

Neutral Citation Number: 2010 EWHC 3961 (Ch)

Claim No: HC09C00198

**IN THE HIGH COURT OF JUSTICE**  
**CHANCERY DIVISION**

Royal Courts of Justice  
Strand,  
London WC2A 2LL

Friday, 29 October 2010

BEFORE:

**MR JOHN RANDALL QC**  
(Sitting as a Deputy Judge of the High Court)

BETWEEN:

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**VIVIAN**

Claimant

- and -

**KONINGSVELD and 2 others**

Defendants

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MR P JOHN (Instructed by Milton Rosenfalk) appeared on behalf of the Claimant

The Defendants were unrepresented.

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**Approved Judgment**  
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J U D G M E N T

THE DEPUTY JUDGE:

1. This is a claim for rectification of a deed of variation of the will of the late John Adams (“John”). The application is brought by his only daughter, and the stepdaughter of his late widow, Violet, as claimant. The first defendant is the personal representative, firstly, of the estate of Violet, who died 10 months after John did, and secondly, by the chain of representation, of the estate of John. He is also a defendant because he, in common with the second and third defendants, is one of the nephews of Violet, and under her will the claimant obtained half of the residue, and the nephews between them the other half.
2. John died aged 99 on 22 June 2005, his last will having been executed 2 years earlier. By that will he made two specific bequests: one of £100,000 to his daughter (the claimant) and the other of £5,000 to his sister, Alice Downe. Subject to those bequests, he made a residuary gift to Violet in the event of her surviving him, which she did. The specific bequests were not, in the event, capable of being fully satisfied, because the net value of John’s estate was only £66,000-odd. The reason for that, albeit a reason which took their surviving relatives by some surprise, was not that John and Violet had only modest assets, but rather that, despite their combined assets having a total value of almost £900,000, most of them were vested in their joint names and accordingly passed not into John’s estate, but directly to Violet by survivorship.
3. Ten months later Violet died, aged 94, and her last will, which had been executed on 16 August 2000, dealt with her estate essentially by way of the residuary gift, which was split in two halves as I have mentioned. Given what, at least to their surviving relatives, was the relative wealth of John and Violet, this was, of course, an extremely inefficient way of their estates being dealt with for the purposes of inheritance tax (“IHT”). This came to the attention of the claimant, who, through reading newspapers, had been aware of the possibility of retrospective variation of wills, including for the purpose of mitigating the incidence of IHT. She explored the matter initially by attending a seminar concerning estate planning in August 2006, and then, following that seminar, by obtaining advice from the principal of the firm which had run it, Miss Iolande Jackson. The letter which she in due course received from Miss Jackson was a detailed one, though much of the detail is, in the event, of no particular relevance to the application before me. Importantly, however, in relation to the wishes formed by the claimant as a result of Miss Jackson’s advice, near the outset of the letter Miss Jackson stated that:

“...This will involve severing the joint ownership of some of the assets so that they were held as tenants in common...”

Beyond that conventional advice, the letter went on to recommend a somewhat elaborate trust structure which, in the event, as I shall shortly explain, was not something that the claimant chose to pursue.
4. The claimant then consulted solicitors, RHY Law, concerning the implementation

of this advice. She initially dealt with a Miss Elaine Openshaw, a probate manager, but following Miss Openshaw speaking with her managing partner, a Mr Yalden, he himself wrote a letter of advice to the claimant dated 9 November 2006. It recorded in its second paragraph that deeds of variation of the estates of both her late parents were under consideration, and then continued:

“The deeds of variation clearly would enable the nil rate band attributable to each of the estates to be utilised based on the nil rate band available at the date of each respective death...”

Mr Yalden went on to advise, in essence, that he felt that the trust structure which had been recommended by Miss Jackson was, firstly, unnecessary and, secondly, potentially disadvantageous; his advice was in due course accepted by the claimant.

5. There are in the bundle before me subsequent letters addressed to the claimant from her solicitors, but the next document of any particular assistance with this case is the initial letter of instruction which RHY Law the matter at this stage being handled, as the reference suggests, by a Miss Felicity Wood – sent to counsel, requesting him to settle appropriate deeds. Again, I need not recite much of the content of this letter, but it is important to note, firstly, that in the first paragraph of the letter it was made clear that the purpose for which the two wills were to be varied was “In order to achieve a tax saving for Mrs Vivian” and, secondly, that in the fourth paragraph it was stated that:

“Mrs Vivian now intends to vary her mother’s will so that her share [her 50% share in residue under her mother’s will] should fall back into her late husband’s estate, thereby achieving a saving of inheritance tax on Mrs Adams’ estate. She also wishes to vary her father’s will [so as to include] gifts to her son, two grandchildren and stepdaughter. The value of these gifts is unknown at the present.”

