Neutral Citation: [2024] UKFTT 00272 (TC)

Case Number: TC09118

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2021/10367

Entrpreneurs' relief – mistake – rectification possible – appeal allowed

Judgment date: 3 April 2024

Before

TRIBUNAL JUDGE SARAH ALLATT
Mr MOHAMMED FAROOQ

Between

JONATHAN COOKE

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Wilson

For the Respondents: Mr Waldegrave of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

BACKGROUND

1. This appeal relates to a disposal of shares by the Appellant. The question in this appeal is whether the Appellant is entitled to entrepreneurs' relief in respect of the gain.

2. On 26 February 2019 the Appellant disposed of his entire shareholding in a company called ISG Holdings Limited (the "Company") to a third party, TimeC 1667 Ltd ('TimeC'). For capital gains tax purposes, he realised a gain of about £600,000 on this disposal.

3. At time of the disposal entrepreneurs' relief was available in respect of a gain arising on a disposal of shares if (assuming other conditions to be satisfied) the person making the disposal had held at least 5% of the "ordinary share capital" in the company concerned for a period of one year prior to the disposal. It is understood to be common ground that the Appellant did not hold 5% of the ordinary share capital in the Company during the year preceding the disposal. Rather he held throughout that period 4.99998% of the ordinary share capital in the Company.

4. The Appellant's case that he should nevertheless be entitled to entrepreneurs' relief relies on two propositions (in respect of both of which he must succeed):

> (1) First, if appropriate proceedings were brought in the High Court, it would order the rectification of certain documents in such a way as to secure that during the year preceding the Disposal the Appellant held at least 5% of the ordinary share capital in the Company.
>
> (2) Secondly, the First-tier Tribunal (the "FTT") should proceed as if such rectification had been ordered. In this regard the Appellant relies in particular on the decision of the Upper Tribunal (the "UT") in Lobler v. HMRC.

EVIDENCE

5. The Tribunal heard oral evidence from Mr Jonathan Cooke, Mr Ben Ridgeway, Mr Jamie Cooke (no relation to the Appellant) and Mr Eoghan Johnston. Mr Ridgeway and Mr Jamie Cooke were the sellers of the shares to Mr Jonathan Cooke. Mr Johnston was the Finance Director of ISG Holdings.

6. All of the individuals who gave oral evidence had also prepared and submitted witness statements. The statements were, when dealing with the facts of the transaction, identical.

7. HMRC took issue with parts of the witness statements being identical or extremely similar.

8. We find it usual that some parts of a witness statement are formulaic, and not unusual that the witnesses would have taken facts from a common source. We do not find that this detracts from the truth of the witness statement or the truthfulness of the individuals in question.

9. We heard first from Mr Jonathan Cooke. We found him to be a credible and straightforward witness.

10. Mr Cooke explained he had known the founders of ISG Holdings, Mr Ben Ridgeway and Mr Jamie Cooke, since 2012. For a number of years he had held the role of 'friendly adviser' to them, and helped them grow the business by giving them the benefit of his expertise in the property industry and also introducing them to his industry contacts.

11. He had had a number of conversations with them about becoming involved as an investor in the business, and this came to fruition in 2017.

12. Mr Cooke explained he had invested in two previous small businesses and had qualified for entrepreneurs' relief on both of those exits. Therefore he knew he wanted at least 5% of the business in order to qualify for entrepreneurs' relief.

13. The agreement he made with the founders was to buy 5% of the business for £500,000.

14. He was very focussed on the 5%, and requested an anti-dilution clause to be included in the documents so his shareholding would not fall below 5%.

15. When the shares were sold to TimeC, Mr Cooke declared on his tax return that the sale qualified for entrepreneurs' relief. Upon enquiry by HMRC, he became aware for the first time that his holding of 245,802 D shares in ISC Holdings was one share short of 5% of the ordinary share capital of the company.

16. The mistake occurred due to the fact that a spreadsheet was used to calculate the number of shares in question, and this rounded the percentages to 2 decimal places.

17. The discussions on the purchase of 5% in ISC Holdings by Mr Cooke from Mr Ridgeway and Mr Cooke led to a Heads of Terms agreement being agreed on 19 July 2017.

