IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN.

CAUSE NO. 252/89

15-12-89

BETWEEN:	BARRY STANLEY BRIGGS	PLAINTIFF
AND:	INTEGRITAS TRUST MANAGEMENT (CAYMAN) LTD	FIRST DEFENDANT
AND:	GEMMA BRIGGS (a minor) by Sherri A. Bodden her guardian ad litem	SECOND DEFENDANT
AND:	CLARE BRIGGS (a minor) by Sherri A. Bodden her guardian ad litem	THIRD DEFENDANT

Pierre Lamontagne, Q.C. and Charles Quin for Plaintiff.
Allan Turner for first Defendant.
Ramon ALberga, Q.C. and Timothy Shea for second and third Defendants.

JUDGMENT

In this action commenced by way of originating summons, the plaintiff Barry Stanley Briggs ("the settlor") is the settlor of two settlements made on the 29th October, 1987, between himself and the first defendant Integritas Trust Management (Cayman) Limited, ("Integritas"). The settlements are known respectively as the Barry Briggs Cayman Islands Life Interest Settlement and the Barry Briggs Cayman Islands Accumulation and Maintenance Settlement. Both settlements are expressed to be subject to the laws of the Cayman Islands. The settlor sought the advice of London solicitors with respect to tax planning matters arising out of a proposed sale of shares in a company called Technology Group Limited. Discussions led to the setting up, some months later, of the two settlements referred to above. In both settlements "the children and remoter issue of the settlor now in existence or born hereafter" are among the listed beneficiaries and are defined as the principal beneficiaries. The settlor has two children by his wife, Gemma Briggs and Clare Briggs, who are now fourteen years and twelve years respectively.

I shall refer to these two children as "the infant defendants". They have been brought into these proceedings as the second and third defendants through a guardian ad litem Sherri Bodden, an attorney-at-law in these Islands. The settlor's wife was previously married and divorced and by that previous marriage had a child, now aged twenty-two years, named Kerry Dale. The settlor maintains that he has throughout his marriage regarded Kerry as a daughter and intended Kerry to be a beneficiary and principal beneficiary under the two settlements and, indeed, so instructed his solictors. The definitions of "beneficiary" and "principal beneficiary" in the two settlements do not, as they stand, include the settlor's step-child and so this application is brought for rectification of the two settlements by the insertion of a new sub-clause (7) at the end of clause 2 of each settlement in the following terms:-

> "(7) Provided that for the purpose of the definitions of Beneficiaries and the Principal Beneficiaries hereinbefore contained and for all other purposes of this settlement the children of the settlor shall include Kerry Dale the stepchild of the settlor".

The application is contested, and quite rightly so, to ensure that the interests of the two infant defendants are protected. If the application succeeds then it operates to the detriment of those two children and whilst counsel for the two infant defendants quite fairly stated that he does not allege wrong doing or fabrication of evidence he had a duty to test the quality of the evidence to see if it comes up to the high standard of proof required to obtain the remedy sought. His submissions were to the effect that it fell far short of the standard required. For that reason I must go into the evidence, which was wholly by way of affidavit, in some little detail.

The settlor has a business partner called Granville Smithies who was a major shareholder in Technology Group Limited and with whom he worked very closely. Both men were fully aware of each other's personal financial affairs and in their dealings with their solicitors were said to be "interchangeable" in the

sense that whatever one of them would deal with, learn or decide would apply to the other without the necessity of both being involved in the meetings and discussions. The settlor and Smithies intended to adopt a similar approach in connection with their tax matters and, in fact, did so.

