

Neutral Citation Number: [2015] EWHC 1086 (Ch)

Case Number: B30MA156

**IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MANCHESTER DISTRICT REGISTRY**

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

5th March 2015

B e f o r e :

HIS HONOUR JUDGE HODGE QC sitting as a Judge of the High Court

**John Ellis Rees Vaughan-Jones
Emlyn Griffiths**

- and -

**Barbara Elizabeth Vaughan-Jones
Robert Meuric Wyn Vaughan-Jones
Richard Henry Vaughan-Jones** **Defendants**

**Mr Richard D. Oughton appeared on behalf of the Claimants
The Defendants were not present or represented**

Approved in Liverpool on 22 April 2015 without reference to any papers

HIS HONOUR JUDGE HODGE QC:

1. This is my extemporary judgement on the trial of a Part 8 claim issued in the Manchester District Registry of the Chancery Division on 3rd February 2015 under Claim Number B30MA156. The claim concerns the estate of the late Richard Vaughan-Jones, who died as long ago as 18th October 2007.
2. The claimants, Mr John Ellis Vaughan-Jones and Mr Emlyn Griffiths, are the two proving executors of the last will of the deceased, which is dated 8th September 2000. The first-named claimant is one of the three sons of the deceased. The first defendant, Mrs Barbara Elizabeth Vaughan-Jones, is the deceased's widow; and the second and third defendants, Robert Meuric Wyn Vaughan-Jones and Richard Henry Vaughan-Jones, are, together with the first-named

claimant, the other two sons of the deceased. Under the terms of Clause 7 of the deceased's last will, the deceased's residuary estate passed to the deceased's widow and his three sons in equal shares absolutely.

3. The claim form seeks rectification of Clause 3 of a Deed of Variation of the dispositions of the deceased's estate that was executed on 13th October 2009, some five days before the second anniversary of the deceased's death. The parties to the Deed of Variation were the two claimants, in their capacity as the executors of the deceased's estate (therein described as "the executors"), and the first-named claimant and the three defendants, in their capacity as the beneficiaries of the estate.
4. The Deed of Variation, which was apparently drafted by a solicitor (now deceased) practising in Wales, called Mr Gareth Evans, recites the death of the deceased, his will, and the appointment of the claimants to be his executors and trustees. Reference is made to the fact that the third-named executor was renouncing probate.
5. The Deed of Variation then recites that in the will, the deceased (amongst other things) gave his residuary estate between the beneficiaries in equal shares absolutely. Recital 4 stated that the beneficiaries were desirous of varying the terms of the will to the effect that the residuary estate of the deceased was to pass to the deceased's widow absolutely. Paragraph 5 of the recitals stated that the executors had no objection to the will being so varied.
6. The operative part of the Deed comprised three short clauses. Clause 1 provided that the parties amended the will so that the residuary gift in Clause 7 should read as follows:

"My Trustees shall hold the remainder of my residuary estate upon Trust for my wife, Barbara Elizabeth Vaughan-Jones absolutely."

Paragraph 2 provided that in all other respects the will should remain the same.

7. Clause 3 of the will was in these terms:

"The parties hereto shall, if called upon to do so, give the notice required under the relevant Finance Acts for capital transfer tax purposes."

It is that clause that gives rise to the difficulty in the present case. Until a change in the law effected by the Finance Act 2002, an election, to be effective for Inheritance Tax purposes, did not need to be contained within the Deed of Variation itself, but it had to be sent to the Capital Taxes Office within six months of the Deed. That was changed by the Finance Act 2002. As so amended, section 142(2) of the Inheritance Tax Act 1984 now provides that subsection (1), relating to the fiscal effect of all alterations of dispositions taking effect on death, shall not apply to a variation unless the instrument contains a statement made by all the relevant persons to the effect that they intend the subsection to apply to the variation. A similar change was made to the reading-back provisions for Capital Gains Tax purposes contained within section 62 of the Taxation of Chargeable Gains Act 1992: see section 62 (7) as amended.

