

1 IN THE GRAND COURT OF THE CAYMAN ISLANDS  
2 FINANCIAL SERVICES DIVISION

3 CAUSE NO. FSD 79 OF 2012 – ASCJ

4  
5 **IN THE MATTER OF THE TRUSTS OF A SETTLEMENT DATED 31<sup>st</sup> MARCH**  
6 **1994 BETWEEN ABUBAKER MOHAMMED MEGERISI AND PROTEC TRUST**  
7 **MANAGEMENT KNOWN AS THE GOLDENTRUST**

8  
9 **AND IN THE MATTER OF THE TRUSTS LAW (2001 REVISION)**

10  
11 **AND IN THE MATTER OF GCR O. 85, r.2**



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13  
14 **BETWEEN ABUBAKER MOHAMMED MEGERISI PLAINTIFF**

15  
16 **AND 1. PROTEC TRUST MANAGEMENT**  
17 **ESTABLISHMENT**

18 **2. PAGET-BROWN TRUST COMPANY LTD. DEFENDANTS**

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20  
21 **IN CHAMBERS**  
22 **BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE**  
23 **THE 10<sup>TH</sup> DAY OF DECEMBER 2012**

24  
25  
26 **REPRESENTATIONS:** Mr. Edward Davidson QC instructed by Morven McMillan of  
27 Mourant Ozannes for the Plaintiff  
28 Mr. Andrew De La Rosa of ICT Chambers instructed by Lucy  
29 Diggle of Mourant Ozannes for Paget Brown Trust Company  
30 (with him Mr. Sydney Coleman of Paget Brown)  
31 Mr. Chris Young of Forbes Hare for Simmons & Simmons and  
32 their insurers (holding a watching brief with permission of the  
33 Court)

34  
35  
36 **REASONS FOR DECISION**

37  
38 1. This is an application by the Plaintiff, Mr. Abubaker Megerisi, to rectify a voluntary  
39 settlement made by him on 31<sup>st</sup> March 1994 and known as the Golden Trust.

- 1 2. The settlement was originally constituted under the laws of the Principality of  
2 Liechtenstein, which thus became the initial forum for its administration.
- 3 3. However, the concerns leading to the need for its rectification having come to light  
4 and primarily for the reason that the laws of Liechtenstein do not allow for  
5 rectification (as to which legal expert evidence has been made available to this  
6 Court); the proper law of the settlement was changed to the laws of the Cayman  
7 Islands. This was done in keeping with enabling provisions within the settlement  
8 deed and the Cayman Islands became the new forum for its administration.
- 9 4. This effectively took place when the second defendant was appointed as Trustee,  
10 replacing the first defendant (a Liechtenstein entity) on 31<sup>st</sup> October 2011.
- 11 5. The second defendant is incorporated in and carries on business in the Cayman  
12 Islands and is the sole current trustee.
- 13 6. The settlement is a discretionary settlement in favour of the Plaintiff (“the Settlor”)  
14 and his immediate family, with power (not exercised to date) to add beneficiaries, and  
15 with an ultimate gift to charity if no beneficiary is living or in existence at the expiry  
16 of the trust period.

17  
18 **Background**

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

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

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

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

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

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

- 1 11. The difference in the factual circumstances between this and Omar Megerisi's case –  
2 that of the domicile of origin of the two settlements - I do not regard as a bar to relief  
3 by way of rectification, for reasons to be explained below.
- 4 12. The evidence filed in support of the present application comprises in the main an  
5 affidavit filed by the Settlor himself (sworn on 30<sup>th</sup> November 2011) with  
6 documentary exhibits and an affidavit filed by Mr. Patrick Daniels (also with  
7 exhibits) sworn on 28<sup>th</sup> November 2011.
- 8 13. Mr. Daniels was the lawyer responsible in common both for the drafting of this  
9 settlement and that in Omar Megerisi's case. He frankly admits to the omission from  
10 the settlement as described above (and had frankly so admitted to the similar  
11 omission in Omar Megerisi's case) and explains how it came about.
- 12 14. In essence, despite the Settlor having made known his wishes and intention to settle  
13 the aforementioned loans upon the trust, Mr. Daniels had failed to make this known to  
14 his associate lawyers within his firm, those who actually drafted the deed of  
15 settlement. Mr. Daniels also failed to recognise the omission from the schedule to the  
16 settlement of the trust assets when the deed was presented to the Settlor for execution.  
17 This is evidence that I had no hesitation in accepting. It is clearly and cogently set  
18 out in Mr. Daniels' affidavit and the true nature of the Settlor's intentions and wishes  
19 is supported by contemporaneous file notes and internal memoranda retrieved from  
20 within the files of Mr. Daniel's firm and exhibited in the evidence.
- 21 15. For his part, not only is the Settlor's account supported in the same way, but his own  
22 evidence also explains the background leading to the perceived need on his part to  
23 create the settlement and to settle the assets (the loans) upon it, in a manner that is