The first meeting between the settlor and his solicitors took place on 24th July, 1987. The solicitors attending the settlor of the firm of Messrs. Clifford Chance of London were Andrew Garth Pollard, a partner in the firm's tax department and Aidan Lewis Langley one of Pollard's junior solicitors in the same department. The first part of the meeting was taken up with discussions regarding the setting up of an employee trust. The second part of the meeting, and the part we are concerned with, was taken up with discussion of the settlor's personal affairs, and suggestions by his solicitors that the settlor set up an offshore life interest settlement and an offshore accumulation and maintenance settlement for the settlor's children. The settlor has deponed that he gave Pollard and Langley full details of his family and explained to them that Kerry Dale was his wife's child by a previous marriage but that any settlements which might subsequently be established should include Kerry as a beneficiary in the same manner and to the same extent as his two daughters by his marriage. The settlor has gone further in his affidavit to describe how he has always treated Kerry in exactly the same manner as the two children of his marriage and how he has treated Kerry as one of his own daughters. I must say at once that at no stage of these proceedings has any doubt been cast upon those assertions and the very fact that the settlor has instituted these proceedings is an indiction, if further indication be needed, of his concern and affection for Kerry. It is the settlor's intentions and instructions at the time the settlements were established, not his love and affection for Kerry, which are in contest.

Pollard's affidavit in connection with the settlor's instructions regarding his family reads:

members of the settlor's present family should be included as

step-daughter of the settlor." He was of the opinion that all

a was a child was not discussed that one child was to

of the meeting it was not discussed that one child was to

settlor their establishment was deferred." On Meier's recollection

proposed family settlements were discussed between Meier and the

settlor decided to appoint Integritas, an associated company of

companies in Switzerland and as a result of a meeting with a Mr.

Meier of Rothschild Trust Management A.G. on 30th July, 1987, the

Rothschild, as trustees of the employee trust. Although the

Langley arranged for the settlor to visit two trust

trust fact, together with the subsequent events, have caused the

intended Kerry to benefit equally with the other two children.

There is no recorded note that the settlor stated he

therewith, to be called into question by those representing the

two infant defendants".

of this part of the meeting is not so clear and unambiguous. Langley's note

This evidence is clear and unambiguous. It

reads"

"Personal Affairs
Married, age 42, wife 40.
3 daughters - (eldest is wife's
child), age 20.
2 from present marriage, 10 and 12."

Langley's affadavit in the same regard reads"

"He gave us full details of his family
and he informed us that he had three
daughters". The eldest daughter, whom I
now know to be Miss Kerry Dale, then aged
20, was his wife's child by a previous
marriage". Mr. Briggs made it clear that
he had always regarded Miss Dale as his
own child". There were two other children
by the present marriage, then aged 10 and
12. Mr. Briggs made it clear to us that
all three children should benefit equally
under any dispositions."

" I recall Mr. Briggs giving us details of
his family and stating that he had three
daughters, the eldest of which was his
wife's child by a previous marriage". Mr.
Briggs made it quite clear that any tax
planning arrangements he might
subsequently decide to effect should
benefit all three children, including his
step-daughter Miss Kerry Dale, since Mr.
Briggs regarded Miss Dale as his own
daughter".

beneficiaries but legal aspects of the settlements were not discussed.

On 1st October, 1987, the settlor telephoned Pollard and instructed him to complete the establishment of the family settlements. The settlor says he did not discuss with Pollard who the beneficiaries under the settlements should be because he had given Langley very clear instructions at the meeting of the 24th July, 1987, and saw no need to repeat them. Pollard discussed the matter with Langley who, as a result, had a meeting with the settlor and Smithies at the offices of Technology Group Limited. The settlor was present only at the beginning and end of the meeting and the substantial part of the meeting was between Langley and Smithies. The settlor told Langley that he was willing to proceed if Smithies was content with the technicalities. Clearly Smithies was so content because he instructed Langley to draft settlements for both himself and the settlor. Langley worked on these drafts from precedents in his office on the 14th and 15th October 1987. Prior to proceeding with the drafts Langley did not read his attendance note of the 24th July, 1987, and so, he depones, neglected to amend the clauses which define "beneficiaries" and "principal beneficiaries" to reflect the settlor's instructions and intention to include Kerry, his step-daughter. Langley states that he did not recall the settlor's instructions at that time.