8. Thus, the Deed of Variation, as drafted, and unless rectified, is ineffective for Inheritance Tax, and also for Capital Gains Tax, purposes. It is to cure that that this Part 8 claim form was issued, seeking rectification of Clause 3 of the Deed of Variation by deleting the clause in its entirety and substituting a provision whereby:

"The parties hereto hereby elect that the provisions of Section 142 (1) of the Inheritance Tax Act and Section 62 (6) of the Taxation of Chargeable Gains Act 1992 shall apply to the variation of the dispositions of the estate of the deceased hereby effected."

9. The application is supported by a witness statement from the first-named claimant, Mr John Ellis Rees Vaughan-Jones, dated 8th January 2015. Having related the background to the application, Mr Vaughan-Jones indicates that the family had instructed Mr Gareth Evans, the sole principal of J Charles Hughes & Co, Solicitors of Dolgellau in the County of Gwynedd, to act in the administration of the deceased's estate. Mr Vaughan-Jones points out that although the second-named claimant was the deceased's accountant, in relation to matters of Inheritance Tax he very much relied upon Mr Evans.
10. Reference is made to the value of the net estate of the deceased, which was approximately £2.5 million. The principal assets comprised financial assets, land, and an interest in a farming business. It is said that the majority, but not all, of the land, and the interest in the farming business, qualified for 100 per cent agricultural property, or business property, relief for Inheritance Tax purposes.
11. Mr Vaughan-Jones makes the points that under the will, Inheritance Tax would be payable by the deceased's estate in respect of the land and farming assets which did not qualify for 100 per cent agricultural property or business property relief on the three-quarters of the residuary estate which passed to the deceased's three sons.
12. Reference is then made (at paragraph 8) to a meeting between the claimants and Mr Evans on 6th October 2009. It is said that the Grant of Probate was yet to be obtained, and the full Inland Revenue account had not yet been prepared. The second anniversary of the deceased's death was to fall due some twelve days later, on 18th October 2009. Mr Vaughan-Jones exhibits, as Exhibit JERV-J4, a copy of an attendance note made by Mr Evans of the meeting on 6th October. He says that the contents of the attendance note accord with the recollection of the writer's co-claimant, Mr Griffiths, and the first claimant himself.
13. The meeting began with Mr Evans explaining that the deceased had substantial assets which would be subject to Inheritance Tax. Mr Vaughan-Jones then reproduces the third and fourth paragraphs of the attendance note:

“I [that is Mr Evans] also told the two executors that I had not prepared a Deed of Family Arrangement prior to probate before. However I do not believe that they actually need the consent of the executors to the deed. The four beneficiaries are deciding that Mrs Jones will receive the residue of the estate, which is in excess of £500,000 in cash, plus some property. In effect, the other three are losing out on a short-term basis, but the plan is to pay as little Inheritance Tax as possible at this stage and for Mrs Jones to transfer as much as she can and survive seven years. It does not matter a great deal as far as the agricultural properties are concerned, but she should of course get rid of as much cash as she can. While speaking to John last week, I do not believe that his mother is short of income, so she can give away a great deal of capital. The Deed of Family Arrangement must be signed next week as it must be in effect less than two years after death. Told John that I may well call and see his mother next Wednesday as I am in the Towyn area anyway. He is seeing his brother, Richard, this weekend and I gave John my card so that Richard could telephone me next week if he wants to discuss anything.”
14. Mr Vaughan-Jones relates that he did indeed speak with his two brothers and they were in agreement with what was proposed. The whole point of the Deed of Variation is said to be that it should be back-dated to the date of death for the purposes of Inheritance Tax and Capital Gains Tax. Such further papers of Mr Evans, which the claimants' current solicitors, Morris & Bates, have been able to inspect, do not assist in further explaining Mr Evans's thinking. I should say that although reference is there made to Capital Gains Tax, there is no such reference in the attendance note itself, nor is there anything said in the Deed of Variation about Capital Gains Tax, as distinct from Capital Transfer Tax, which Mr Evans had correctly identified in his attendance note under its then current name of 'Inheritance Tax.'