18. The court was not presented with a signed copy of this agreement, and Mr Cooke could not remember whether he had signed it or not. It had come to him over email, and he was happy it represented what had been agreed, the most important part being the purchase, by him, was to be of 5% of the company for £500,000.

19. Under cross examination, Mr Cooke was clear that although some items remained to be decided at the date of the Heads of Terms, this agreement for him to buy 5% was agreed and was not still the subject of discussion.

20. There was to be a restructure that needed to take place in order to designate as D shares the shares that Mr Cooke was to acquire. The company intended to seek clearance from HMRC on the restructure. Mr Jonathan Cooke said that he did not get involved in the detail but he trusted Mr Ridgeway and Mr Cooke, he trusted his advisers, and he was clear on the agreement that had been made.

21. Mr Cooke explained that he regularly spoke to Mr Ridgeway and Mr Cooke on the phone, but that once he was certain that the key points were agreed between all parties he left the matters up to the advisers (generally Mr Wilson and Mr Johnston). There are emails between the advisers showing the progression from the Heads of Terms to the signing of the documents on 17 November.

22. Mr Cooke said that later on, before the relevant sale of the company, in 2019, he had cause to be concerned about 'dilution on the day' of his shareholding, due to other employees having share options but had done some research and was satisfied it would not affect his entrepreneurs' relief entitlement. He said that as further evidence that his understanding, continuing up to the point of the HMRC enquiry, was that he had acquired 5%.

23. Mr Cooke was asked what difference it would make should the High Court order rectification. He was clear that he would still have sold all his shares at the relevant transaction date. However there would have been minor knock on effects in addition to him gaining entrepreneurs' relief. He would have acquired one or two more shares for the same £500,000 original payment. He would therefore have been paid slightly more for the subsequent sale. This would, if rectified, result in Ben Ridgeway and Jamie Cooke owing him a small payment.

24. We then heard from Mr Johnston. Mr Johnston was the key individual involved in creating the spreadsheet and liaising with all parties throughout the transaction. We found him to be a clear and credible witness.

25. Mr Johnston explained that at the time of the purchase of shares by Mr Jonathan Cooke from Mr Jamie Cooke and Mr Ben Ridgeway, he was the Finance Director of ISG Holdings Ltd. He took instructions from Mr Jamie Cooke and Mr Ben Ridgeway.

26. He was clear that the purchase had been outlined to him as the purchase of 5% of the shares, to be paid for partly in cash and partly by a loan.

27. A Heads of Terms agreement was drawn up on 19 July 2017 showing the intention to transfer a 5% shareholding for £500,000. This was drawn up by Mr Johnston, under instruction from Ben Ridgeway. Mr Johnston was clear that the Heads of Terms agreement reflected what was agreed at that time about the deal.

28. Mr Johnston, under cross examination, agreed that the details of the agreement had been left to him by the parties involved, who were more concerned with the 'big picture'.

29. Mr Johnston had also been instrumental in obtaining clearance from HMRC on the overall transaction. HMRC pointed out several inaccuracies in a document that was a key part of the clearance, all relating to shareholding percentages or amounts.

30. When taken through the document, Mr Johnston agreed that there were (accidental) inaccuracies, but was clear that this did not mean that the 5% to be held by Mr Jonathan Cooke should be taken as either 'around 5%' or subject to change. He was clear that if anyone had discovered at any point in the transaction that the number of shares to be transferred was less than 5%, the number of shares would have been increased so that no less than 5% had been bought by Mr Jonathan Cooke.

31. We then heard from Mr Ben Ridgeway. We found him to be a clear and credible witness.

32. Mr Ridgeway explained the background to the company and the various transactions it had undertaken as it grew.

33. He explained that Mr Johnston would look after financial, legal and human resources matters as part of his day to day job. Mr Ridgeway would speak to him regularly, but left it up to Mr Johnston to interact with corporate finance and tax advisers.

34. Mr Ridgeway was clear that his agreement with Mr Jonathan Cooke was that Mr Cooke would purchase 5% of the company from Mr Ridgeway and Mr Jamie Cooke. This was clearly very important to Mr Jonathan Cooke because of the entitlement to entrepreneurs' relief. He was clear that if at any point he had been told that the 5% was not currently achieved by the number of shares proposed to be sold, he would certainly have understood that their agreement meant that either 1 more share from each of he and Mr Jamie Cooke, or 1 more share from one of them, needed to be included in the sale, and that this would have happened.