6. Those instructions to counsel were subsequently varied by a letter of 4 January 2007 in two respects: firstly, that Mrs Vivian’s intention was modified so that rather than giving up the entirety of her half share in residue under her mother’s estate, she was to give up £160,000 and, secondly, it gave greater detail as to the specific bequests intended to be included in the will of John (as varied).
7. In due course, counsel provided draft deeds of variation under cover of an explanatory e-mail dated 17 January 2007. It made clear that counsel had taken on board the objectives which were sought to be achieved by instructing him, in that his explanatory e-mail includes reference to “Limiting the residue passing into Mrs Adams’ estate and the IHT liability” and “allowing for the £160,000 diminution in the estate to come from her share”. When this was received by Miss Wood, she appears to have come very close to spotting what turned out to be the fundamental flaw in the documents which were prepared and in due course executed (to which I will come), in that she responded to counsel’s e-mail raising two questions, the second of which was that he should “Explain to us the source of the funds exactly”.

Counsel's response, by an e-mail dated 23 January 2007, both gave a clear answer to that question and clearly demonstrated the mistake of fact under which he was operating, because, referring to the amount of the specific bequests to be provided for under John's will, as varied, he said this:

"The additional £265,000 which will form the specific bequests in Mr Adams' varied will can all come from funds in his sole name, being more than £329,000 – see the typewritten schedule of his assets including joint assets which would have passed to Mrs Adams by survivorship."

8. So it is clear either (and more probably) that counsel believed that there were £329,000 or more of assets already in John's estate, or (as is another possible construction of his words) that he believed that the document which he had drafted had the effect of bringing about that position. Whichever of those it was, he was operating under a fundamental error, which most unfortunately was not spotted either by Miss Wood, despite her having raised what was apparently the right question, nor indeed by either of her colleagues whom I have already mentioned.
9. So, in due course, the deeds of variation, essentially as prepared by counsel, were executed at the solicitors' offices on 25 April 2007, both by the claimant and by the first defendant.
10. The deeds of variation were appropriately drafted to achieve one of their intended effects, in that they provided, in substitution for the pecuniary legacies of £100,000 and £5,000 (which I have already explained), for a reduced pecuniary legacy for the claimant of £60,000, retention of a £5,000 pecuniary legacy for John's sister Alice, and a series of new and additional pecuniary legacies: £120,000 for John's grandson Adam, £40,000 for Linda Stutherfield and £20,000 each, contingent on reaching the age of 18, for two great-grandsons. This, if effective, would have had the benefit of ensuring that the entire available nil rate band of IHT in respect of John's estate was used. Unfortunately, however, it was not effective, because the deed did not also provide for the severance of any of the joint tenancies to which I have previously made reference, whether (as is conventional) immediately prior to the death of John, or at all. Accordingly, John's estate continued to comprise only the previously mentioned £66,000-odd, so that the substituted bequests, insofar as they exceeded that sum, were of no practical effect. This was picked up by HM Revenue & Customs ("HMRC") when the documentation was sent to them. Although it has not been necessary for Mr John to go into this in any detail, in essence, as one might expect, alarm ensued in the camp of the claimant and the various advisors concerned.
11. After further advice had been taken, a deed of rectification of the said deed of variation was prepared and in due course executed on 11 December 2008, again by the claimant and by the first defendant. It duly made provision for the severance of a series of joint tenancies, so as to cause a much enhanced sum to fall into the estate of John, thereby funding in full the substituted pecuniary legacies which I have already identified. However, as was appreciated by the advisers and, as I understand it, made clear to HMRC from the outset, in order to have the

retrospective effect that was necessary to achieve the intended tax advantage, the deed of rectification needed to be (as it is put for short) ‘approved by the court’; more specifically, what was needed was for the court itself to make an order rectifying the will of John in like terms. And that is what gives rise to the claim before me.