15. Mr Vaughan-Jones goes on to relate (at paragraph 9) that Mr Evans duly prepared a Deed of Variation, which was executed by the claimants and the defendants on 13th October 2009. That Deed of Variation is exhibited, and it is explained that it contained no statements in accordance with section 142(2) of the Inheritance Tax Act 1984 (as amended) or section 62(7) of the Taxation of Chargeable Gains Act 1982 (as also amended). It is said that at no time had Mr Evans, or any party to the Deed of Variation, called upon any party to the deed to execute any separate statement in relation to the back-dating of the deed for either Inheritance Tax or Capital Gains Tax purposes.
16. It is said that it was nearly two years later when Mr Evans caused the Inland Revenue account to be submitted to the Capital Taxes Office. A grant of probate to the deceased's estate was made, out of the Probate Registry of Wales, to the two claimants on 27th September 2011, and that is then exhibited. It is said that after the Inland Revenue account was submitted, there was correspondence between Mr Evans's firm of solicitors and the Capital Taxes Office concerning the amount of Inheritance Tax payable. This correspondence is said to have proceeded slowly on both sides, and to have concerned principally the applicability of agricultural property and business property reliefs. It is said that, by a letter dated 1st May 2013 from Her Majesty's Revenue & Customs to Mr Evans's firm, the Revenue took the point that the Deed of Variation did not have the necessary reading-back statements required by the relevant legislation. Accordingly, the Capital Taxes Office held that the Deed of Variation did not relate back to the date of death for Inheritance Tax purposes.
17. The effect of this was that three-quarters of the residuary estate was subject to Inheritance Tax; and this, taking into account the effect of grossing-up with a partially exempt residuary gift, it is said, would increase the amount of Inheritance Tax payable upon the deceased's estate from approximately £32,000 to approximately £232,000. It is said that exact figures cannot be given because there are ongoing negotiations in relation to the precise amount of the applicable reliefs.
18. Mr Vaughan-Jones relates that, on about 2nd January 2014, Mr Gareth Evans died, probably as a result of suicide. He was facing a criminal charge in relation to the forgery of a Land Registry document in 2009, wholly unrelated to the subject-matter of the present proceedings. Following Mr Evans's death, the executors instructed Morris & Bates, Solicitors, in Aberystwyth.
19. Reference is made to advice received from those solicitors that Clause 3 of the Deed of Variation is not a sufficient statement as required by the relevant legislation, and that, accordingly, the Deed of Variation is not back-dated to the date of the deceased's death for Inheritance Tax purposes. Accordingly, whilst the deed was effective to assign the three-quarters interest in the residuary estate from the deceased's sons to the first defendant, for Inheritance Tax purposes the three-quarters interest in the residuary estate is treated as passing to the sons, and hence is taxable.
20. Mr Vaughan-Jones relates that, although the 6th October 2009 attendance note refers to the first defendant giving financial assets to the three sons, there was no arrangement whereby she was to give specific sums or assets at any specific times. In November 2011, over two years later, the claimant gave the third defendant and the first claimant £20,000 each; and, in June 2012, she gave the third defendant just over £73,000. The first defendant is said to have received £220,000 from the father's estate which she intended to divide between the three sons; but, in the event, neither the first claimant nor the second defendant have taken up that offer. Other than those gifts, the first defendant is said to have given no other gifts of money or other assets to any of the three sons, with the exception of the usual modest birthday and Christmas gifts.
21. Paragraph 4 states:

“It was the intention of all parties to the Deed of Variation and Mr Evans that it should be back-dated to the date of death for the purpose of Inheritance Tax and any other relevant taxes. Otherwise, the Deed of Variation would have been pointless.”

