IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 79 OF 2012 – ASCJ

IN THE MATTER OF THE TRUSTS OF A SETTLEMENT DATED 31st MARCH 1994 BETWEEN ABUBAKER MOHAMMED MEGERISI AND PROTEC TRUST MANAGEMENT KNOWN AS THE GOLDENTRUST

AND IN THE MATTER OF THE TRUSTS LAW (2001 REVISION)

AND IN THE MATTER OF GCR O. 85, r.2

GRAND COURT - CAYMAN ISLANDS

BETWEEN	**ABUBAKER MOHAMMED MEGERISI**	**PLAINTIFF**
AND	**1. PROTEC TRUST MANAGEMENT ESTABLISHMENT**	
	2. PAGET-BROWN TRUST COMPANY LTD.	**DEFENDANTS**

IN CHAMBERS
BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 10TH DAY OF DECEMBER 2012

REPRESENTATIONS: Mr. Edward Davidson QC instructed by Morven McMillan of Mourant Ozannes for the Plaintiff
Mr. Andrew De La Rosa of ICT Chambers instructed by Lucy Diggle of Mourant Ozannes for Paget Brown Trust Company (with him Mr. Sydney Coleman of Paget Brown)
Mr. Chris Young of Forbes Hare for Simmons & Simmons and their insurers (holding a watching brief with permission of the Court)

REASONS FOR DECISION

1. This is an application by the Plaintiff, Mr. Abubaker Megerisi, to rectify a voluntary settlement made by him on 31st March 1994 and known as the Golden Trust.

2. The settlement was originally constituted under the laws of the Principality of Liechtenstein, which thus became the initial forum for its administration.

3. However, the concerns leading to the need for its rectification having come to light and primarily for the reason that the laws of Liechtenstein do not allow for rectification (as to which legal expert evidence has been made available to this Court); the proper law of the settlement was changed to the laws of the Cayman Islands. This was done in keeping with enabling provisions within the settlement deed and the Cayman Islands became the new forum for its administration.

4. This effectively took place when the second defendant was appointed as Trustee, replacing the first defendant (a Liechtenstein entity) on 31st October 2011.

5. The second defendant is incorporated in and carries on business in the Cayman Islands and is the sole current trustee.

6. The settlement is a discretionary settlement in favour of the Plaintiff ("the Settlor") and his immediate family, with power (not exercised to date) to add beneficiaries, and with an ultimate gift to charity if no beneficiary is living or in existence at the expiry of the trust period.

Background

7. The error which it is sought to be corrected by way of rectification lies in the omission from the settlement when the deed was originally subscribed, of the very corpus of the trust. The error resulted in the omission of an assignment to the first defendant (as original trustee) of an asset, namely loans totaling £7,950,000 and USD5,434,617; the principal asset which the Settlor avers he intended to settle.

8. The circumstances of the omission - arising from a mistaken belief on the Settlor's part the result in turn of an omission on the part of his lawyers in the preparation of the deed of settlement - are relied upon by the Settlor now as basis for the grant of the equitable discretionary relief of rectification.

9. Thus, the case is unusual (though not unique) in that the error which it is sought to correct is one of omission, rather than an error to be found in either the expressed beneficial or administrative provisions of the settlement as it stands.

10. This unusual feature is, however, described by counsel as being without significance because:

(1) The legal principles applicable to the rectification of voluntary settlements in general apply to this case exactly as to any other, and

(2) The applicability of those principles is now established in the Cayman Islands (as well as in the U.K.). This, in the context of the Cayman Islands, could hardly be more pointedly illustrated in this case than by the earlier case of ***Omar Megerisi v Scotiabank Trust (Cayman) Limited and Another 2004-05 CILR 456***. That was the case in which rectification of a settlement was granted on the application of the brother of the Settlor, in circumstances of a like omission of assignment of assets by way of settlement upon a Cayman Islands trust, resulting from the mistaken belief that they were included in the settlement. There, too, the omission was that of the lawyers who drafted the settlement deed, the same lawyers responsible for the present deed.

