 shares
1987 settlement	300,000 shares
Peter Prowting	300,000 shares

10. All these shares were 'A' ordinary shares with a nominal value of SOp. The legal title to them was held by a nominee company ("the nominee"). The remaining shares of different classes were held by the chief executive and members of the board of Banner. These other shares varied in their nominal value: Ordinary (375,660) £1, 'B' Ordinary (167,000) 1p and 'C' Ordinary (346,000) 52p.

11. By mid-2011 plans were developing for the Prowting family's interest in Banner to be sold to an independent third party. As planning proceeded it became clear that there would be a tax advantage if capital gains tax entrepreneurs' relief ("ER") could be obtained on the planned sale, since that would reduce the rate of CGT from 28% to 10%.

12. The provisions in respect of ER are contained in sections 169H-1695 Taxation of Chargeable Gains Act 1992, most relevantly for present purposes are in s.1691 ("material disposal of business assets"), s.169J ("disposal of trust business assets") and s.169S(3) (which defines "personal company"). The effect of these may be

summarised as follows. In order for the relief to apply, it is necessary for there to be a qualifying beneficiary, namely a beneficiary in possession who throughout a full year immediately before the relevant disposal fulfils the following conditions:

(a) s/he holds in her/his own right at least 5% of nominal share capital;
(b) s/he holds in her/his own right at least 5% of voting rights;
(c) s/he is an officer or employee of the company.

13. In this case, if the requirements were satisfied, then not only the beneficiaries (Barry and Kevin) would be entitled to the relief, but also the settlements.

14. The agreements were entered into in order to satisfy conditions (a) and (b). There is no issue in this case as to whether conditions (b) and (c) were satisfied.

15. The rectification claim arises from the fact that the total number of shares transferred to each the defendants by the settlements was 115,000. This is 5.5% of the total number of shares, but only 4.97% of their total nominal value.

16. The explanation as to how this occurred is found in Mr Cull's witness statement. His evidence (§17) is that he was aware ofthe 3 conditions that needed to be satisfied to obtain ER; and, in any event, he was expressly advised as to those conditions by Rawlinson & Hunter, Peter Prowting's personal tax advisers in an email of 14 September 2011.

17. It is unnecessary to set out in detail the events leading up to the final determination ofthe number of shares to be sold to Barry and Kevin. Mr Cull had originally estimated 105,000 shares in total (to come from both settlements) to be sufficient. This was based on discussions with Richard Walbourn, Banner's Finance Director. Matters were complicated by the fact that the non-Prowting shareholders (executive employees of Banner) were also to be allocated additional 'C' Ordinary shares, so that the overall amount of the share capital would increase. An email dated 18 August 2011from Ian Phipps (a partner in Oury Clark) to Mr Cull

and Mr Oury attaches a "Game Plan", which refers to the need to know how many additional 'C' shares are to be issued as these will mean more shares will need to be transferred to Barry and Kevin. It goes on to say *"it would be terrible if they ended up at 4.999999% owing to some further minor share issue we are not aware of".*

18. The process by which Mr Cull arrived at the final figure of 115,000 in total to be transferred to each of Barry and Kevin is described in some detail in his evidence. On 12 April 2012 Mr Walbourn had provided him with a schedule (p130 of exhibit DGMC 1) setting out the shareholdings in Banner. It distinguished between the different types of shares, but did not set out their nominal value. Mr Cull noted that the 3 directors of Banner who had recently been allocated 'C' shares so that they each held 114,795 shares, had 5.43% holdings. He used that as *"a benchmark"* to arrive at the figure of 115,000 to be transferred to Barry and Kevin. His evidence is that in doing so, he overlooked the fact that those directors held a considerable number of Ordinary shares (with a nominal value of £1) as well as their newly allocated 'C' shares. By contrast, as already mentioned, all of the shares held by the nominee for the settlements were 'A' Ordinary shares, so that a greater number were required to reach the 5% nominal value level. Although he does not state so expressly, he must have assumed (wrongly) that a 5.43% of the total number of shares would be 5.43% of the issued share capital.

19. Having formed the view that 115,000 shares were sufficient to meet the ER requirements, with which Mr Walbourn agreed, Mr Cull reported to his co-trustee, Mrs Amos-Yeo in a letter dated 27 June 2015:

> *"In order to meet the requirements for Entrepreneurial Relief, both BAY [Barry] and KAY [Kevin] will have to hold* ***at least 5% of the issued share capital.*** *I have agreed with Richard Walbourn, the Finance Director of Banner, that the number of shares needed to ensure this percentage is reached is 115,000 for Barry and 115,000 for Kevin."* (emphasis supplied)

20. Mr Cull was also responsible to determining the number of shares to be sold by each settlement. His evidence is that it was initially proposed that all the 230,000 shares would be transferred from the 1987 settlement; but that this needed to be revised when it became apparent that this would result in it holding less than 5% of the shares in Banner.