On the 16th October, 1987, Langley forwarded the engrossments of the two settlement deeds, and two related assignments to transfer, to the settlor. Certain details unrelated to this action had been left blank in the instruments and the settlor was to complete and sign and then forward them to Integritas through Rothschild in Zurich.

The settlor received the documents and signed them in Smithie's presence. He depones:-

> "I flipped through the settlements but did not read them. In particular, I do not recall whether or not I saw the definitions of "Beneficiaries" or

firm decision in this connection, for reasons which will become

any will he prepared. Although it is difficult to come to any

Carron to himself to ensure he did not leave Kerry's name out of

sentence of the note was in the nature of an aide memoire by

surprisingly, urges me to the opposite view, that the second

settlements were drafted. Counsel for the settlor, not

he would have had that same knowledge and understanding when the

realise that Kerry must be specifically mentioned in a will then

knowledge and understanding, when he instructed Carron, to

and urges me to take the view that if the settlor had sufficient

note as being a record of the settlor's specific instructions,

infant defendants asks me to construe the second sentence of this

It is convenient here to interpose that counsel for the

"Kerry is in fact a child of his wife but
not a child of his, but he does want her
treated in all respects the same as the
other two children which are children of
the present marriage. This means that her
name must be clearly specified throughout
as she is not legally adopted by him."

On the 11th January, 1988, the settlor discussed the possibility of making a will with a Mr. Carron of Barclays Bank Trust Company Limited. He explained to Carron that he wanted all his daughters, including Kerry Dale, to benefit equally from all his assets. This is borne out by Carron's affidavit and by his handwritten note of the meeting. Although Carron's handwriting in the note of the settlor's instructions to prepare the will is in places difficult to read, under paragraph 10(b), headed "Residue" the latter part of the note clearly reads "Children - named to include Kerry everywhere". An extract from Carron's typed note of the meeting reads:

The settlement deeds which it is sought to be rectified, and dated the 29th October, 1987, sealed and the assignments, reached Integritas and were signed,

It was unfortunate that I totally relied upon my solicitors. I saw no reason to double-check the work done by Clifford Chance after I had given them very clear instructions, especially with respect to Kerry being treated in exactly the same manner and to the same extent as my other two daughters."

apparent I favour, and I put it no higher than that, the view urged by counsel for the settlor.

Carron asked to see copies of the two settlements and asked the settlor to supply additonal information. He met the settlor again, who was this time accompanied by his wife, on the 15th February, 1988. Carron had, prior to that meeting, received copies of the settlements and had noticed that Kerry was not a beneficary under them. This he says conflicted with what he had gathered previously from the settlor. He thus told the settlor of his discovery and Carron's note of the meeting was to the effect that the settlor told him the whole matter had been set up by his partner (Smithies) and he would speak to him and, in one way or another, check the situation. Although the settlor disputes that he actually told Carron that Smithies had set the whole matter up, in view of the peculiarly close relationship between Smithies and the settlor in their business and personal relationships, I do not attach any weight to that discrepancy.

Indeed another example of the closeness of the relationship between Smithies and the settlor is that the settlor asked Smithies to raise the question of Carron's interpretation of the settlements with their solicitors. This Smithies did by way of a telephonic communication to Langley on the 15th February, 1988.

According to Smithie's affidavit he made it clear to Langley that Kerry should have been included in the settlements and if Carron was correct something needed to be done, and that Langley advised him that Kerry could be included as a beneficiary if certain deeds were prepared pursuant to the terms of the settlements. According to Langley's affidavit, at the time of this telephone conversation he did not recall the settlor's earlier instructions and he explained to Smithies that pursuant to the terms of the settlements there was power to add an additional beneficiary. Langley's written note of that conversation, copied to Pollard, is interesting and is worthy of recitation.

> "ALL (Langley) attending Granville Smithies on his calling us. He said that Barry Briggs wanted to include as beneficiary of his trusts his step-daughter, ie the daughter of his wife by his wife's previous marriage. She was over 21 and her name was Kerry Dale. Granville Smithies was not sure of her date of birth.
>
> We said that the Trustees had power, with the consent of the settlor, to add to the class of beneficiaries and we would draft the appropriate deeds."