11. The difference in the factual circumstances between this and Omar Megerisi's case – that of the domicil of origin of the two settlements - I do not regard as a bar to relief by way of rectification, for reasons to be explained below.

12. The evidence filed in support of the present application comprises in the main an affidavit filed by the Settlor himself (sworn on 30th November 2011) with documentary exhibits and an affidavit filed by Mr. Patrick Daniels (also with exhibits) sworn on 28th November 2011.

13. Mr. Daniels was the lawyer responsible in common both for the drafting of this settlement and that in Omar Megerisi's case. He frankly admits to the omission from the settlement as described above (and had frankly so admitted to the similar omission in Omar Megerisi's case) and explains how it came about.

14. In essence, despite the Settlor having made known his wishes and intention to settle the aforementioned loans upon the trust, Mr. Daniels had failed to make this known to his associate lawyers within his firm, those who actually drafted the deed of settlement. Mr. Daniels also failed to recognise the omission from the schedule to the settlement of the trust assets when the deed was presented to the Settlor for execution. This is evidence that I had no hesitation in accepting. It is clearly and cogently set out in Mr. Daniels' affidavit and the true nature of the Settlor's intentions and wishes is supported by contemporaneous file notes and internal memoranda retrieved from within the files of Mr. Daniel's firm and exhibited in the evidence.

15. For his part, not only is the Settlor's account supported in the same way, but his own evidence also explains the background leading to the perceived need on his part to create the settlement and to settle the assets (the loans) upon it, in a manner that is

equally cogent and compelling. I take the following summary from that, very helpfully, provided by Mr. Davidson Q.C. in his written submissions.

16. The Settlor's domicil of origin is Libya but he came to take up residence in London in 1978. Under the United Kingdom Inheritance Tax Act 1984 (section 267 (1) (6) in particular), ("the Act") a person who had been resident in the U.K. for the relevant period (as defined under and for the purposes of that section) became deemed to be domiciled there for the purposes of the Act and his assets which were situated in the United Kingdom at the time of deemed domicil, became liable to inheritance tax.

17. As at the 6th April 1994 (after 16 consecutive years of residence and that being the first day of his 17th year of residence and the completion of the relevant period), the Settlor became subject to the Act and had been advised in late 1993 by Simmons & Simmons (Mr. Daniel's firm and the Settlor's and his family's established legal advisers) that he would become deemed U.K. domiciled for inheritance tax purposes on that date.

18. Accordingly, Simmons & Simmons advised him to settle the bulk of his business assets upon trust before becoming deemed U.K. domiciled that is: before the 6th April 1994.

19. By section 6(1) of the Act, property situated outside the U.K. is excluded property, and so outside the scope of inheritance tax, but only if the person beneficially entitled to it is an individual domiciled outside the U.K. So, on 31st March 1994 when the settlement was created, the Settlor could still have settled property situated outside of the U.K. without incurring inheritance tax. However, as at 6th April 1994, the making of any such settlement might have been vulnerable to inheritance tax.

20. The property situated outside of the U.K. as at the time of the settlement on 31st March 1994, took the form not only of the receivables by way of the loans but also the form of certain shares in a Cayman Islands company as explained below.

21. The Settlor's assets at the time of settlement included one-third of the shares in Garden Holdings Limited ("GHL") the Cayman Islands company in question, all of the shares in which were held jointly and beneficially with his father, Mohamed Megerisi (through a trust earlier settled by him) and brother Omar.

22. Accordingly, the 100 issued shares of USD1.00 each in GHL were owned beneficially by each in equal shares and they were each entitled equally between them to repayment by GHL of interest free loans which they had made to GHL in a combined total of £23.85 million and USD16,303,581. These were loans made for the purpose of reinvestment in their various family businesses and it was this arrangement that was the source of the loans owed to the Settlor mentioned above in the amounts of £7,950,000 and USD5,434,607.

23. The shares in GHL were themselves only of little or nominal value. The real value, representing at the time of settlement the bulk of the Settlor's wealths; was in the loans and so it was of crucial importance, given the perceived need for a settlement, that they be included in it.