22. Accordingly, the claimants submit that the Deed of Variation should be rectified to substitute, for Clause 3, the statement required by section 142(2) of the Inheritance Tax Act and section 62(7) of the Taxation of Chargeable Gains Act 1992. It is said that it is likely that the error arose because Mr Evans was working under time pressures, and that he used an old precedent, and a poor quality one at that. The witness statement concludes by saying that Mr Evans’s insurers have agreed to indemnify the parties for the reasonable costs of making the claim.
23. The claim form and supporting evidence were duly served upon all three of the defendants. All three have filed acknowledgments of service stating, perhaps predictably, that they do not intend to contest the claim. Notice of these proceedings has also been given to Her Majesty’s Revenue & Customs by a letter dated 5th February 2015.
24. The response of Her Majesty’s Revenue & Customs is contained within a letter to the claimants’ solicitors, Morris & Bates, dated 26th February 2015. The letter states that, having taken specialist advice on the matter, the writer confirms that HMRC does not wish to be joined to the litigation. If the claimants decide to proceed with the application, the solicitors are invited, as they have done, to draw the court’s attention to the case of *Racal v Ashmore* [1995] STC 1151 and the authorities discussed by the Court of Appeal in that case. Reference is also made to the Court of Appeal’s decision in *Allnutt v Wilding* [2007] EWCA Civ 412, reported at [2007] WTLR 941.
25. In addition, Her Majesty’s Revenue & Customs also refer the addressee of the letter to the operation of section 142(3) of the Inheritance Tax Act 1984. That provides that subsection (1) shall not apply to a variation or disclaimer made for any consideration in money or money’s worth, other than consideration consisting in the making, in respect of another of the dispositions, of a variation or disclaimer to which that subsection applies.
26. The attendance note is said specifically to mention that the plan in relation to the Deed of Variation was for the deceased’s spouse, the first defendant, to transfer as much of the re-directed benefit as she could, and then survive for seven years. It is said therefore to appear that the variation was made with the intention that Mrs Vaughan-Jones would make gifts back to the original beneficiaries; and that is said to be what has transpired, given the terms of paragraph 13 of the first-named claimant’s witness statement, which records that:

“The widow subsequently made gifts of £20,000 each to two of the sons and of a little over £73,000 to one of the sons.”

27. The consideration for the purposes of section 142(3) is said to be the agreement of Mrs Vaughan-Jones to pay as much of the re-directed benefit as she could to her three sons. In the view of HMRC, the deed was made for consideration in money’s worth, such that section 142(3) applies, so that the deed is ineffective for tax purposes. That view is said to be supported by the decision of a Special Commissioner, Mr Michael Tildesley OBE, in the case of *Lau v Revenue & Customs Commissioners* [2009] SPC740, [2009] STC (SCD) 352. In that case, it is said that various beneficiaries, who were to inherit a pecuniary legacy under their father’s will, disclaimed their legacies so that they would pass to the deceased’s spouse and would be exempt from Inheritance Tax. The spouse thereafter made gifts to the beneficiaries of an amount equal to the original legacies in addition to the tax which would otherwise have been payable on those amounts. It is said that the Special Commissioner found as a fact that the beneficiaries disclaimed their legacies in exchange for the spouse’s gifts. This was held to be consideration for the purposes of section 142(3), such that the purported renunciation of the legacies failed for tax purposes.

28. The letter from Revenue & Customs continues:

“So even if the claimants are successful with their application for rectification, HMRC will not agree to give effect to the deed as rectified on the grounds that section 142(3) applies. The consequence of such a conclusion would be that the spouse exemption would not apply to the whole of the residue and the deceased’s sons would have made a potentially exempt transfer.”

HMRC therefore advise the solicitors to advise their clients, the claimants, to consider withdrawing their application for rectification. If the claimants do decide to proceed with the application, the letter is to be referred in its entirety to the court to make the court aware of HMRC’s view on section 142(3). The letter then concludes with various matters to which it is unnecessary for me to refer.

