

Rectifying a faulty deed

Mistakes in legal documentation are certainly not unknown but rectifying them can be quite a troublesome matter. Once a document has been signed as a deed by all parties and dated, it has full legal effect and it is treated as accurately setting out the intentions of the parties. If in fact it does not, the question then arises as to what can be done about it.

A case heard in the High Court on 31 July 2007 and recently reported gave a helpful summary of the possibilities. The case was *Wills v Gibbs* and it concerned a deed of variation of a will. The document concerned had been prepared by a well-known firm of solicitors, but unfortunately they omitted to include the required statement that it was to have effect from the date of death for inheritance tax and capital gains tax purposes. Accordingly on the face of the document, it took effect as a lifetime transfer for inheritance tax purposes and had no consequence for the amount of inheritance tax payable on the death. This was clearly not what the parties intended.

In some circumstances, a deed can be rectified by a further document, normally described as a Deed of Rectification. This would normally only be possible to correct obvious errors on the face of the original document, such as typing mistakes leading to some confusion in the wording. In this regard, the following passage from the Revenue's Trusts and Estates Manual (paragraph 1865) is particularly relevant:

'Where it is claimed a deed contains an error or omission that means it does not properly reflect the parties' intentions, the parties may seek to have the deed rectified by the High Court. In such cases, they may ask whether HM Revenue & Customs wants to be joined as a party to the proceedings.

'In some cases the parties to such a deed may approach us seeking our agreement to ignore the error for tax purposes without going to Court. In the absence of a court order, we would normally adhere to the tax consequences that flow from the actual words in the document.

'Refer all cases involving errors in trust deeds and/or rectification to HMRC Trusts Head Office Edinburgh for advice.'

Accordingly, normally the way forward has to be an application to the Court for rectification of the original deed. This is what took place in *Wills v Gibbs*.

The court gave a helpful summary of the principles which apply to rectification. It said that this was a discretionary equitable remedy. Its function was to enable parties to a transaction to correct mistakes in the way their transaction had been recorded. It was no part of its function to enable parties to change the substance of the transaction they had entered into.

So the Court would investigate whether the document gave effect to the true agreement between the parties and, if it did not, it would order rectification so long as there was some issue capable of being contested between them, but

upon which they were all agreed as to the solution. So the court will not order rectification of a document if the rights between the respective parties would not in any event be affected. This might be the case if the only result of the order was to secure a fiscal benefit.

With the Deed of Variation in the present case, there were issues between the parties, even though the rectification was primarily to secure the inheritance tax benefit. If there were no retrospective rectification, the deed operated as a lifetime potentially exempt transfer which could, in the event of the death of the transferor within seven years, give rise to substantial amounts of inheritance tax. In the meantime, there were issues as to whether all the property subject to the Deed of Variation could be transferred immediately without waiting for the end of the seven-year period.

Accordingly the court ordered rectification of the document so as to insert the necessary inheritance tax and capital gains tax statements.

The process of applying to the court for rectification need not necessarily be an expensive one. It may be possible for it to be dealt with by junior counsel and if there is agreement between all parties to seek the alteration of the original document, the hearing should be unchallenged and it will only be necessary to satisfy the Court that the principles behind the doctrine of rectification, as briefly described above, are satisfied.

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