24. The evidence is that this was sought to be done at a meeting in the afternoon of 29 November 1993 between the Settlor, Mr. Daniels and Mr. McNeile, (an associate within Simmons & Simmons), for the settlement of his assets upon his trust. There is a memorandum of the same day by Mr. McNeile which was copied to Mr. Daniels and to Mr. Way (a tax partner at Simmons & Simmons who was assisted by Mr.

McNeile) and which noted that the Settlor's assets included "one-third share in Garden Holdings" and that "Golden Investments [another Cayman Islands Company not germane for present purposes] and Garden Holdings would be transferred into one trust".

25. As it is also clear from the evidence that Liechtenstein was selected as the domicil, it is implicit in this memorandum that the Settlor gave instructions for the settlement in a Liechtenstein trust of his one-third share in GHL, and the Settlor as well as Mr. Daniels, confirm this expressly in their evidence.

26. Moreover, this intention is supported by the fact that at another meeting on the same day - the 29th November 1993 - the Settlor's brother Omar, whose position was materially similar to that of the Settlor, had met Mr. Daniels, Mr. Way and Mr. McNeile and gave instructions to settle his "one-third share of GHL" in a Caymanian trust; and that is the settlement which is the subject of the above-mentioned rectification decision for reason of the like omission from that settlement of Omar's interest in GHL and his loans to it. See ***Megerisi v Scotiabank*** (above).

27. Following the meeting between the Settlor, Mr. Daniels and Mr. McNeile on the 29th November 1993; the evidence shows that the preparation of the settlement was handled, not by Mr. Daniels, but by Mr. McNeile. It is now apparent however, that while Mr. Daniels knew about the loans to GHL, which in value terms constituted the bulk of the Settlor's interest (as it did Omar's) in GHL; Mr. McNeile did not. He did not know about the Settlor's intention to settle them upon the trust nor appreciated the importance of doing so.

28. That that was the cause of the erroneous omission of the GHL loans from the trust settlement, is readily and fully acknowledged by Mr. Daniels in his affidavit. At paragraph 31, he explains:

> *Had I been directly responsible for preparing the Trust Deed, or had I realised that my colleagues were unaware of the existence of the loans, I would have ensured that Abubaker Megerisi's beneficial interests in the loans was expressly made part of the settlement, as was the clear intention of Abubaker Megerisi at the time, a fact which I myself fully understood following the above-mentioned meeting on 29th November 1993."*

29. In his evidence, the Settlor explains that on 31st March 1994, he believed that he had only to sign the settlement in order for his instructions to settle the loans to be carried out, and that by signing it he had done everything necessary for that purpose.

30. I accept that evidence and find that in holding that belief at the time of execution of his settlement, the Settlor was mistaken. I accept that the settlement did not give effect to his intention or to his belief, because the settlement, as executed, comprised only a nominal sum. His intention was that his shares in GHL (which held the bulk of his assets by way of the sums loaned to it) were to be settled and, along with them, his interests in the loans. This would have entailed, as a matter of the legal formalities for which he relied entirely upon his legal advisers, the assignment of the loans to the first defendant, the original trustee of the Golden Trust. None of this was done as he intended and believed.

31. While the Settlor's interests in the loans have since been transferred to the original trustee (and later to the second defendant as successor trustee), reinvested in his family business and grown very substantially in value; the failure to include them in the settlement on 31st March 1994 meant that they became and continue to be vulnerable to inheritance tax since 6 April 1994.

32. This consequence can be avoided only by rectification of the settlement with retroactive effect to the 6th April 1994. Hence this application to this court now.

33. The problem first came to light in 1999 when it was sought to separate the business interests of the Settlor, his brother Omar and his father, which until then, were all intertwined. It was then discovered that as a result of the similar failure of Simmons & Simmons, the Cayman settlement of Omar Megerisi executed on 9th March 1994, also omitted any assignment of the corresponding loans owned to Omar. Mr. Daniels then forthrightly advised the Settlor that a similar error was likely to have occurred in his case, but because issues of Liechtenstein law might give rise to complications which did not affect Omar's case, it would be best to deal with the rectification of Omar's trust first. Then followed the application to this Court and its judgment reported in that case (**above**).