There is no mention here that Smithies had indicated that it was the settlor's intention from the beginning to include Kerry as a beneficiary.

Langley drafted a deed of appointment in respect of each settlement and forwarded them to the settlor on the 18th February, 1988. Langley's letter forwarding the two deeds commences:

> "Granville Smithies telephoned me last week to say that you have decided that you would like your step-daughter, Kerry Dale, to become a beneficiary of your two Cayman Islands Trusts."

This gives the impression that Kerry's inclusion as a beneficiary was a new idea. In the letter Langley went on to explain that in respect of the life interest settlement the effect of the deed was simply to add Kerry to the list of beneficiaries but in respect of the accumulation and maintenance settlement the trust fund is held for the benefit of the two infant children and their shares cannot be altered until after each of them attains the age of twenty-five. It was not therefore at that moment possible to change the terms of the accumulation and maintenance trust instrument so that Kerry benefited equally with the two infant children. This distinction between the two settlements, and the effect of executing deeds of appointment, becomes important when it comes to the consideration of alternative remedies to rectification. It is accepted by counsel for all parties that Langley's advice in this letter was correct and that whilst the desired result of including Kerry among the beneficiaries can be obtained by executing a deed of appointment in respect of the life interest settlement, such result can not be achieved in the same way in respect of the accumulation and

involvement rather than it being a display of the settlor's further instance of confusion over the extent of Smithie's weight to that. I am more inclined to the view that this is a instruments for him but, again, I do not attach a great deal of settlor actually said he relied on Smithies to read the

Again there is some slight disagreement over whether the

> "He (the settlor) said he had not read the document (the settlement instruments) himself before signing it but had relied on his colleague, Granville Smithies, to read it for him."

over a particular sentence in the note which read:

The settlor had a further meeting with Pollard and Langley on the 16th March, 1988. Langley's note of that meeting was produced as additional evidence as were further affadavits of the settlor, Smithies and Langley. Clarification had been sought

> I will sign an affidavit if necessary to support this correction.
>
> Yours sincerely,
>
> G. Smithies."

this letter was. Smithies tells us that when he discussed the deeds with him the settlor was very annoyed. Smithies returned the deeds, unsigned, with the following covering letter dated 1st March, 1988:

> "Dear Aiden,
>
> Family Trust
> I return the enclosed.
> To restate the position:-
>
> 1. Barry, in all discussions with myself always made it clear that all of Enid's children would be treated equally regardless of whether he fathered them or not. His stepdaughter Kerry Dale should have been a beneficiary under the Accumulation and Maintenance Trust (and the Life Interest Trust).
>
> 2. Barry remembers briefing both you and Garth on full names ages and sex of his dependents and assumed that Kerry had automatically been included along with his natural children.
>
> 3. Barry will sign an affidavit to this effect and sign off hand modifications to the Trust Deeds (if necessary in Switzerland). Can I ask you to make happen what should have happened and which he and me believed had happened.
>
> I will sign an affidavit if necessary to support this correction.
>
> Yours sincerely,
>
> G. Smithies."

The settlor has not told the Court what his reaction to maintenance settlement.

unreliability as a deponent.

The settlor subsequently took independent legal advice and the originating summons commencing this action was filed on the 20th July, 1989.

It is accepted that the Grand Court has jurisdiction in Equity to grant the remedy of rectification in respect of a voluntary settlement (James Jeremy Bond and Others v. Integritas Trust Management and Others CC40,41,58,59,66 and 67 of 1988). The remedy may be granted to give effect to the true intention of the settlor. As stated by Brightman J. in the Re Butlin's Settlement Trust [1976] 2 All E.R. 483, 488.

> "The settlement can be rectified though voluntary, and it can be rectified notwithstanding that the mistake arose, not in omitting, or using words intended, or not intended, to be included, but in ascribing the wrong interpretation to the words intended to be used."