35. Mr Ridgeway said that Mr Johnston wrote the Heads of Terms and that it reflected what was agreed. He agreed that subsequently the balance altered between the amount to be paid as cash and the amount to be loaned, but was adamant that this did not mean that the 5% had ever been the subject of debate or potential alteration.

36. Mr Ridgeway understood that were the High Court to order rectification, a very small amount would be further due by him to Mr Jonathan Cooke. This was in answer to whether anything other than the tax due would be altered by rectification.

37. Mr Ridgeway confirmed he did not draft the legal documentation and his understanding was that they were transferring 5% shareholding, by those documents, to Mr Jonathan Cooke.

38. We then heard from Mr Jamie Cooke.

39. We found Mr Jamie Cooke to be a clear and credible witness. Mr Jamie Cooke explained that the negotiation had been clear on the part of Mr Jonathan Cooke that, due to entreprenuers'

relief, Mr Jonathan Cooke wished to buy no less than 5% of the company. This was to be protected by the anti-dilution clause put in place.

40. He was also clear that he and Mr Ridgeway did not wish to sell more than 5% of the company, but that he considered the additional 1 or 2 shares required for Mr Jonathan Cooke to achieve 5% to be immaterial in the context of how much he and Mr Ridgeway intended to sell. He was clear that he, or Mr Ridgeway, would have considered it necessary to stay true to the agreement that Mr Jonathan Cooke acquired at least 5%, and that either or both of them would have sold an additional share to achieve that.

41. Similarly to Mr Ridgeway, he explained that he had left it up to Mr Johnston and the advisers to draft the legal documentation.

42. Under cross examination Mr Jamie Cooke was taken through the same identified mistakes in the clearance document as mentioned above. He maintained that regardless of any slight changes to terms of the agreement, or accidental mistakes in documentation, none of this changed his understanding that the agreement had always been to sell 5% of the company.

43. As discussed in the oral evidence above, in addition to the Heads of Terms, there were a number of other documents referring to the 5% shareholding in between the Heads of Terms and the signing of the documents. These were:

(1) an email from Mr Alsitair Wilson to Mr Johnston on 1 August 2017 referring to the fact that it will be important to add an anti dilution clause to ensure the 5% shareholding of Mr Jonathan Cooke to be maintained

(2) An email from Mr Alistair Wilson on 10 October confirming the mechanism for the acquisition of the 5%

(3) An email from Mr Johnston to the lawyers on 18 October 2017 setting out details of the restructuring, again mentioning Jonathan Cooke acquiring 5%.

(4) The clearance application on 31 October 2017, which as mentioned above contains some inaccuracies. This sets out a restructuring of the group also including Mr Graham Wilson, a minority shareholder in the group, and also shows the redesignation of the A&B shares owned at that time by Mr Ridgeway and Mr Jamie Cooke to D shares prior to the sale to Mr Jonathan Cooke.

THE LAW

44. The law on First Tier Tribunal jurisdiction in this matter is most recently covered in Lobler v Revenue and Customs Commissioners [2015] UKUT 152 (TCC). The relevant passages are:

> [47] Thus although the FTT did not itself have power to order rectification, it could determine that if rectification would be granted by a court who does have jurisdiction to grant it, Mr Lobler's tax position would follow as if such rectification had been granted.
>
> [48] It has never been suggested that before the effect of the availability of specific performance can be taken into account by the FTT, the appellant must go to court and actually obtain the remedy of specific performance. On the contrary, the cases show that this is not the case: see Oughtred v IRC [1959] 3 All ER 623, [1960] AC 206, Jerome v Kelly (Inspector of Taxes) [2004] UKHL 25, [2004] STC 887, [2004] 1 WLR 1409, BMBF (No 24) Ltd v IRC [2002] EWHC 2466 (Ch), [2002] STC 1450 and HSP Financial Planning Ltd v Revenue and Customs Comrs [2011] UKFTT 106 (TC), [2011] SFTD 436.