29. Thus it is that the rectification claim comes before the court for trial today. Mr Richard Oughton (of counsel) appears for the claimants and he has produced a detailed written skeleton argument which he has supplemented with a bundle of the relevant authorities. I am satisfied that Mr Oughton has discharged the duty that was placed upon him by HMRC.
30. Mr Oughton has taken me to various authorities on the law of rectification. I have been taken to the well-known observations of Brightman J in the case of *Re: Butlin’s Settlement Trusts* [1976] Ch 251, in particular at page 260H to 261A. I have been referred to the well-known observation of Peter Gibson LJ in the case of *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560, reported at [2002] 2 EGLR 71, at paragraph 34(3). There, Peter Gibson LJ said that:
- “... the fact that a party intends a particular form of words in the mistaken belief that it is achieving its intention does not prevent the court from giving effect to the true common intention.”
31. Most significantly, Mr Oughton has taken me to the decision of Rimer J in the case of *Wills v Gibbs* [2007] EWHC 3361 Ch, reported at [2008] STC 808. Mr Oughton has, understandably, because he says that that case is on all fours with this one, cited extensively from that decision, in particular from paragraphs 16 through to 25, and later again at paragraph 27. The facts bear a remarkable similarity to those of the present case in that, there again, a Deed of Variation omitted the prescribed statements for Inheritance and Capital Gains Tax purposes.
32. The issue was whether it was appropriate to rectify the Deed of Variation to include those prescribed statements. Rectification was ordered, although I note again that, as in this case, there was no opposition by the defendants to the relief sought. Rimer J held that there was no suggestion that the third defendant, who was the relevant beneficiary who had executed the Deed of Variation, had intended the deed to include the prescribed statements in relation to either Inheritance or Capital Gains Tax. The beneficiary had not so intended because he did not know that such statements were required. However, he had intended to effect a disposition which would, as a matter of law, enjoy the special treatment in relation to both taxes which a Deed of Variation executed within two years of a testator’s death was capable of achieving.
33. He had engaged the second defendant, a solicitor, to prepare the deed because the solicitor was a lawyer and would understand the legal requirements that had to be satisfied in order for the deed to take effect in line with his intention. Unfortunately, the lawyer had, by mistake, omitted to include the required statement. There were said to be issues between the parties which would be resolved by rectification so that the rectification sought would not solely have the effect of securing for the claimant a fiscal benefit. It was said that the mistake was one which the court could, and should, rectify in the manner sought.

34. As with most cases on rectification, the decision turns on its own particular facts. At paragraph 16, Rimer J accepted the submission that the only relevant intention was that of the beneficiary who had executed the Deed of Variation, and not the intentions of the two executors who had also executed it. Rimer J accepted the submission that the beneficiary was, in effect, in the like position as a settlor who seeks to rectify a settlement he has created. The two executors who also joined in the deed, although parties, had not needed to be. Mr Oughton submitted that, in the present case, the relevant intention was that of the three sons who had given up their interest in the residuary estate, and that the court need not be unduly concerned with the intention of the widow, who was the beneficiary of her son's benevolence.
35. I do not accept that submission. When one looks at the terms of the Deed of Variation itself, it seems to me that it is clear that the intention of *all* of the residuary beneficiaries, although not of the executors, is the relevant intention for rectification purposes. It seems to me also that, because of the specific terms of sections 142(1) and (2), the court is required also, so far as Clause 3 is concerned, to have regard to the intention of the widow as well as that of her two sons.
36. At paragraph 18 of his judgement, Rimer J referred to the fact that there was no evidence that, when the beneficiary instructed the lawyer, the beneficiary knew anything about, or had given any thought to, the like provision in relation to Capital Gains Tax; but Rimer J observed that the lawyer's letter of instruction, enclosing the deed for execution, to the beneficiary had explained that, as it was being executed within two years of the testator's death, it worked in the like way for Capital Gains Tax as for Inheritance Tax; and the beneficiaries' evidence was, as that letter showed, that the lawyer had intended that the corresponding Capital Gains provision should apply also. The beneficiary had no reason to dissent from that. Rimer J interpreted that as meaning that he had read the lawyer's advice and accepted it. In short, Rimer J said:
- "The beneficiary had intended the deed to achieve the special effects that a two year deed could achieve, not just in relation to Inheritance Tax, but also in relation to Capital Gains Tax, and he believed it would do so."
37. Rimer J said that there was no suggestion that the beneficiary had intended the deed to include the prescribed statements in relation to either tax. He had not so intended because he did not know that such statements were required; but what Rimer J did find he had intended was to effect a disposition that would, as a matter of law, enjoy the special treatment in relation to both taxes which a Deed of Variation, executed within two years of a testator's death, was capable of achieving. The reason he had employed the lawyer to prepare the deed was because he was a lawyer, and would understand the legal requirements that had to be satisfied in order for the deed to take effect in line with the beneficiary's legal intention. It was, Rimer J found, plainly the beneficiary's intention, albeit no doubt an unspoken one, that the lawyer, as his agent, would prepare the deed in proper form so as to give effect to the beneficiary's commercial and legal intentions.
38. In the event, the lawyer, by what Rimer J found was a mistake, omitted to include the required statement. His evidence was that he was, at the time, well aware of the need to include such statements, and his firm's standard precedent in use at the time incorporated that. Rimer J said that it was apparent that the Deed of Variation followed the structure of that precedent; and the lawyer's evidence was that he was confident, although he could not now know, that the first draft would have included the statement. The lawyer suggested that it was probable that, at some point between the preparation of that draft and the engrossment of the deed, the statement was removed, although there is no suggestion that it was removed deliberately.
39. That, it seems to me, provides the second distinguishing feature on the evidence between the present case and that of *Wills v Gibbs*. Here, there is no evidence that Mr Evans, the draftsman of the Deed of Variation, was well aware of the need to include such a statement as to the