34. As sought to be done here, that was done by the insertion of an assignment of Omar's share of the loans.

35. Thereafter, attention was given to the Plaintiff's case and as some six years have passed, an issue of undue delay arises and which itself was frankly raised with me by counsel as a matter for consideration in the exercise of the discretionary jurisdiction

that rectification involves. As I explain below, I am satisfied that no issue of undue delay in the sense of laches as a bar the grant of rectification, arises.

36. The first defendant Protec (as original trustee) takes no point on the absence of any assignment of the loans from the settlement and has not doubted the Settlor in his explanation that he had intended to settle them at the outset, and in due course Protec (and now Paget-Brown as successor) accepted the proceeds of repayment of the loans when they matured, pending clarification of their entitlement as trustee.

37. That, however, has not resolved the problem raised by the failure to have assigned the loans to Protec in the settlement itself on 31st March 1994. When the question of rectification of the settlement was raised, the Settlor was advised by a Liechtenstein lawyer (as mentioned above) that the courts in Liechtenstein could not rectify the settlement to give effect to his intention to include the loans in the settlement, because the laws there do not provide such a remedy. This is now confirmed by the expert opinion provided to me by Dr. Helmut Wohlwend, a Liechtenstein lawyer in his evidence and which I accept.

38. That limitation of Liechtenstein law having been recognised, it was then decided to change the proper law of the settlement to the Cayman Islands. That is said to have involved a long process but was eventually achieved for administrative purposes by change of the Trustee as mentioned above, on 31st October 2011. Amendments made pursuant to clause 10(a) of the deed of settlement to limit its duration (and the perpetuity period of the trust) so as to comply with the laws of the Cayman Islands in that regard, were made on 8th November 2011. On that same date, the power

conferred by Clause 9(d) of the settlement was exercised to change the proper law of the settlement to the laws of the Cayman Islands.

Jurisdiction to Rectify

39. The provisions of the Trusts Law (2011 Revision) relied upon are in section 89 (2), (4) and (5) and in section 90 respectively as follows:

> *"89(2) A term of the trust expressly selecting the laws of the Islands to govern the trust is valid, effective and conclusive regardless of any other circumstances."*

40. This provision plainly requires this Court to regard the laws of the Cayman Islands as governing the Golden Trust, now that it has been effectively re-domiciled to the Cayman Islands, irrespective of the state of the laws of its domicil of origin (Liechtenstein) at the time it was originally settled.

> *"89(4) If the terms of a trust so provide, the governing law of the trust may be changed to or from the laws of the Islands provided that –*
>
> *(a) In the case of a change to the laws of the Islands, such change is recognised by the governing laws of the trust previously in effect."*

41. This provision, along with others which follow in section 90 dealing with choice of domicil, are thought by Mr. De La Rosa to have been adopted to reflect (or one might add, "address") Hague Convention principles.

42. An examination of Hague Convention XXX (concluded on the 14th July 1985 on the Law Applicable to Trusts and on their Recognition) tends to support this hypothesis,

although this Convention, which has been ratified by the United Kingdom, has not been extended to the Cayman Islands.

43. The impact of section 89(4) must nonetheless be recognized for its full meaning and effect. Accordingly, as it requires in this case that for the change of domicil of the Golden Trust to the Cayman Islands to be effective it must also be recognised by the laws of Liechtenstein, the expert evidence of Dr. Helmut Wohlwend speaks also to this issue. He confirms, and I accept, that the laws of Liechtenstein would recognise and regard the change of domicil of the trust to the Cayman Islands as valid.