12. HMRC indicated in correspondence that they would not wish to oppose this application, nor to appear in it, but they did ask the claimant’s representatives to draw the court’s attention to three particular cases. This has duly been done, and they have been included in the bundle before me. I have read all three of them, and I will make specific reference to two later in this judgment.
13. The witness evidence before me comes from Miss Openshaw (whom I have already introduced), because she was the person at RHY Law who took the initial instructions from the claimant, and from the claimant herself. The evidence contained in those witness statements explains the whole history, but for immediate purposes I will refer only to those passages which appear to be of principal relevance for establishing the case which Mr John has to make out. Miss Openshaw states (in the last sentence of her paragraph 2):

“I was also always clear that this could only be achieved by severing the joint tenancy of certain assets owned by the deceased and Mrs Adams.”

Then towards the end of her witness statement, having quoted from counsel’s e-mail of 23 January 2007 (as I have already done), she states as follows (at paragraph 12):

“As a result of the misunderstanding as to the size and nature of the deceased’s estate, the deed of variation relating to the deceased’s estate did not effect the severance of the joint tenancy by which the deceased and Mrs Adams held any of their property.”

14. The claimant in her witness statement explains the history, explains her receipt of advice from Miss Jackson, and (at paragraph 8) spells out her understanding of a particular and, for present purposes, highly relevant part of the advice she had received:

“Although the deceased’s estate was extremely modest, I understood from Miss Jackson that it would be possible to increase this estate by effecting a severance of some of the assets which the deceased had owned jointly with my stepmother.”

Then later in her witness statement, speaking of when the two deeds of variation settled by counsel were placed before her, she says (in paragraph 13):

“As far as I was concerned I believed that they achieved the objectives

I desired, namely the reduction of inheritance tax payable on the two estates by passing an amount of money back into the deceased's estate and for a number of additional specific bequests to be made to my son, stepdaughter and grandsons, and reducing the amount of the bequests which I received ...”

Then in the following paragraph she states:

“I now understand that the deeds did not sever the joint tenancy by which the deceased and my stepmother owned the majority of their property and therefore did not have the effect which I had instructed RHY to achieve, namely of reducing the amount of inheritance tax payable on the two estates. Had I known or realised that the deeds of variation were defective, I would not have signed them and would have required them to be altered.”

I am quite satisfied that that is cogent evidence which I can and should accept, clearly fitting in, as it does, with the various contemporaneous documents from which I have already quoted. I therefore turn to the legal principles which I must apply.

15. The basics of the remedy of rectification are dealt with in the opening pages of Chapter 14 of Snell's Equity (31<sup>st</sup> edition). They include, of course, the familiar requirement for clear or strong evidence to support the making of the relevant mistake. I will refer only to particular sentences which appear to have at least potential relevance to the particular circumstances of this case. That is not to say that I have not taken the opportunity of reminding myself of the basic principles set out in the passages around them, which of course I have. On page 337 Snell refers to the fact that

“... rectification may be ordered where the words which the party chose to use did not give effect to their intention... It is not necessary that the party should at the material time have formulated the words which it is sought to insert by rectification so long as they had the necessary common intention as to the substance of what would be achieved by the rectification sought.”

Those propositions are supported by the cases of Grand Metropolitan plc v The William Hill Group Ltd [1997] 1 BCLC 390, and Swainland Builders Ltd v Freehold Properties Limited Ltd [2002] EWCA Civ 560, the latter of which Mr John has placed before me. Snell continues (on page 338):

“Usually the mistake is one of fact but rectification may also be granted where the mistake is as to the legal effect of the language used.”

One passage later in Snell which would potentially pose a serious obstacle for the claim before me is at paragraph 14-18, where it is stated, under the side heading “Rectification unnecessary by reason of subsequent agreement”:

“If all those concerned voluntarily rectify the instrument, the court will not decree rectification even if such a decree would, by operating retrospectively, have fiscal advantages which the voluntary rectification lacks.”

Footnoted is the case of Whiteside v Whiteside [1950] Ch 65 (CA).

16. Having reviewed the authorities which have been helpfully placed before me, including the three suggested by HMRC, I am satisfied that the law is a good deal more refined or sophisticated than that, and that the proposition stated in paragraph 14-18 of Snell is somewhat over-simplistic, and capable of giving a misleading impression.
17. The starting point for a case where this sort of issue arises, i.e. where there has been a deed of rectification and where one of the purposes sought to be achieved was the saving of tax, is the statement of the general principles made by Graham J in Re Slocock's Will Trusts [1979] 1 All ER 358. At page 363b-e the learned judge said this, immediately after having referred to the case of Whiteside:

“The true principles governing these matters I conceive to be as follows. (1) The court has a discretion to rectify where it is satisfied that the document does not carry out the intention of the parties. This is the basic principle. (2) Parties are entitled to enter into any transaction which is legal, and, in particular, are entitled to arrange their affairs to avoid payment of tax if they legitimately can. The Finance Acts 1969 and 1975 tell them explicitly how they can do so in the case of estate duty and capital transfer tax. (3) If a mistake is made in a document legitimately designed to avoid the payment of tax, there is no reason why it should not be corrected. The Crown is in no privileged position qua such a document. It would not be a correct exercise of the discretion in such circumstances to refuse rectification merely because the Crown would thereby be deprived of an accidental and unexpected windfall. (4) As counsel for the trustees submitted, neither *Whiteside v Whiteside* nor any other case contains anything which compels the court to the conclusion that rectification of a document should be refused where the sole purpose of seeking it is to enable the parties to obtain a legitimate fiscal advantage which it was their common intention to obtain at the time of the execution of the document.”

18. Similar issues to those posed by facts such as the present came to be analysed very recently by His Honour Judge David Hodge QC (sitting as a Judge of this Court) in the case of Ashcroft v Lonsdale & Others [2010] EWHC 1948 (Ch), decided on 30 July 2010.<sup>1</sup> I will not take time to record the facts giving rise to that decision, but rather will identify four points from it which appear to be of assistance in identifying the correct approach to a case such as the present.

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<sup>1</sup> Subsequently reported at [2010] STC 2544 and [2010] WTLR 1675.



19. In paragraph 17 Judge Hodge said:

“In my judgement, the effect of the authorities is that the court cannot rectify a document *merely* because it fails to achieve the fiscal objectives of the parties to it... The specific intention of the parties as to how the fiscal objective was to be achieved must be shown if the court is to order rectification.”

As he had earlier referred to in paragraph 13 of his judgment, this is linked to the well-known dictum of Millett J in Gibbon v Mitchell [1990] 1 WLR 1304 at 1309D-F, where that distinguished judge drew the important distinction between a mistake as to the effect of the transaction and a mistake which merely goes to the consequences or advantages to be gained from entering into it.

20. The second of the four points from Judge Hodge’s judgment to which I would make particular reference appears in paragraph 16, where the learned judge accepted counsel’s alternative submission in that case

“that the Deed of Variation fails to give effect to the true agreement of the parties. So long as a mistake relates to the meaning or effect of a document...relief may be available even though the actual words of the document were deliberately adopted by the parties. It is now firmly established that the fact that the parties intended to use a particular form of words in the mistaken belief that it was achieving their common intention does not prevent the court from giving effect to their true intention...where (as here) the mistake results from the inadvertent *omission* of a word or phrase from a document, and it is sought to introduce additional words into the document to cure that mistake, it may, in practice, prove easier to discharge the evidential burden of establishing the existence of a mistake than in the case where words have been inadvertently *included* in the document which it is sought to rectify.”

21. Thirdly, at paragraph 19 of his judgment Judge Hodge said this:

“...my task is to evaluate the uncontradicted evidence, and to decide whether it is good enough to discharge the standard of cogent proof required in order to satisfy the requirements of a claim for rectification. In the present case, I am satisfied on the evidence, to the required standard of proof, that the true intention of the parties to the Deed of Variation was not in any way to alter the incidence of the burden of the inheritance tax chargeable upon the deceased's estate but merely to reduce the amount of tax payable to HMRC.”

At paragraph 20, again dealing with his conclusion on those facts (which I quote in this judgment because there appears to me to be a clear parallel with the present case), he said:

“I am satisfied that this is not a case where the parties merely proceeded under a misapprehension as to the true fiscal consequences of the Deed of Variation as actually drafted. Rather, the Claimant has demonstrated a specific common intention as to how the parties' fiscal objectives were to be achieved; and he has established that, owing to a mistake in the way in which that intention was expressed in the Deed of Variation, effect has not been given to that intention.”

22. Fourthly, and finally, Judge Hodge dealt with the point arising from paragraph 14-18 in Snell, to which I have already referred, and because on the face of it that passage in Snell is an obstacle to the relief sought in this case being granted, I in turn should refer to these passages from his judgment. In paragraph 12 Judge Hodge set out the submissions made to him by counsel in that case, and I will quote them because he went on (in paragraph 15) directly to accept them. Judge Hodge referred to counsel having submitted that

“That was said to be sufficient to enable the court to entertain a claim for rectification when, unlike the situation in the earlier case of Whiteside v Whiteside [1950] Ch 65, there had been no supplemental deed of rectification. [Counsel] recognised that, in the present case, a deed of rectification had been executed; but he submitted that the existence of a deed of rectification could only preclude the court from exercising its powers of rectification where, as a result of the deed, there was no longer an issue between the parties which was capable of being contested (as in Whiteside v Whiteside itself). That was not the situation here because HMRC refused to accept the efficacy of the Deed of Rectification for inheritance tax purposes; and the Claimant had not sought to challenge the correctness of that position.”