> A tribunal such as the FTT must however take into account all the factors that the court would in deciding whether specific performance would be available, such as whether damages would be inadequate, whether specific performance would require constant supervision, whether the appellant is ready, willing and able to perform, hardship and so on.
>
> [49] I am told that the cases in this context are all specific performance cases; equity treats a specifically enforceable contract to do a thing as if it were already done: see Walsh v Lonsdale (1882) 21 Ch D 9 at 14, Oughtred v IRC [1959] 3 All ER 623 at 625, [1960] AC 206 at 227, Neville v Wilson [1996] 3 All ER 171 at 182 [1997] Ch 144 at 157.
>
> [50] One issue is therefore whether the same principle applies to rectification as it does to specific performance, although the FTT made no direct reference to specific performance. Mr Davey said that it does not, but without to my mind giving any convincing or principled reason as to why not. As specific performance is also a discretionary remedy I agree with Mr Firth that there is no relevant distinction between specific performance and rectification for present purposes.'

45. When considering what the High Court would consider when looking at rectification, and when it would not consider it, we were referred to a number of cases, and we give extracts below of those most relevant.

46. In Swainland Builders Ltd v Freehold Properties Limited [2002], it is set out that:

> 33. The party seeking rectification must show that:
>
> (1)the parties had a common continuing intention, whether or not amounting to an
>
> agreement, in respect of a particular matter in the instrument to be rectified;
>
> (2)there was an outward expression of accord;
>
> (3) the intention continued at the time of the execution of the instrument sought
>
> to be rectified;
>
> (4) by mistake the instrument did not reflect that common intention.
>
> 34. I would add the following points derived from the authorities:
>
> (1)The standard of proof required if the court is to order rectification is the
>
> ordinary standard of the balance of probabilities.
>
> "But as the alleged common intention ex hypothesi contradicts the written
>
> instrument, convincing proof is required in order to counteract the cogent
>
> evidence of the parties' intention displayed by the instrument itself": Thomas Bates
>
> and Sons Ltd v Wyndham's (Lingerie) Ltd [1981] 1 WLR 505 at page 521 per Brightman LJ.
>
> (2)Whilst it must be shown what was the common intention, the exact form of
>
> words in which the common intention is to be expressed is immaterial if in
>
> substance and in detail the common intention can be ascertained: Cooperative
>
> Insurance Society Ltd v Centremoor Ltd [1983] 2 EGLR 52 at page 54, per Dillon LJ,

> with whom Kerr and Eveleigh LJJ agreed.
>
> (3)The fact that a party intends a particular form of words in the mistaken belief
>
> that it is achieving his intention does not prevent the court giving effect to the true
>
> common intention: see Centremoor at page 55 A-B and Re Butlin's Settlement
>
> Trusts [1976] Ch 251 at page 260 per Brightman J.

47. In Racal Group Services [1995] STC 1151 Peter Gibson LJ expressly approved the summary by Vinelott J, who also stated, in relation to fiscal consequences:

> 'that there is an issue, capable of being contested, between the
>
> parties or between a covenantor or a grantor and the person he
>
> intended to benefit, it being irrelevant first that rectification of the
>
> document is sought or consented to by them all, and second that
>
> rectification is desired because it has beneficial fiscal consequences. On
>
> the other hand, the court will not order rectification of a document as
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> between the parties or as between a grantor or covenantor and an
>
> intended beneficiary, if their rights will be unaffected and if the only
>
> effect of the order will be to secure a fiscal benefit.'

48. Notwithstanding this, it is difficult to read *Lobler* and also Prowting 1968 Trustee One Limited v Amos-Yeo 2015 EWHC 2480 as other than having a purely fiscal benefit. In Prowting, the judge summarises the effect of rectification thus:

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

49. In that case the High Court granted the rectification sought.

DISCUSSION

50. HMRC invited us to find that the parties only ever intended that the Appellant would receive 'about' 5% of the ordinary share capital.

51. They point to a variety of reasons we should make this finding. Firstly, it is not possible for an exact 5% amount to be held unless more shares were issued. Secondly, there was no evidence that either party intended to transfer any specific number of shares to the Appellant. Thirdly, the Appellant purchased equal numbers of shares from each of Mr Ridgeway and Mr Johnston. It is therefore not clear whether a mistake was not to sell one more share from only one party, or one more share from both.