44. In the same vein, all questions as to the validity of the change of domicil being settled, section 90 of the Trusts Law further provides that:

> *"All questions arising in regard to a trust which is for the time being governed by the laws of the Islands or in regard to any disposition of property upon the trusts thereof including questions as to...*
>
> *(a)....*
>
> *(b) any aspect of the validity of the trust or disposition or the interpretation or effect thereof....*
>
> *(c) ...*
>
> *(d) ...*
>
> *are to be determined according to the laws of the islands, without reference to the laws of any other jurisdiction with which the trust or disposition may be connected."*

45. This provision is clear in its requirement that the present question – whether the Golden Trust which is now governed by the laws of the Cayman Islands should be rectified on the ground of the mistaken omission of the main corpus of the assets intended to be settled upon it – must be determined according to the laws of the Islands.

46. The law of the Cayman Islands dealing with the subject of rectification is, of course, embodied in the common law and so it is to the case law that one next turns for the answer.

47. I am grateful to both counsel, Mr. Davidson and Mr. De La Rosa, for their comprehensive examination and exposition of the case law, a significant body of which is already to be found in the local cases. .

The Law of Rectification

48. The doctrine of rectification is authoritatively discussed in ***Joscelyn v Nissen*** ***[1970] 2 Q.B. 86***. In the judgment of the Court of Appeal delivered by Russell LJ, it is explained (after a detailed review of the earlier cases) that rectification is an equitable remedy by which, under certain circumstances, a document which does not accurately set out the agreement which it was intended to set out (or in the case of a voluntary settlement such as the present – the intention of the Settlor which the settlement was intended to set out); will be corrected by the Court to accord with the true intention of the parties (or Settlor). See in particular, at p. 98 D-K and G where it is also explained that convincing proof of the real intention of which there was failure to express will be required to overcome the impact of that which was actually expressed, but this will be to the civil, not the criminal, standard of proof. The uncontradicted evidence of the Settlor himself may suffice; as indeed was found to be the case in ***Megerisi v Scotiabank*** (above) ***at p.461***) following ***Hanley v Pearson*** ***(1890) 13 Ch.D. 545.*** The requirement of "convincing proof of the real intention" thus simply reflects the need to counteract the evidence found in the document itself as to what

the intention may have been: ***Thomas Bates and Son Ltd. v Wyndham's (Lingerie) Ltd. [1981] 1 WLR 505*** at 521 per Brightman J.

49. The essence of the remedy as an equitable form of relief, is to avoid unfair prejudice to a person (or as here his beneficiaries) arising from the terms of a written document which fail to give effect to his true intentions.

50. And, was explained more recently in ***Allnutt and another v Wilding and others [2007] WTLR 941*** at 944 paras 110-11:

> *"...the function of the discretionary equitable remedy of rectification is "to enable the parties to correct the way in which their transaction has been recorded.*
>
> *In other words, rectification is about putting the record straight. In the case of a voluntary settlement, rectification involves bringing the trust document into line with the true intentions of the Settlor as held by him at the date when he executed the document."*

51. As was also emphasized in response to the unsuccessful argument of the appellant on the facts of the case in ***Allnutt***; the court does not reformulate agreements or trusts by "substituting a wholly different settlement" in the place of that actually expressed in the document, but it will rectify the existing settlement to reflect the true intention of the Settlor held at the time the document was executed.

52. It is now well settled as a matter of Cayman law, that a settlement can indeed be rectified although it is voluntary. See ***Briggs v Integritas Trust Management Limited (Cayman) Limited 1988-89 CILR 456*** per Schofield J. at p. 466 following

***Re Butlin's Settlement Trust** [1976] Ch. 251 at 160* (per Brightman J.) and ***Megerisi v Scotiabank** (above at 461)* per Anderson J (Ag.).

53. Those cases show that in the absence of a bargain between the Settlor and the trustee, the court may nonetheless rectify a settlement on the Settlor's application supported by proof that the settlement did not express his true intention: he need not prove that the settlement also failed to express the true intention of the trustee if the trustee has not bargained upon the settlement, but rectification may be refused as a matter of discretion (rectification being an equitable remedy) where a trustee protests and objects to rectification.