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

3   16.   The Settlor's domicile of origin is Libya but he came to take up residence in London in  
4           1978. Under the United Kingdom Inheritance Tax Act 1984 (section 267 (1) (6) in  
5           particular), ("the Act") a person who had been resident in the U.K. for the relevant  
6           period (as defined under and for the purposes of that section) became deemed to be  
7           domiciled there for the purposes of the Act and his assets which were situated in the  
8           United Kingdom at the time of deemed domicile, became liable to inheritance tax.

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

15   18.   Accordingly, Simmons & Simmons advised him to settle the bulk of his business  
16          assets upon trust before becoming deemed U.K. domiciled that is: before the 6<sup>th</sup> April  
17          1994.

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

- 1 20. The property situated outside of the U.K. as at the time of the settlement on 31<sup>st</sup>  
2 March 1994, took the form not only of the receivables by way of the loans but also  
3 the form of certain shares in a Cayman Islands company as explained below.
- 4 21. The Settlor's assets at the time of settlement included one-third of the shares in  
5 Garden Holdings Limited ("GHL") the Cayman Islands company in question, all of  
6 the shares in which were held jointly and beneficially with his father, Mohamed  
7 Megerisi (through a trust earlier settled by him) and brother Omar.
- 8 22. Accordingly, the 100 issued shares of USD1.00 each in GHL were owned  
9 beneficially by each in equal shares and they were each entitled equally between them  
10 to repayment by GHL of interest free loans which they had made to GHL in a  
11 combined total of £23.85 million and USD16,303,581. These were loans made for  
12 the purpose of reinvestment in their various family businesses and it was this  
13 arrangement that was the source of the loans owed to the Settlor mentioned above in  
14 the amounts of £7,950,000 and USD5,434,607.
- 15 23. The shares in GHL were themselves only of little or nominal value. The real value,  
16 representing at the time of settlement the bulk of the Settlor's wealths; was in the  
17 loans and so it was of crucial importance, given the perceived need for a settlement,  
18 that they be included in it.
- 19 24. The evidence is that this was sought to be done at a meeting in the afternoon of 29  
20 November 1993 between the Settlor, Mr. Daniels and Mr. McNeile, (an associate  
21 within Simmons & Simmons), for the settlement of his assets upon his trust. There is  
22 a memorandum of the same day by Mr. McNeile which was copied to Mr. Daniels  
23 and to Mr. Way (a tax partner at Simmons & Simmons who was assisted by Mr.

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

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

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

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

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

4 *Had I been directly responsible for preparing the Trust Deed, or had I*  
5 *realised that my colleagues were unaware of the existence of the loans,*  
6 *I would have ensured that Abubaker Megerisi's beneficial interests in*  
7 *the loans was expressly made part of the settlement, as was the clear*  
8 *intention of Abubaker Megerisi at the time, a fact which I myself fully*  
9 *understood following the above-mentioned meeting on 29<sup>th</sup> November*  
10 *1993."*