A few paragraphs after expressing his acceptance of counsel's submissions, Judge Hodge added these further observations at paragraph 22:

“I am also satisfied that, notwithstanding the 2007 Deed of Rectification, there still remains an issue, capable of being contested between the parties, which will be addressed by an order for rectification. HMRC's letter...makes it clear that HMRC cannot accept the Deed of Rectification as having any effect for Inheritance Tax purposes unless the parties obtain a Court Order [for ...] rectification. The Claimant does not seek to challenge HMRC's position; and, since HMRC are not a party to this litigation, it is not open to me to do so... Conversely, by their letter of 29th May 2010, HMRC confirm that if the Court orders rectification of the Deed of Variation, HMRC will be bound by that. It follows that an order for rectification will have practical consequences, in terms of altering HMRC's treatment of the ultimate incidence of the inheritance tax chargeable in respect of the pecuniary legacy to the two children effected by clause 2.1(a) of the Will, as varied by the Deed of Rectification.”

23. If Judge Hodge had had the benefit, as I have had through the combination of

the letter from HMRC and Mr John's faithful adherence to it of having the above two decisions of Graham J cited to him in this regard, I have no doubt that he would also have referred to them. In the first of those, Re Colebrook's Conveyances [1972] 1 WLR 1397, the learned judge referred to the case of Whiteside and stated at page 1399B-E:

"It had been argued that the only effect of refusing rectification would be to deprive the husband of a benefit from the point of view of payment of surtax, but, as Lord Cohen pointed out at page 77, there was no evidence that it was the common intention to secure him that benefit... As I read Whiteside v Whiteside, it may well be an authority for saying that if the only result of the rectification of an error, which was due to the plaintiff himself, will be to give the plaintiff a tax advantage, then that may well be a good reason for refusing to exercise the equitable jurisdiction. Where, on the other hand, the document is found not to carry out the true intention of the parties, and rectification, whilst enabling that intention to be carried out, incidentally gives or may give one of the parties a tax advantage, the case is not an authority for saying that such presence or possibility of such tax advantage is a bar to relief."

24. In the later case of Re Slocock's Will Trusts, from which I have already quoted for another purpose, Graham J reverted to the same topic and gave further consideration to the case of Whiteside v Whiteside. At page 362b-c he referred to the fact that

"the question of tax [i.e. surtax] was never present in the mind of the plaintiff's former wife so that rectification was being asked for, when, owing to the execution of the supplementary deed, there was no issue between the parties.

I do not find the decision very easy to follow [i.e. the decision in Whiteside v Whiteside], but it seems clear, contrary to the facts in the present case, that the court in Whiteside v Whiteside was not satisfied that it was the intention of both parties at the date of the original deed that the wife should receive the £1,000 free of tax, so as to enable the husband to claim a benefit from the point of view of surtax. Cohen LJ, for example, states: '*... there is no evidence that it was the common intention of the parties to secure him that benefit.*'"

25. On the basis of the law as explained by Judge Hodge and usefully, in my judgment, supplemented by the two judgments of Graham J from which I have quoted, I am entirely satisfied that this is a case in which I can and should make an order for rectification, mirroring the terms of the deed of rectification which has already been executed by the parties. This is not a case where such relief is sought in order belatedly to achieve tax advantage in the abstract. Rather, just as Judge Hodge found on the facts of his case, this is one where the claimant has clearly and cogently demonstrated a specific common intention as to how those fiscal objectives were to be achieved, that is by severing a number of the joint tenancies

that existed between John and Violet prior to John's death, thereby ensuring that the estate of John at the time of his death contained assets at least matching the amount of the nil rate IHT band, and by taking advantage of that band by the granting of specific bequests in at least that sum.

26. That being the case, applying the authorities to which I have already referred, the fact that there was also a clear common intention that such an IHT saving should be achieved: (i) meets the point in Whiteside v Whiteside, which is oversimplistically stated in Snell, but (ii) does not constitute any reason why this court should, as a matter of discretion, withhold the grant of an order of rectification.
27. For those reasons, the order of rectification sought will be granted.

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