54. Here, it is to be noted in this regard that neither the original trustee nor the successor trustee objects, although it is to be emphasised that as neither had bargained upon this, a voluntary settlement, any objections could have been ignored.

55. Rectification, being a discretionary remedy, will not be granted where there is another practical and convenient remedy: ***Megerisi v Scotiabank*** above, at p. 461-2; ***Briggs*** (above) at 471 and ***Bond v Integritas Trust Management and others** 1988-89 CILR N. 22 per Collett CJ.*

56. However, as explained in ***Walker v Medlicott** [1999] 1 Ll.L.R. 20*; as a general rule a plaintiff (there a disappointed beneficiary under a will) should mitigate his loss by bringing proceedings for rectification and exhaust that remedy before issuing proceedings for negligence against a solicitor whose negligence is said to have resulted in the true intentions of the donor (the plaintiff's benefactor) not being expressed and which was alleged to have given rise to the plaintiff's need for remedy.

57. Here, I am told that the Settlor has filed proceedings against Simmons & Simmons (who were represented before me on a watching brief on their behalf and on behalf of their insurers by Mr. Chris Young of Forbes Hare). That action may however, I am told, be settled if rectification is granted (and no doubt if ancillary issues of costs are agreed).

58. In the exercise of my discretion, it is open to me to accept that the Settlor has no alternative remedy open to him which is practical and expedient. The Settlor cannot himself settle the loans upon the Golden Trust with retroactive effect. Any unilateral attempt on his part at settling them now would nonetheless expose his beneficiaries to risk of UK inheritance tax. And his recourse against Simmons & Simmons must follow his reasonable attempts to mitigate his losses which is what he seeks to do now by way of rectification through the court. Ratification has retroactive effect, operating ex tunc or from the outset: **Allnutt** (above) at 944, para. 9. The rectified document is to be read as if it had been drawn originally in its rectified form.

59. It is no bar to a grant of rectification that the Settlor relied on his legal advisors to effectuate his intentions or that his advisors were careless (See ***Briggs v Integritas and Megerisi Scotiabank*** both above). The same point is made in ***Snell's Equity*** 32nd Ed. at section 16-026 – there discussed in terms of whether such failings could provide "defences" to a claim for rectification.

60. The fact that rectification will generate a tax advantage (or more correctly, avoid a tax disadvantage) for the Settlor and his beneficiaries is, by itself, no bar to rectification. This would be so even if that consequence were the sole purpose of the application for rectification, provided that the case for it is otherwise properly made out:

Megerisi (above at p. 462); ***Wills v Gibbs [2008 STC 808 at 814***, citing ***Racal Group Services v Ashmore [1995] S.T.C. 1151 at 1157***; where it is stated that the court must be satisfied that:

> *"...there is an issue capable of being contested, between the parties or between a covenantor or grantor and the person he intended to benefit, it being irrelevant first that the rectification of the document is sought or contested to by them all, and second that rectification is desired because it has beneficial tax 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 an order will be to obtain a fiscal benefit."*

61. This proposition of principle was applied as restated in ***Chisholm v Chisholm [2011] WTLR 188 at 193*** by Deputy High Court Judge Prevezer QC in these terms (at paragraph 11):

> *"However, the jurisdiction of the court does not extend to rectifying mistakes which are purely as to the fiscal advantages of a transaction, although the fact that rectification will have a fiscal advantage does not of itself prevent rectification from being granted provided that there is a non-fiscal issue between the parties.*

62. As Mr. De La Rosa helpfully explained; even while this passage confirms the availability of the remedy it could be regarded, from the point of view of the Cayman case law, as an overly broad proposition particularly as it proposes that the Court

must identify a "non-fiscal issue" between the parties "before the relief of rectification can be granted".

63. There are immediately apparent practical problems with the proposition, in the context where, as here, rectification is sought in relation to a voluntary settlement and where all that is in issue is the unilateral intention of the Settlor at the time of settlement.

64. Thus in a case like the present, there will be no "non-fiscal issue" as such joined between parties who contend differently than the Settlor himself. All persons in a position of knowledge of the relevant facts and circumstances agree as to his intentions at the time of settlement.