21. As Mr Cull puts it, *"the plan was revised"* so that 90,000 of the shares were to be transferred to each of Barry and Kevin from the 1987 settlement, leaving it with 120,000 shares; and 25,000 from the 1968 settlement, leaving it with 550,000 shares. It is a curious feature of this case that Mr Cull arrived at the right figure of 120,000 for the 1987 settlement to retain a 5% share of the nominal capital.

22. It is clear that Mr Cull intended the settlements to transfer to each of Barry and Kevin shares with a minimal nominal value of 5% of the total shareholding so as to satisfy the ER requirements. This is not of itself determinative of the number of shares - any number greater than the minimum would satisfy the requirements. But his evidence shows that he intended to transfer that minimum plus an additional number to round up the figure and provide margin or cushion against error. He had been advised to do this by Mr Phipps (in the comments set out in paragraph 17 above and in an email from Mr Phipps dated 30 August 2011) and he accepted that advice.

23. The agreements were prepared and executed in October 2012. In March 2014, the legal title to the entire shareholding in Banner was sold by the nominee to Cala Homes. Shortly before the sale, Rawlinson & Hunter advised Mr Cull that the 115,000 shares held by Barry and Kevin were less than 5% of the nominal capital of Banner. By this stage, it was too late (for fiscal purposes) to transfer additional shares, as they would not have been held for the full year before the sale required by the ER provisions outlined above.

Legal principles

24. The requirements for rectification for common mistake summarised by Peter Gibson U in *Swain/and Builders Ltd v Freehold Properties Ltd* [2002] 2 EGLR 71at 74, [33] were approved by the House of Lords in *Chartbrook v Persimmon Homes Ltd* [2009] UKHL 38, [2009] 1AC 1101, and are as follows:

> "The party seeking rectification must show that: (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (2) there was an outward expression of accord; (3) the intention continued at the time of the execution of the instrument sought to be rectified; (4) by mistake, the instrument did not reflect that common intention."

25. A more recent summary of the principles is to be found in the judgment of Barling J in *Giles v RN/8* [2014] STC 1631; [2014] EWHC 1373, in his analysis of the judgment of Peter Gibson U in *Raca/ Group Services Ltd v Ashmore* [1995] STC 1151:

> "(1) While equity has power to rectify a written instrument so that it accords with the true intention of its maker, as a discretionary remedy rectification is to be treated with caution. One aspect of that caution is that the claimant's case should be established by clear evidence of the true intention to which effect has not been given in the instrument. Such proof is on the civil standard of balance of probability. But as the alleged true intention of necessity contradicts the written instrument, there must be convincing proof to counteract the evidence of a different intention represented by the document itself (1154h-1155b);
>
> (2) There must be a flaw in the written document such that it does not give effect to the parties'/donor's agreement/intention, as opposed to the parties/donor merely being mistaken as to the consequences of what they have agreed/intended; for example it is not sufficient merely

that the document fails to achieve the desired fiscal objective (1158f-g);

(3) The specific intention of the parties/donor must be shown; it is not sufficient to show that the parties did not intend what was recorded; they also have to show what they did intend, with some degree of precision (1158g-j);

(4) There must be an issue capable of being contested between the parties notwithstanding that all relevant parties consent. This criterion has been much criticised: the purpose of it, and its actual content and scope, are by no means clear. In *Racal* Peter Gibson U expressly approved the following summary of the principle by Vinelott J in the same case. Vinelott J stated 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 to by them all, and second that rectification is desired because it has beneficial fiscal consequences. On the other hand, the court will not order rectification of a document as between the parties or as between a grantor or covenantor and an intended beneficiary, if their rights will be unaffected and if the only effect of the order will be to secure a fiscal benefit." (1155c-1158b)."

Application of the principles to this case

Convincing proof of error

26. It is clear in my judgment that Mr Cull made an error. His evidence includes a detailed account of the genesis of the agreements and the reasons why 115,000 was chosen as the number of shares to be transferred. He has explained how the error occurred, namely because he overlooked the fact that the different nominal values of the shares meant that the 5.43% (just under 115,000 shares) held by the Banner directors was not an appropriate benchmark to use when determining how many shares should be transferred to the defendants.

27. Mr Oury's evidence is that he was aware of all 3 requirements to obtain ER. He understood that the purpose of the agreements was to obtain ER. He was not involved in or aware of the precise process or calculation resulting in the 115,000 figure. His intention was that Barry and Kevin would acquire a qualifying (for the purposes of ER) shareholding of 5% in Banner. It follows that he believed (in error) that 115,000 shares was 5% of the nominal capital. I am satisfied that Mrs Amos-Yeo had the same belief as a result of the letter dated 27 June 2012 sent to her by MrCull.