52. We reject these reasons from HMRC, and make as a finding of fact that the intention was to transfer a minimum of 5% to qualify for entrepreneurs' relief and a maximum of no material amount above 5%. We do not consider the inability for the lack of precision around one or two

shares is an issue, and this follows from the decision in *Giles v Royal National Institute of Blind People and Others* [2014] EWHC 1373, where it was said:

> 'provided the intended effect is clearly proved, the courts appear to have taken a relatively relaxed approach to the precise terms in which that effect was to be achieved in the instrument. In Swainland Builders Ltd v Freehold Properties Ltd [2002] EWCA Civ 560 at [34], [2002] All ER (D) 314 (Apr) at [34] (a case concerning rectification for common mistake in a bilateral document) Peter Gibson LJ observed:
>
> 'Whilst it must be shown what was the common intention, the exact form of words in which the common intention is to be expressed is immaterial if in substance and in detail the common intention can be ascertained: Co-operative Insurance Society Ltd v Centremoor Ltd [1983] 2 EGLR 52 at 54 per Dillon LJ, with whom Kerr and Eveleigh LJJ agreed.'

53. We make this finding on the basis that the oral evidence from all parties was that a minimum of 5% was a clear red line for Mr Jonathan Cooke, due to the fact that he wanted to qualify for entrepreneurs' relief. The fact he asked for (and received) an anti-dilution clause in the shareholders' agreement further points to this fact. The sellers were clear that although they did not want to transfer more than 5%, they would not consider the transfer of one additional share each to be any more than giving effect to what they believed was their agreement.

54. The decisions we then have to make are 'does this Tribunal have authority to consider this matter?' and 'do we consider that the High Court would order rectification?'

55. In the matter of the jurisdiction of the Tribunal, we follow the decision in Lobler v Revenue and Customs Commissioners [2015] UKUT 152 (TCC), where Proudman J states:

> [45] Rectification for mistake is a different matter. The remedy has its own
>
> rules. With a bilateral contract, those rules (as summarised by Peter Gibson LJ in Swainland Builders Ltd v Freehold Properties Ltd [2002] EWCA Civ 560, [2002] 2 EGLR 71 (at [33])) are: (i) that the parties had a common continuing intention, whether or not amounting in law to an agreement, in respect of the particular matter in the instrument to be rectified; (ii) there was an outward expression of accord; (iii) the intention continued at the time of execution of the instrument sought to be rectified; and (iv) by mistake, the instrument did not reflect that common intention.
>
> [46] The FTT, doubtless trying to help Mr Lobler, itself I believe raised the question in paras [22]–[23] of whether rectification might be available: 'If a court would order rectification of the forms on which Mr Lobler made his application for funds so that they would take effect as the full surrender of some of the subsidiary policies, then relying on the maxim that equity treats what should have been done as done, we might treat the applications as total surrenders.'
>
> [47] Thus although the FTT did not itself have power to order rectification, it could determine that if rectification would be granted by a court who does have jurisdiction to grant it, Mr Lobler's tax position would follow as if such rectification had been granted.
>
> [48] It has never been suggested that before the effect of the availability of specific performance can be taken into account by the FTT, the appellant must go to court and actually obtain the remedy of specific performance. On the contrary, the cases show that this is not the case: see Oughtred v IRC [1959] 3 All ER 623, [1960] AC 206, Jerome v Kelly (Inspector of Taxes) [2004]

> UKHL 25, [2004] STC 887, [2004] 1 WLR 1409, BMBF (No 24) Ltd v IRC [2002] EWHC 2466 (Ch), [2002] STC 1450 and HSP Financial Planning Ltd v Revenue and Customs Comrs [2011] UKFTT 106 (TC), [2011] SFTD 436. A tribunal such as the FTT must however take into account all the factors that the court would in deciding whether specific performance would be available, such as whether damages would be inadequate, whether specific performance would require constant supervision, whether the appellant is ready, willing and able to perform, hardship and so on.
>
> [49] I am told that the cases in this context are all specific performance cases; equity treats a specifically enforceable contract to do a thing as if it were already done: see Walsh v Lonsdale (1882) 21 Ch D 9 at 14, Oughtred v IRC [1959] 3 All ER 623 at 625, [1960] AC 206 at 227, Neville v Wilson [1996] 3 All ER 171 at 182, [1997] Ch 144 at 157.
>
> [50] One issue is therefore whether the same principle applies to rectification as it does to specific performance, although the FTT made no direct reference to specific performance. Mr Davey said that it does not, but without to my mind giving any convincing or principled reason as to why not. As specific performance is also a discretionary remedy I agree with Mr Firth that there is no relevant distinction between specific performance and rectification for present purposes.