65. True it is that there could be an "issue" or "issues" joined for instance between the Settlor, his trustee, and the beneficiaries of his settlement, depending on whether or not rectification is granted. This is for the reason that the outcome could well determine whether the loans (or now their proceeds) fall within or outwith the settlement and the respective rights could be altered or confirmed accordingly. And so, even if the approach taken in **Chisholm v Chisholm** (earlier adopted in ***Allnutt v Wilding***, ***Racal v Ashmore*** and ***Wills v Gibb*** (all above)) requiring of a "non-fiscal issue" were adopted and followed by this Court, rectification could nonetheless be an available remedy in this case.

66. But I am obliged to note that I do not consider that the requirement of the identification of a non-fiscal issue operating as a fetter upon the court's jurisdiction or discretion to grant rectification, forms any part of Cayman Islands law.

67. From the cases discussed above, this appears to be a fetter adopted by the United Kingdom courts in deference to the imperative of domestic fiscal policy as articulated by Her Majesty's Revenue and Customs ("HMRC").

68. It is aimed at discouraging the rectification of settlements where there is no "issue" between parties and so solely for the sake of vesting a retroactive fiscal benefit which was not genuinely contemplated and intended at the time of settlement. See for instance ***Racal v Ashmore***, ***Allnutt v Wilding*** (both above) and later ***Chisholm v Chisholm*** (also above) at p193 para 9 and para 15. In the latter passage, the learned Deputy Judge confirms "for the benefit of HMRC" her consideration of those two earlier cases which address the policy concerns and to which the HMRC has come routinely to invite the English Court's attention upon applications of this kind.

69. Such imperatives of fiscal policy do not arise in this jurisdiction to justify the fetter upon the exercise of the equitable remedial jurisdiction that is rectification. In my judgment, it is a jurisdiction to be exercised by this court, as a matter of discretion, as the justice of the case deserves, including in cases where there may be no identifiable issue joined between parties.

70. The classic exposition of Cayman law on the subject is that which is stated in the Cayman Islands cases cited above following ***Joscelyn v Nissen*** (above) and ***Re Butlin's ST [1976] Ch 251.***

71. It is that this court will rectify a document *"to set the record straight"* (adopting also those words of Mummery LJ. from the latter case of ***Allnutt v Wilding*** (above)); where it is satisfied that the document did not carry out the common intention of the parties, or in the case of a voluntary settlement, the intention of the Settlor.

Rectification is available not merely in respect of words wrongly added, omitted or wrongly written but also used in the mistaken belief that they bear a meaning different from their correct meaning as a matter of true construction.

72. On the facts of the present case, and as already shown in ***Megerisi v Scotiabank*** (above), this remedy as it relates to an omission, can appropriately be extended beyond cases concerning beneficial and administrative provisions, to the present situation where the trust as set up mistakenly omitted the very corpus of the trust assets and where the sole purpose is to avoid an unfortunate tax consequence. See also on this point ***Re Slocock's Will Trust*** ***[1979] 1 AER 358.***

73. While it is important to explain the position under Cayman law as above, in the end, as Mr. De La Rosa also helpfully explained; there is very little difference in practice separating the position here from that in the U.K; when the facts of the decided cases are properly understood. That is because in the U.K. too, as the cases show, rectification will be granted where it is appropriate to do so, even when the sole purpose is to avoid an unfavourable tax consequence. (See cases discussed at paragraph 60-68 above.

74. What is fundamentally discountenanced in the U.K. cases, is not the seeking of a tax advantage as such, but rather the use of rectification for the vesting of a "retroactive fiscal benefit which was not genuinely contemplated and intended at the time of settlement". See for instance ***Racal v Ashmore*** (above).

75. So there the Courts in their quest for the proper resolution of that question, in positing whether there is "an issue capable of being contested between the parties to the instrument", have really been seeking to be satisfied that there were genuine tax or

other implications for the parties which were capable of being addressed by rectification. Thus rectification will not be granted *"if...rights will be unaffected"* per Peter Gibson, LJ in ***Rascal*** (above) at p1157 d-f.