Brightman J. then went on to consider whether rectification lies where the mistake is that of the settlor alone, as in this case, and not that of the settlor and trustees. His conclusion at p. 489 was:

> "..... in the absence of an actual bargain between a settlor and trustees: (i) a settlor may seek rectification by proving that the settlement does not express his true intention, or the true intention of himself and any party with whom he has bargained, such as a spouse in the case of an antenuptual settlement; (ii) it is not essential for him to prove that the settlement fails to express the true intention of the trustees if they have not bargained; but (iii) the Court may in its discretion decline to rectify a settlement against a protesting trustee who objects to rectification."

In this case there was no bargain between the settlor and the trustees, Integritas, and there was no other party with whom he bargained, so the settlor need prove only that the settlements do not express his true intention.

Strong and convincing evidence is required to prove the

settlor's intention. In Tucker v. Bennett (1887) 38 Ch. D. 1 Lopes L.J. said, at p. 16 :-

> "In my opinion, it requires strong evidence to justify the rectification or setting aside of an instrument under seal;"

At p. 15 of that same authority Cotton L.J. referred to the requirement of "very clear and distinct evidence" before rectification would be granted. Reference to such a high standard of proof recurs through the leading cases on rectification. Phrases such as "strong irrefragable evidence" (per Lord Thurlow L.C. in Shelburne (Countess Dowager) v. Inchiquin (Earl) (1784) 1 Bro. CC 338) and "highest degree of probability", "such as to leave no fair and reasonable doubt upon the mind" (per Lord Chelmsford L.C. in Fowler v. Fowler (1859) 4 De G. & J. 250) occur in the earlier authorities. In Joscelyne v. Nissen [1970] 1 All E R 1213, 1222 Russell L.J. said in context of the strong burden of proof which lies on the shoulders of those seeking rectification :-

> "We do not wish to attempt to state in any different phrases that with which we entirely agree, except to say that it is in our view better to use only the phrase "convincing proof" without echoing an old-fashioned word such as "irrefragable" and without importing from the criminal law the phrase "beyond all reasonable doubt".

Although Joscelyne v. Nissen was a case involving a bilateral agreement I do not think that anything other than "convincing proof" should be required of those seeking rectification of a unilateral instrument of settlement.

I have been referred, by counsel for the two infant defendants, to the following passage from Bonhote v. Henderson [1895] 1 Ch. 742, where, after determining that the Court had jurisdiction to grant rectification in respect of a voluntary settlement as well as in respect of a bilateral contract, Kekewich J. said, at p. 748 :-

> "Given the extended jurisdiction, it is obvious that the Court must approach the exercise of it with caution at lease equal to that required in dealing with the investigation of bargains; and the difficulty is necessarily increased by the circumstances that in the nature

test the truth of that statement". In short, one type of evidence

further than a comparison of the notes of Langley and Carron to

fuller and more elaborate note than others, and we need go no

responsible for taking notes of events and conversations take a

recollection of events and conversations. This Court is extremely

alert to that fact. On the other hand some people who are

v. Pearson (1870) 13 Ch. D. 545). On the one hand witnesses are

notoriously selective and are often unreliable in their

uncontradicted affadavit evidence of a settlor alone (see Hanley

Court, and indeed, a settlement can be rectified on the

merely warns the Court to take proper caution in assessing the

evidence before it. But each case is different and must be dealt

with according to the merits of all admissible evidence before the

The passage from Bonhote v. Henderson (supra) to my mind

kind of evidence over the other.

he is entitled to, that I prefer, in this particular case, the one

ascendency over statements of recollection I am unable to do so.

me to formally elevate all documentary evidence into a position of

the affadavits are of limited value. If in so doing counsel asks

instructions, and has urged that the ex post facto statements in

prefer the objective written evidence, eg. Langley's notes on his

than by statements of their recollection. Counsel asks me to

ER 739, 747) are more faithfully evidenced by the written notes

(per Denning LJ. in E.E. Rose Ltd. v. Wm. H. Pim Ltd. [1953] 2 All

passage to written instructions. He seeks to persuade me that the

parties' "outward acts ie. what they said or wrote to one another"