28. The defendants similarly had no involvement in arriving at the precise figure to be transferred to them. They attended a number of meetings in 2012 at which the plan to transfer sufficient shares to them to enable them to qualify for ER was discussed. It is clear from the defendants' evidence and the minutes of the meetings attended by them that they understood the relevant requirement to be ownership of a 5% shareholding, without drawing any distinction between the numbers of shares held and the nominal value of those shares. Both defendants were aware that the transfer had to be of a sufficient number of shares to satisfy the ER requirements, but left the determination of that number to Mr Cull.

Error as to intended effect of document as opposed to consequences

29. As Barling J in *Giles* points out, the distinction drawn in this criterion is between a mistake as to the effect of a document and a misapprehension of what the fiscal or other consequences are of a document which does not in fact misimplement the parties' or donor's intention. As the Chancellor put it in *Kennedy v Kennedy* [2014] EWHC 4129 (Ch), [43]:

> "Intention must be distinguished from motive."

However, as will be seen, the distinction between the two is not always clearcut.

30. There will be clear cases on each side of this distinction. *Allnutt v Wilding* [2007] EWCA Civ 412 is an example where the claimant intended to create a discretionary trust, but mistakenly believed that transfers into such a trust were potentially exempt transfers as opposed to being subject to an immediate lifetime charge to inheritance tax. The Court of Appeal held that there had been no mistake as to the effect of the trust document, only as to its fiscal consequences. Similarly, in *Kennedy v Kennedy* the intention was to transfer assets, which were transferred. The mistake was the belief that losses were available to be set off so that that the transaction would not result in any chargeable gains - this mistake was *'for purely factual reasons, extraneous to the document itseif'[43]*

31. At the opposite end ofthe spectrum will be cases where, even though a document may be executed for fiscal purposes, its contents do not reflect the agreement reached by the parties. An example would be if the parties in this case had in fact all intended to transfer 30,000 shares under each agreement, but owing to a clerical error the figure was stated in the agreements to be 25,000. Rectification would plainly be available.

32. However, between these clear cases, there is a continuum moving from a formulation of a general intent or objective to a specific understanding of how that objective is to be achieved in documentary form.

33. I was referred to *Racal Services Group v Ashmore* [1995] STC 1151. The claim there failed because although the fiscal objective was clear, the evidence did not establish with sufficient clarity what the specific intentions were as to how that objective should be achieved. I agree that *Racal* is distinguishable from the present case where Mr Cull had specifically identified what was required to meet the ER requirements.

34. On the other side of the line is the decision in *Giles*. In that case, the established intention of a deed of variation was to redirect the entire estate to charities (so that sums otherwise due as inheritance tax would accrue to them); but due to an

error or oversight only part of the estate was redirected. This is closer to the example given in paragraph 30 above, than to the present case.

35. The decision of *Vaughan-Jones v Vaughan-Jones* [2015] EWHC 1086 (Ch) is closest to the present case. Again, it concerned a deed of variation of a will, drafted by a solicitor who omitted the statement required by s.142(2) of the Inheritance Tax Act 1984, so that the deed was ineffective for inheritance tax purposes. The Judge accepted that the solicitor and all parties to the deed intended it to be back-dated to the date of death for the purpose of saving inheritance tax. The mistake (by the solicitor) was failing to give effect to the right machinery for doing that. He held that this was a mistake not extraneous to the terms of the document itself; it was a mistake which went to the terms of that document.

36. In my judgment the evidence sufficiently establishes that the parties' intention was that the defendants should receive from the 1968 settlement enough shares (when combined with the shares they received from the 1987 settlement) to satisfy the ER requirements. As in *Vaughan-Jones,* they left the precise calculation of the relevant number to Mr Cull, and he made a mistake in that calculation. In my judgment therefore the claimants have shown a sufficient mistake to found the jurisdiction to rectify the agreements.

Specific intention

37. In relation to this issue, the defendants' counsel relied upon *Giles* at para 35:

> "provided the intended effect is clearly proved, the courts appear to have taken a relatively relaxed approach to the precise terms in which that effect was to be achieved in the instrument. In *Swain/and Builders Ltd v Freehold Properties Ltd* [2002] EWCA 560 (a case concerning rectification for common mistake in a bilateral document) Peter Gibson U observed at paragraph 34:
>
> 'Whilst it must be shown what was the common intention, the exact form of words in which the common intention is to be expressed is immaterial if in

substance and in detail the common intention can be ascertained: *Cooperative Insurance Society Ltd v Centremoor Ltd* [1983] 2 EGLR 52 at page 54, per Dillon U, with whom Kerr and Eveleigh UJ agreed."'

38. It follows from my findings above, that the parties to the agreements had a sufficiently specific intention which was not reflected in the agreements as executed by them. The fact that they left the precise number of shares to be determined by Mr Cull to decide does not prevent their intention from being sufficiently specific.

Issue between the parties

39. There is plainly an issue between the parties capable of being contested, namely how many shares the defendants should have acquired and the purchase price that each of them should have paid.

Conclusion

40. For the reasons set out above therefore, I will order rectification of the agreements in the terms ofthe draft order attached to the claimants' counsel's skeleton argument.