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

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

- 1 31. While the Settlor's interests in the loans have since been transferred to the original  
2 trustee (and later to the second defendant as successor trustee), reinvested in his  
3 family business and grown very substantially in value; the failure to include them in  
4 the settlement on 31<sup>st</sup> March 1994 meant that they became and continue to be  
5 vulnerable to inheritance tax since 6 April 1994.
- 6 32. This consequence can be avoided only by rectification of the settlement with  
7 retroactive effect to the 6<sup>th</sup> April 1994. Hence this application to this court now.
- 8 33. The problem first came to light in 1999 when it was sought to separate the business  
9 interests of the Settlor, his brother Omar and his father, which until then, were all  
10 intertwined. It was then discovered that as a result of the similar failure of Simmons  
11 & Simmons, the Cayman settlement of Omar Megerisi executed on 9<sup>th</sup> March 1994,  
12 also omitted any assignment of the corresponding loans owned to Omar. Mr. Daniels  
13 then forthrightly advised the Settlor that a similar error was likely to have occurred in  
14 his case, but because issues of Liechtenstein law might give rise to complications  
15 which did not affect Omar's case, it would be best to deal with the rectification of  
16 Omar's trust first. Then followed the application to this Court and its judgment  
17 reported in that case (**above**).
- 18 34. As sought to be done here, that was done by the insertion of an assignment of Omar's  
19 share of the loans.
- 20 35. Thereafter, attention was given to the Plaintiff's case and as some six years have  
21 passed, an issue of undue delay arises and which itself was frankly raised with me by  
22 counsel as a matter for consideration in the exercise of the discretionary jurisdiction

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

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

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

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

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

3  
4 **Jurisdiction to Rectify**

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

8 *“89(2) A term of the trust expressly selecting the laws of the Islands to*  
9 *govern the trust is valid, effective and conclusive regardless of*  
10 *any other circumstances.”*

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

15 *“89(4) If the terms of a trust so provide, the governing law of*  
16 *the trust may be changed to or from the laws of the Islands*  
17 *provided that –*

18 *(a) In the case of a change to the laws of the Islands, such*  
19 *change is recognised by the governing laws of the trust*  
20 *previously in effect.”*

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

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

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

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

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

11 *“All questions arising in regard to a trust which is for the time being*  
12 *governed by the laws of the Islands or in regard to any disposition of*  
13 *property upon the trusts thereof including questions as to...*

14  
15 (a)....

16  
17 (b) *any aspect of the validity of the trust or disposition or the*  
18 *interpretation or effect thereof....*

19  
20 (c) ...

21  
22 (d) ...

23  
24 *are to be determined according to the laws of the islands, without*  
25 *reference to the laws of any other jurisdiction with which the trust or*  
26 *disposition may be connected.”*

27  
28 45. This provision is clear in its requirement that the present question – whether the  
29 Golden Trust which is now governed by the laws of the Cayman Islands should be  
30 rectified on the ground of the mistaken omission of the main corpus of the assets  
31 intended to be settled upon it – must be determined according to the laws of the  
32 Islands.

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

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

7

8 **The Law of Rectification**

9 48. The doctrine of rectification is authoritatively discussed in Joscelyn v Nissen [1970]  
10 **2 Q.B. 86**. In the judgment of the Court of Appeal delivered by Russell LJ, it is  
11 explained (after a detailed review of the earlier cases) that rectification is an equitable  
12 remedy by which, under certain circumstances, a document which does not accurately  
13 set out the agreement which it was intended to set out (or in the case of a voluntary  
14 settlement such as the present – the intention of the Settlor which the settlement was  
15 intended to set out); will be corrected by the Court to accord with the true intention of  
16 the parties (or Settlor). See in particular, at p. 98 D-K and G where it is also  
17 explained that convincing proof of the real intention of which there was failure to  
18 express will be required to overcome the impact of that which was actually expressed,  
19 but this will be to the civil, not the criminal, standard of proof. The uncontradicted  
20 evidence of the Settlor himself may suffice; as indeed was found to be the case in  
21 Megerisi v Scotiabank (above) **at p.461**) following Hanley v Pearson (1890) 13  
22 **Ch.D. 545**. The requirement of “convincing proof of the real intention” thus simply  
23 reflects the need to counteract the evidence found in the document itself as to what

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

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

6 50. And, was explained more recently in Allnutt and another v Wilding and others  
7 [2007] WTLR 941 at 944 paras 110-11:

8 *“...the function of the discretionary equitable remedy of rectification*  
9 *is “to enable the parties to correct the way in which their transaction*  
10 *has been recorded.*

11 *In other words, rectification is about putting the record straight. In*  
12 *the case of a voluntary settlement, rectification involves bringing the*  
13 *trust document into line with the true intentions of the Settlor as held*  
14 *by him at the date when he executed the document.”*

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

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

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

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

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

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

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

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

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

15 59. It is no bar to a grant of rectification that the Settlor relied on his legal advisors to  
16 effectuate his intentions or that his advisors were careless (See Briggs v Integritas  
17 and Megerisi Scotiabank both above). The same point is made in Snell's Equity  
18 32<sup>nd</sup> Ed. at section 16-026 – there discussed in terms of whether such failings could  
19 provide “defences” to a claim for rectification.