Counsel has placed emphasis on the reference in this

same advantages of criticism and
opposition". If there are documents,
such as written instructions,
evidencing the intention of the
parties, the course may be clear" but
if that intention rests on statements
of settlors made, perhaps, long after
the date of the deed, where precise
memory is wanting and circumstances
have changed, it behoves the Court to
act warily". It may be too much to say
that no effect is to be given to a
statement on oath that if the settlor
has known the deed to be what it is he
or she would not have executed it."

is not entitled, per se, to have greater weight attached to it than another. Each item of evidence must be considered by the Court and must be given the weight which the Court considers it merits, bearing in mind the heavy burden which is placed on a plaintiff in a case such as this.

Turning now to consideration of the evidence there is the clear recollection of the settlor, Langley and Pollard to the effect that when the settlor gave his initial instructions in their meeting of 24th July, 1987, at which the establishment of settlements was discussed, the settlor made it clear that Kerry should be included as a beneficiary in the same manner and to the same extent as his two infant daughters. This is consistent with all the evidence relating to the settlor's declared intentions to treat Kerry as his own daughter, confirmation of which is received from Smithie's affadavit as to several conversations in that regard between himself and the settlor, stretching back to 1985, and from Carron's affadavit of their conversations in early 1988. Langley's note of the meeting of 24th July, 1987, is ambiguous in that regard but if anything it would appear to be more consistent with the recollection of the three deponents than with an intention on the settlor's part to exclude Kerry from any settlement. Clearly the settlor's step-daughter was referred to in connection with the proposed settlements and it is, surely, more likely (and I put it no higher than that) that the note would have merely referred to two daughters if the step-daughter was to be excluded, or there would have been a note by the reference to the step-daughter that she was to be excluded, if such was the case.

The evidence as to the meeting between the settlor and Langley of 13th October, 1987, reveals that the settlor left most of the discussions to Smithies. It has been pointed out that there is no evidence that the settlor, or Smithies, attempted to convey to Langley at that meeting who should be the beneficiaries, but if the settlor had given specific instructions to include Kerry in the settlements at the meeting in July then there would be no need for him to repeat those instructions. That the settlor

did not read the settlement documents in full when he received them is not surprising. Laymen are surely entitled to rely on their legal advisers to draft documents which give effect to their intentions.

Then we have the settlor's instructions to Carron in January, 1988, regarding a proposed will. His instructions in regard to Kerry are entirely consistent with his alleged instructions in connection with the establishment of the settlements, and indeed entirely consistent with his declared intentions regarding Kerry from as far back as 1985. Although counsel for the infant defendants seeks to persuade me that the evidential value of the settlor's conversations with Carron is minimal because the conversations are to an intention of the settlor some months after the intention under investigation, I am of the view that it is relevant as showing consistency of intention towards Kerry stretching over a period of years and continuing beyond the dates under investigation. And the evidence is relevant to this further extent. Not only do we have evidence from Carron that the settlor wanted to include Kerry in his will to the same extent as his other daughters, but the settlor must have told Carron that Kerry was, in his belief, included in the earlier settlements otherwise there would have been no reason or Carron to point out the "anomoly" after reading the settlement instruments. Indeed, Carron has said that his review of the settlements revealed a conflict with his instructions. To my mind that is strong confirmation that the settlor thought that Kerry had been included as a beneficiary under the settlements.

