

5 Stone Buildings

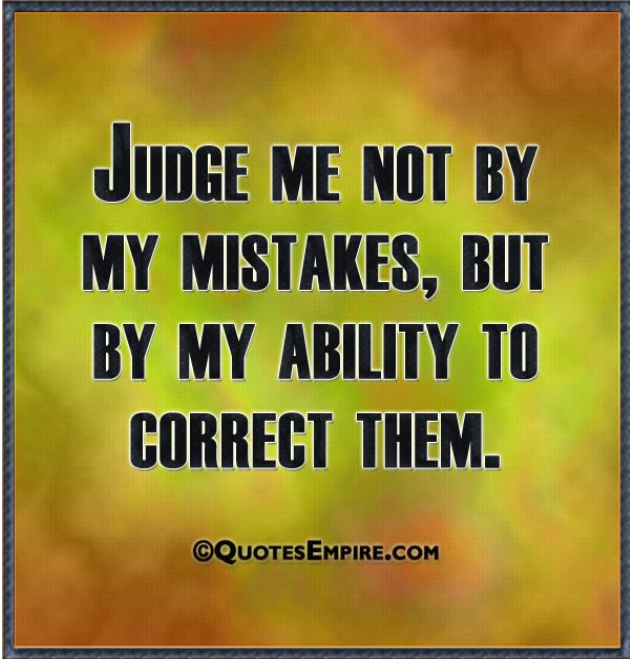
RECTIFICATION: GRAHAM V LYNCH

Penelope Reed QC

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Introduction

- Difficult area of law
- Many cases uncontested
 - HMRC reluctance to join
- Graham v Lynch
 - Jurisdiction
 - Evidence
 - Issue



**JUDGE ME NOT BY
MY MISTAKES, BUT
BY MY ABILITY TO
CORRECT THEM.**

Factual Background **5** Stone Buildings

- Alan and Angela domiciled in Monaco
- wanted to buy properties for sons to occupy in England in tax efficient way
- Advised to set up BVI trusts
- Alan and Angela not included in the class of beneficiaries
 - not excluded from benefit
 - wide power to add beneficiaries



The Tax Problem

- Alan = economic settlor of Broadhaven Trust
- Other trusts set up by non-dom
- Interest free loan Broadhaven -> 4 Trusts
- Gift by Alan to 4 Trusts
- Not excluded from benefit as could be added



Principles of Rectification I

- Remedy is discretionary
- Court does not rectify arrangements but instruments reflecting them
- Court will rectify instrument notwithstanding fiscal advantage

KNOW ALL MEN BY THESE PRESENTS,
That *I James J. Kimball of Durham State of New Hampshire and County of Cochetan Esq*
for and in consideration of the sum of *Twenty Eight Dollars*
to *me* in hand, before the delivery hereof, well and truly paid by *Saran D. Gould of the afore*
said State and County and Henry Wastson of
the aforesaid State and County I do hereby acknowledge, have given, granted, bargained, sold, and by these presents do give, grant
bargain, sell, alien, enfeoff, convey, and confirm, unto the said *Gould & Wastson*
their heirs and assigns, forever, *A certain parcel*
of land situate in said Durham described as follows
(viz) commencing at a certain *stone* *near Eastons Brook*
(so called) and on the road leading from Durham
Millage to Wentworth Haven on the South of said
the land owned by Daniel Mather Haven

Principles of Rectification II

- Evidence in support of claim must be “strong irrefragable evidence”
- Court has power to rectify voluntary transactions.
 - Court looking only at the intention of person entering into the transaction and
- Effect/consequences issue

Jurisdiction

- BVI Trusts
- Litigation in BVI more expensive and HMRC involvement
- Offshore trustees submitted to jurisdiction
 - In personam jurisdiction
 - BVI law applied
 - Presumption same as English law



Evidence

- Alan had lost capacity
- Solicitor who drew up trusts in disgrace
- Evidence from Alan's wife and sons
- Some attendance notes and trust reviews
- Subsequent events evidence to corroborate what was intended



Type of Mistake

- Court will rectify mistake as to
 - Effect
 - Not consequences
- *Allnutt v Wilding*
 - Intended trust to be discretionary i.e. no mistake as to effect
 - Mistake as to tax consequences



Is there an Issue?

- *Whiteside v Whiteside*
 - Maintenance agreement not tax effective
 - Parties had agreed to modify
- *Racal Group Services Ltd. v Ashmore*
 - First instance
 - No need for a dispute
 - Had to be some change to the rights of the parties

Giles v Royal National Institute for the Blind

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- Rectification of deed of variation
- Purpose to save IHT
- Same charities would benefit
 - But would get less if IHT payable
 - Would have an impact on the negligence claim against draftsmen



Issue in Graham

- Funds all appointed out but
- Trust does not die
- Impact on the argument with HMRC
- Court followed *Giles*



Summary

- Think about inventive ways to avoid litigating offshore
- Don't be daunted by the absence of evidence from the draftsman
- Give some serious thought as to the issue/consequences point
- The Courts seem to be rowing back from the "issue" point

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Thank you,
any questions?

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