56. We therefore consider that we do have the jurisdiction to consider what the High Court would do, were it to be asked for rectification.

57. We bear in mind that the word 'would' does mean that we have to have a high degree of certainty about what the High Court would do. We turn first to the remarks by Lord Justice Peter Gibson, quoted above.

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

58. We consider it clear that the parties had a common intention, as found above, that this intention was specific, and as shown by various documents including the Heads of Terms, this intention continued. HMRC invited us to find that as various of these documents could have changed, or did change, this was evidence that the agreement to sell 5% was something that was not fixed. We don't consider that this is any evidence that the things that didn't change were flexible, and we think that the intention here was so clear as to be clear to all parties that it wasn't going to change, and in actual fact it didn't.

59. There was an outward expression of accord, this was shown by the Heads of Terms agreement.

60. We consider that the intention continued at the time of execution of the instrument. This was shown in oral evidence and by the continued discussion (by 3rd parties i.e. Mr Wilson and Mr Johnston) up the the date of the signing. This is also shown by the oral evidence that everyone was surprised when it transpired that in actual fact 5% had not been sold.

61. Both parties agree that there was a mistake, made by Mr Johnston due to the spreadsheet rounding to 2 decimal places. We find that the instruments that did not reflect this intention are the redesignation documents, the stock transfer agreement and the share certificate.

62. We therefore consider that the High Court would treat this matter as one that is capable of rectification. The next point is to consider whether we can be sure enough that it would grant rectification. Here we consider what else the High Court would take into consideration, and what we should be clear that the High Court would not do.

63. Here again we look at the case of *Giles*, based on the analysis by the Judge of *Racal Group Services v Ashmore* [1995] STC 1151, 68 TC 86.

> THE PRINCIPLES TO BE APPLIED BY THE COURT
>
> [24] When considering rectification of a unilateral document (such as the
>
> deed of variation) a leading authority and source of guidance appears to be the decision of the Court of Appeal in Racal Group Services Ltd v Ashmore [1995] STC 1151, 68 TC 86. It is no doubt for this reason that, although not opposing the claim for rectification, HMRC expressly asked that this authority, together with one other, be brought to the court's attention.
>
> [25] An analysis of the judgment of Peter Gibson LJ (with whom the other two members of the Court of Appeal agreed) reveals the following, closely related, criteria for grant of the discretionary remedy of rectification.
>
> (1) While equity has power to rectify a written instrument so that it accords with the true intention of its maker, as a discretionary remedy rectification is to be treated with caution. One aspect of that caution is that the claimant's case should be established by clear evidence of the true intention to which effect has not been given in the instrument. Such proof is on the civil standard of balance of probability. But as the alleged true intention of necessity contradicts the written instrument, there must be convincing proof to counteract the evidence of a different intention represented by the document itself ([1995] STC 1151 at 1154–1155, 68 TC 86 at 101).
>
> (2) There must be a flaw in the written document such that it does not give effect to the parties'/donor's agreement/intention, as opposed to the parties/donor merely being mistaken as to the consequences of what they have agreed/intended; for example it is not sufficient merely that the document fails to achieve the desired fiscal objective ([1995] STC 1151 at 1158, 68 TC 86 at 99).
>
> (3) The specific intention of the parties/donor must be shown; it is not sufficient to show that the parties did not intend what was recorded; they also have to show what they did intend, with some degree of precision ([1995] STC 1151 at 1158, 68 TC 86 at 99).
>
> (4) There must be an issue capable of being contested between the parties notwithstanding that all relevant parties consent. This criterion has been much criticised: the purpose of it, and its actual content and scope, are by no means clear. In Racal Peter Gibson LJ expressly approved the following summary of the principle by Vinelott J in the same case.
>
> Vinelott J stated that the court must be satisfied—
>
> 'that there is an issue, capable of being contested, between the parties or between a covenantor or a grantor and the person he intended to benefit, it being irrelevant first that rectification of the document is sought or consented to by them all, and second that rectification is desired because it has beneficial fiscal consequences. On the other hand, the court will not order rectification of a document as between the parties or as between a grantor or covenantor and an intended beneficiary, if their rights will be unaffected and if the only effect of the order will be to secure a fiscal benefit.' (See [1994] STC 416 at 425.)