Next, we come to Smithie's communication with Langley on Carron's understanding of the settlements. Most certainly Langley was, for a time at least, dealing with that communication as if the idea of including Kerry as a beneficiary was a new one. To test Langley's explanation in that connection that he had not referred to his instruction notes when he wrote his letter of the 18th February, 1988, we must look at the rest of the evidence and in particular Smithie's rather forthright letter in returning the draft deeds of appointment on 1st March, 1988. Is it not

", it is right that a

Others (supra) Collett CJ. said :-

James Jeremy Bond and Others v. Integritas Trust Management and

"In whether to exercise my discretion in favour of the settlor. rectification being a discretionary remedy, I still have to decide

Having been satisfied as to the settlor's intentions,

settlements to the same extent as her step-sisters."

and instructions were to include Kerry as a beneficiary in the

Langley, in drafting the settlements, in his somewhat ambiguous note of his instructions of the 27th July, 1987, and of his reaction to Smithie's communication in February, 1988. In this I am convinced the fault lies with Langley and not with the settlor, either as to his intentions with regard to Kerry's inclusion in the settlements or as to his instructions to Langley and Pollard on her inclusion. I am convinced that the settlor's intentions can be cast upon the settlor's intentions are in the actions of the date the settlements were executed, that Kerry should be included as a beneficiary and principal beneficiary to the same extent as the two infant defendants. The only real doubt which the settlor's intentions were always, and in particular were on

Taking the evidence in its totality I am convinced that

instructions are as they urge".

is, indeed, against their interests if I find that the settlor's

Langley and Pollard puts them, and their firm, in a bad light. It

point in the settlor's favour that the support he receives from

conversations at the meeting. Furthermore, it is a very strong

the note would be likely to jog Langley's memory as to events and

Kerry was to be included in the settlements. The very sight of

construe the note, ie the taker of it, contrued it as meaning that

may be ambiguous to an outside reader the person who has to

whilst Langley's note of his instructions of the 24th July, 1987,

to his notes and then realised his error? It is significant that

when it was brought to his attention that he had erred, referred

practitioner caught the wrong end of a communication and, only

consistent with the whole sequence of events that a busy

Whitaside was a case where the settlor amended correctly worded

should weigh heavily against granting the relief sought."

the person seeking rectification then that is a factor which

the instruments can be attributed to the fault or carelessness of

Whitaside v. Whitaside (supra) in support, that where the error in

It is argued by counsel for the infant defendants, citing

supporting the application."

the trustees take a neutral stance, neither opposing nor

of settlement is not inconsistent with a cautious and jealous

stand to lose by an alteration of the wording of the instruments

avoidance, than to grant rectification where certain beneficiaries

readiness to grant the remedy of rectification in a case where all

parties will benefit by the validation of a trust rather than its

cautiously watched and jealously exercised". To my mind a greater

at 71, that the discretionary remedy of rectification "must be

Evershed MR said, in Whiteside v. Whiteside [1950] Ch. 65

beneficiaries and is vigourously opposed"

case rectification is contrary to the interests of the stated

instruments of settlement should be rectified. In the present

of the settlors, the trustees and the beneficiaries that the

the intention of the settlor and, indeed, it was in the interests

offending the rule against perpetuities. Of course that was not

settlement which were wholly or to a great extent void as

In Bond the Chief Justice was dealing with instruments of

exercise of the Court's discretion."

trustees (see Re Butlin's Settlement Trust (supra))." In this case

One factor to be considered is the position of the

wherever it is shown, as I am
satisfied it has been here, that the
Court has power to do so." I would
also add that a Court sitting in
these Islands should not be averse
towards so exercising the discretion
vested in it as to validate rather
than avoid settlements which are
intended to effect the
purposes of overseas settlors who
have to resort to its laws for those
purposes and to use the facilities
afforded by Cayman-based trustees in
so doing."

drafts in such a way as to avoid his stated intention. That is a far cry from a layman, as in this case, failing to appreciate the meaning or implications of a complicated legal instrument and, as in this case, relying on his legal adviser to give effect to his intentions. I do not regard the settlor, or Smithies for that matter, to have been careless or at fault in failing to read through these complicated documents thoroughly and to detect the mistake in them.

I have been referred to the following passage in Snell, "The Principles of Equity", 28th edition at p. 611 :-

> "Rectification will not be decreed if the desired result can conveniently be achieved by other means."

