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# When can mistakes in trust deeds be corrected?

This note is for information purposes only and is not intended to be legal advice.

Establishing trust structures can be an elaborate process, and if drafting errors go unnoticed, they can have serious consequences. Babbé recently acted for a Trustee seeking rectification of several trust deeds, in which the discretionary beneficiary had been incorrectly cited. Instead of the intended beneficiary, a completely different, unrelated entity had been erroneously included by the deed's draftsmen, who were lawyers in another jurisdiction.

On Babbé's corporate team spotting the error, Babbé made an urgent and successful application to the Royal Court for rectification of the erroneous trust deeds, enabling hundreds of millions of pounds of the trusts' funds to be transferred to the correct beneficiary.

## So when will the Guernsey court order rectification of trust instruments?

The Guernsey law on rectification is well established and was comprehensively set out in *Pelican Trust* [2005-06] GLR 20. In summary, rectification is an equitable - and thus discretionary - remedy of the court. The court may exercise its discretion where a trust fails to express the true intentions of the Settlor as the result of a mistake. This mistake must be of sufficient gravity to make it unjust (or unfair or unconscionable) to leave the mistaken document uncorrected. The court will decide on the basis of the evidence before it whether or not that is the case.

Having regard to the English authorities on rectification, the Guernsey court will likely order rectification not only in "a case where particular words have been added, omitted or wrongly written as the result of careless copying" (*Brightman J. in Re Butlin's Settlement Trust* [1976] Ch. 251). However, the remedy is also likely available where incorrect words in a document have been used, not as a result of carelessness or inadvertence, but because the author "mistakenly considered that they bore a different meaning from their correct meaning as a matter of true construction" (*Re Butlin's Settlement Trust*, *ibid.*, at 260).

In other words, the court may order rectification whether or not the Settlor / draftsman knew that a particular word was used or omitted, so long as the Settlor did not intend to achieve the consequential result of that word's use or omission.

The court must be satisfied of five prerequisites before it will order rectification:

### 1. There must be sufficient evidence of the error

This means "clear and convincing evidence in support of an application for rectification", including evidence of the error made.

### 2. It must be established to the highest degree of civil probability that a genuine mistake has been made

The threshold will vary depending on the nature of the facts to be established, and the circumstances of the case. For example, in Babbé's recent rectification application the Settlor was still alive and there was an abundance of evidence that a mistake had been made. An error on the part of the Settlor may of course be more difficult to prove where the Settlor is deceased. Thus, while the burden of proving the case on the balance of probability must be discharged in every case, "in some cases that balance may be more easily tipped than in others." (*Thomas Bates & Son Ltd. v Wyndham's (Lingerie) Ltd.* [1981] 1 WLR 505)

### 3. There must be full and frank disclosure

The applicant has a duty to ensure that all relevant facts are before the court. This includes evidence which is potentially unhelpful, for example because it casts doubt on the Settlor's true intentions. Again, where evidence from a living Settlor is available, their own evidence on what they truly intended will add significant weight in favour of rectification.

### 4. There must be no other practical remedy

Where a trust is discretionary in nature, the Trustee may have no obligation to distribute funds to any particular beneficiary. An alternative remedy in a case where the wrong beneficiary was added could therefore be to leave that erroneous beneficiary in place and simply amend the deed, adding to it the correct beneficiary. The court has, however, in the past agreed that such a remedy is neither practicable nor efficient, particularly because it would leave open the possibility of future errors.

### 5. No undue delay

On Babbé's advice, our client promptly filed its rectification application. Depending on the particular facts, the court may order rectification where an application was filed several years after the error was made and discovered. As a matter of principle, rectification should nevertheless be sought as soon as possible and without delay.

## Conclusion

Ordering rectification of trust instruments is a discretionary tool of the court, which it will exercise carefully. An application is most likely to succeed where all five prerequisites are fulfilled, and the evidence is strong. This is most likely to be the case where evidence from a living Settlor can be adduced and where the application is made promptly. Drafting errors and mistakes can easily be made but can be costly, even when discovered in time to seek rectification from the court. To minimise the risk of costs, it is best to seek legal advice as soon as an error is identified.

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