76. That is a proposition with which the Cayman case law does not disagree, provided it is understood as admitting also of rectification as a remedy where appropriate, even when the sole purpose is to avoid an unfavourable tax consequence and even where there is no clearly identifiable "issue capable of being contested" between parties interested in a settlement.

77. A further word on the question of delay is required. As already mentioned above, the local case law will also recognise the settled principle that delay (in the sense of "laches") which could prove prejudicial to others if rectification is granted, could be a basis for refusal of the relief in the exercise of discretion:

> *"Laches essentially consists of a substantial lapse of time coupled with the existence of circumstances which make it inequitable to enforce the claim in equity."* – *See Snell's Equity op. at. p117.*

78. In ***Tottenham Hotspur Football and Athletic Club Ltd v Princegrove Publishers Ltd. [1994] 1 WLR 113*** (where at p122 the foregoing passage from Snell's was approved) Lawson J. also said:

> *"...the doctrine of laches is not operated unless one is satisfied that, to put it at its lowest, there is some prejudice to the party who is suffering from laches at the hands of the other."*

79. In the present case, there is no person who would suffer by the grant of the rectification sought: on the contrary, every beneficiary of the Golden Trust would benefit and, not surprisingly, the trustees (past and present) raise no objection at all.

Conclusion

80. The jurisdiction to grant rectification is clear from the case law. It is a jurisdiction that can doubtless be applied to the Golden Trust now that it is re-domiciled to the Cayman Islands. See section 89 (2) and (4) and section 90 of the Trusts Law; all the requirements of which I am satisfied have been met in this case.

81. From the evidence presented, I am satisfied that the Settlor intended to settle, through the settlement of his shares in GHL, his share of the family loans made to GHL and intended to assign his interest in them to the trustee of his settlement, all at the time of execution of the deed of settlement on 31st March 1994. His failure to do so was the result of his mistaken belief that the shares and loans were included in the schedule to the deed of settlement as representing the bulk of the corpus of the assets of his trust.

82. The transfer of the loans was omitted from the settlement by mistake, the cause of which has been made clear by Mr. Daniels in his evidence which I accept: it was an error within Simmons & Simmons.

83. There is no reason to and I do not doubt the Settlor's recollection that he did not see the deed of settlement before the occasion when he executed it and would probably not have seen it before the occasion of signing it or notice the omission of the loans, if he had.

84. Given the technical and complex nature of a settlement of this kind, this entirely accords with the longstanding relationship between lawyer and client: the Settlor and his family had relied on Mr. Daniels over many years; and the Settlor trusted him implicitly (and still does as Mr. Daniels continues to serve as trust protector of the Golden Trust).

85. I also accept that there is no alternative remedy to rectification which is practical and convenient. In particular, the Settlor cannot now himself settle the loans upon the Trust so as to give the settlement the retroactive effect required to 31st March 1994 – but which would be the effect of rectification – to avoid the unfavourable impact of inheritance tax. And, in any event, he is obliged to seek to mitigate his losses in this way before pursing action against his lawyers.

86. The settlement was a measure of avoidance legitimately available to him (and so to his beneficiaries) at the time of settlement and of which he would be unfairly deprived but for the remedy of rectification.

87. The fact that rectification will generate the tax advantage for the Settlor and his beneficiaries, or even the fact that that is the sole purpose of the application for rectification is, as already noted, by itself no bar to the grant of the remedy, where a case for it is otherwise justly made out.

88. It was for all those reasons that I granted rectification of the settlement on 11th December 2012 by the inclusion in it of the Settlor's one-third share of the family loans in GHL owed to him as at the date of settlement in the amounts stipulated above and as set out in the four paragraphs of the Schedule to the Originating Summons, all

as further expressed in the formal order filed with the Court. The formal order also makes provisions for the costs of these proceedings.

Hon. Anthony Smellie
Chief Justice

December 18th, 2012

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