64. The first 3 of these points (clear evidence of true intention, flaw in the written document and specific intention with a degree of precision) we have discussed above. We are content that these are shown in this case.

65. In relation to point 4, this Tribunal considers that in *Lobler* and also in Prouting 1968 Trustee One Ltd vs Amos-Yeo [2015] EWHC 2480 (Ch), it appears that rectification was granted where the only effect was a fiscal one, nevertheless we proceed on the basis that if the only effect was fiscal, we should not be sure that the High Court would grant rectification.

66. In this case we are satisfied that we do not have merely a fiscal benefit. There would be further small amounts that would be due to Mr Jonathan Cooke were this 5 % agreement to be honoured by rectification, as Mr Jonathan Cooke would have been due to receive slightly more on the sale of his shares and Mr Jamie Cooke and Mr Ben Ridgeway slightly less. All parties acknowledged this in oral evidence. We do not consider that this affects any other parties apart from the closed group of Mr Jamie Cooke, Mr Jonathan Cooke and Mr Ben Ridgeway.

67. It is also clear from Milton Keynes Borough Council v Viridor (Community Recycling MK) Ltd [2017 EWHC 239 (TCC) that the court would not order rectification where there was either been significant delay in seeking rectification, or that there has been acquiescence of the situation.

> 'Delay in rectification cases was dealt with generally in Lindsay Petroleum Company v Hurd [1873] 5 AC 221 at 239-240. Lord Selborne LC said that it must be shown that the subsequent delay in seeking rectification meant that:
>
> "…it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted…
>
> Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy'.

68. We find that there was little delay in between finding the problem existed and taking some action to remedy this problem and that since then everybody has been on notice that this is something that remains at issue between the parties. We do not think that the High Court would necessarily think that the appellant delayed in coming to them when what the appellant has actually done is come to this Tribunal instead. We also note that as is perfectly usual in HMRC review letters under their next steps they do indicate that appeal to the First Tier Tribunal is the next step to take in this matter.

69. Acquiescence is similar to delay, in that the longer the time between the mistake and the seeking of rectification, the more likely it is that all parties have actually accepted the status quo. However, here we think that it is very clear that we do not have acquiescence and there it is the clear position of both Mr Jonathan Cooke on the one hand and Mr Jamie Cook and Mr Ben Ridgeway on the other that minor small cash adjustments would be necessary to give effect to the record the rectification and that that is acknowledged still to be an outstanding point.

70. The High Court would also consider any effect on third parties, and will not order rectification if, for example, any contract is part of a chain where the rectification of one would leave another party in an unjust position.

71. Here we have considered the position of Mr Graham Wilson, a minority shareholder in the ISC Holdings both before and after the purchase of shares by Mr Jonathan Cooke, TimeC, and the subsequent purchasers of the shares (or successors to the shares in question) from TimeC.

72. We do not think that the subsequent purchaser is relevant in this situation, because the evidence in the bundle shows that on purchase of all of the different classes of shares, TimeC seems to have redesignated them so that only one share class existed. We heard no evidence on this point. Even if we are wrong about that, we consider that the subsequent purchaser would be in the same position as we consider TimeC was in, that what they wanted to purchase was 100% of the company, for a specific amount of money, and this is what they did do, and that rectification of these documents in this case would not affect this. We consider that it is highly unlikely that the High Court would consider them to be anything but neutral in this situation.

73. Mr Wilson did sign some of the documents which we are saying would be given rectification and we have considered his position. He is not part of the closed group of people of Mr Ridgeway, Mr Jamie Cooke and Mr Jonathan Cooke who would be the ones whose rights would be altered by this rectification.

74. He would have received the same amount of consideration and again we find it extremely unlikely he would be anything but neutral in this situation.

75. He was a minority shareholder and although he was entitled to vote in the resolutions that were made, the founder shareholders had already voted and we consider it unlikely although we didn't hear evidence on this point that his 8% would swayed the matter either way.

76. For all the reasons above we consider that the High Court would, if asked to consider the matter, grant rectification of these documents. The major effect of this would be that the conditions for entrepreneurs' relief would then have been met.

77. We therefore ALLOW this appeal.

78.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

79. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

SARAH ALLATT
TRIBUNAL JUDGE

Release date: 03rd APRIL 2024