No authority is cited for this general proposition but it did receive acceptance by Collett CJ. in James Jeremy Bond and Others v. Integritas Trust Management and Others (supra) where he said :-

> "If rectification of the these instruments cannot be obtained, the possible alternative of each settlor re-settling the funds upon fresh trusts would be available but such a course would be clearly attended with severe taxation disadvantages to the respective settlors all of whom are resident in the United Kingdom. Such an alternative though practical is not, therefore, convenient".

The remedy of rectification is to be jealously exercised and it seems to me to follow that it should not be granted where the desired result can conveniently be achieved by other means.

In respect of the accumulation and maintenance settlement a deed of appointment would not put Kerry into the same position as if she had been included in the original settlement. It has been argued that an action in negligence against the solicitors drafting the instruments is an alternative remedy, but it cannot be seriously argued that it is a convenient alternative with all the costs, delays and uncertainties which follow litigation of that nature. In any case a recovery of damages by Kerry against the solicitors would operate as a windfall to the settlor's

children, and there would be the added difficulty of quantifying Kerry's loss. As rightly pointed out by counsel for the settlor if Kerry was awarded one third of the amount of the original settlement fund, which would have been her entitlement, her step-sisters would remain with one-half of the amount, and so would, in any event, be placed in an advantaged position. An action against the solicitors is not a convenient alternative remedy.

I am in greater difficulty with the life interest settlement because it is acknowledged that the desired result can be obtained by the execution of a deed of appointment. There is a convenient alternative remedy open to the settlor. It seems that Kerry cannot be included as a principal beneficiary, but she can be included as a beneficiary under this settlement which would give effect to the settlor's wishes that she receives equally with the two infant defendants. I am not persuaded by the argument that if Kerry is dealt with differently in the instruments then she will feel some stigma attaches to her. Firstly, that factor does not affect the availability of a convenient alternative remedy and secondly I cannot see that any stigma could possibly be seen to attach to Kerry by the trust instrument being dealt with in this way. She must know she is a step-daughter and if she has been brought up with the same love and care as her step-sisters and has been treated in the same way as her step-sisters in the past, as this Court is satisfied she has, then Kerry is less likely to feel any sting from an error on the part of a third-party which resulted in her being treated differently from her step-sisters. The end result is far more important than the means of achieving that end result.

However, the alternative remedy available is not in the hands of the settlor alone and requires an appointment, pursuant to clause 3(2) of the settlement, by the trustees, Integritas. For some reason, the settlor has not sought confirmation from Integritas that such an appointment would be made at his request. Nor have Integritas seen fit to explore what position they would take if the settlor made that request. This situation does not

assist the Court in determining whether to grant the remedy in respect of the life interest settlement or whether to refuse it on the grounds that a convenient alternative remedy is available.

I am satisfied, in all the circumstances, that I should exercise my discretion to grant the rectification sought in respect of the accumulation and maintenance settlement. It would be tidier for the two settlements to be dealt with in the same manner, but different considerations apply to each of them and I would be breaking faith with the principles I have outlined above regarding the cautious and jealous exercise of my discretion if I were to grant rectification of the life interest settlement when there is a convenient alternative remedy available. It is possible for the two settlements to follow the same course but by using different modes of conveyance, but we are, unfortunately, uncertain at this moment of whether the alternative mode, of deed of appointment, will be made available by Integritas. In the circumstances rather than refuse the application in respect of the life interest settlement outright I shall give the settlor the opportunity to pursue his alternative remedy by granting an adjournment of the application in that regard.

The orders I make therefore are :-

(1) in respect of the life interest settlement, an adjournment sine die with liberty to restore.

(2) in respect of the accumulation and maintenance settlement, rectification of the instrument in the terms sought by an endorsement of a copy of this order on the settlement instrument.

I am asked to make no order for costs.

GRAND COURT - CAYMAN ISLANDS

Schofield J.

20th October, 1989