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

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

4            *“...there is an issue capable of being contested, between the parties or*  
5            *between a covenantor or grantor and the person he intended to*  
6            *benefit, it being irrelevant first that the rectification of the document is*  
7            *sought or contested to by them all, and second that rectification is*  
8            *desired because it has beneficial tax consequences. On the other*  
9            *hand, the court will not order rectification of a document as between*  
10           *the parties or as between a grantor or covenantor and an intended*  
11           *beneficiary, if their rights will be unaffected and if the only effect of an*  
12           *order will be to obtain a fiscal benefit.”*

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

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

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

1 must identify a “non-fiscal issue” between the parties “before the relief of  
2 rectification can be granted”.

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

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

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

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

- 1 67. From the cases discussed above, this appears to be a fetter adopted by the United  
2 Kingdom courts in deference to the imperative of domestic fiscal policy as articulated  
3 by Her Majesty's Revenue and Customs ("HMRC").
- 4 68. It is aimed at discouraging the rectification of settlements where there is no "issue"  
5 between parties and so solely for the sake of vesting a retroactive fiscal benefit which  
6 was not genuinely contemplated and intended at the time of settlement. See for  
7 instance Racal v Ashmore, Allnutt v Wilding (both above) and later Chisholm v  
8 Chisholm (also above) at p193 para 9 and para 15. In the latter passage, the learned  
9 Deputy Judge confirms "for the benefit of HMRC" her consideration of those two  
10 earlier cases which address the policy concerns and to which the HMRC has come  
11 routinely to invite the English Court's attention upon applications of this kind.
- 12 69. Such imperatives of fiscal policy do not arise in this jurisdiction to justify the fetter  
13 upon the exercise of the equitable remedial jurisdiction that is rectification. In my  
14 judgment, it is a jurisdiction to be exercised by this court, as a matter of discretion, as  
15 the justice of the case deserves, including in cases where there may be no identifiable  
16 issue joined between parties.
- 17 70. The classic exposition of Cayman law on the subject is that which is stated in the  
18 Cayman Islands cases cited above following Joscelyn v Nissen (above) and Re  
19 Butlin's ST [1976] Ch 251.
- 20 71. It is that this court will rectify a document "to set the record straight" (adopting also  
21 those words of Mummery LJ. from the latter case of Allnutt v Wilding (above));  
22 where it is satisfied that the document did not carry out the common intention of the  
23 parties, or in the case of a voluntary settlement, the intention of the Settlor.

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

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

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

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

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

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

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

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

13 *“Laches essentially consists of a substantial lapse of time coupled with*  
14 *the existence of circumstances which make it inequitable to enforce the*  
15 *claim in equity.” – See Snell’s Equity op. at. p117.*

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

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

1 79. In the present case, there is no person who would suffer by the grant of the  
2 rectification sought: on the contrary, every beneficiary of the Golden Trust would  
3 benefit and, not surprisingly, the trustees (past and present) raise no objection at all.  
4

5 **Conclusion**

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

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

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

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

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

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

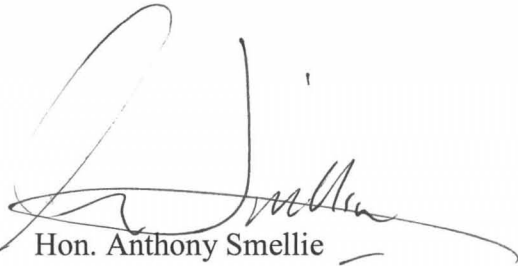
12 86. The settlement was a measure of avoidance legitimately available to him (and so to  
13 his beneficiaries) at the time of settlement and of which he would be unfairly  
14 deprived but for the remedy of rectification.

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

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

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

3  
4  
5



6 Hon. Anthony Smellie  
7 Chief Justice

8 December 18<sup>th</sup>, 2012

9

10 Reissued with corrections on 21<sup>st</sup> December 2012