reading-back of the deed for tax purposes; nor is there any suggestion that Mr Evans' firm had any standard precedent, or that it incorporated the necessary reading-back statement necessitated by the amendment to the original tax legislation.

40. In my judgement, that makes no real difference. Mr Oughton submitted that there were two possible explanations as to how the mistake had arisen. The first was a mistake, in the nature of a clerical error, in using the wrong form of precedent. The second, and I suspect more likely, explanation for the mistake is that Mr Evans had failed to keep up with the change in the applicable law. Whichever is the source of the mistake, however, I am satisfied there was.
41. Although there is evidence only from one of the three beneficiaries of the residuary gift in the deceased's will, I am satisfied that there is – although only just – sufficient evidence to satisfy the high burden of proof required in a rectification claim, that requires convincing evidence of mistake on the part of all the relevant parties to the deed in question. In the present case, I am satisfied that the relevant parties are all three defendants, including the widow, and the first-named claimant.
42. In his witness statement, the first claimant says, in terms, that it was the intention of all parties to the Deed of Variation, and of its draftsman, Mr Evans, that it should be back-dated to the date of death for the purposes of Inheritance Tax. I accept that evidence. It is supported by the attendance note and by the whole objective that the transaction was intended to achieve. The attendance note is permeated by references to the need to achieve a particular result within two years of the date of death in order to achieve Inheritance Tax savings. The mistake was in failing to give effect to the right machinery for achieving that.
43. I am satisfied that that is a sufficient mistake to found jurisdiction in a court of equity to rectify the relevant Deed of Variation, so far, at least, as the reading-back statement for Inheritance Tax purposes is concerned. I emphasise that this was a mistake which was not extraneous to the terms of the document itself. It was a mistake within the terms of the Deed of Variation. It went to the terms of that document.
44. In that regard, the decision is entirely distinguishable from that of the Court of Appeal in the case of *Allnutt v Wilding*, (previously cited). Delivering the leading judgement in the Court of Appeal, Mummery LJ (at paragraph 2) described the claim as “an unusual one.” Mr Oughton took me to paragraph 12, and also to paragraph 20 of the decision. At paragraph 12, Rimer J (who, coincidentally, was the judge at first instance in both *Allnutt v Wilding* and *Wills v Gibbs*) had correctly commented that the former case was far removed from the usual type of case in which rectification was, or might be, available. It was not a matter of correcting a mistake made in recording the settlor's intentions by inserting words, or deleting words, or putting in different words because the words that were there had the wrong meaning. The claim made by the trustees in that case involved substituting a wholly different settlement – an interest in possession settlement – in the place of the discretionary settlement, on the general ground that the substituted settlement would achieve the tax saving which the settlor had intended to achieve, but had failed to achieve by the document that he executed.
45. I am entirely satisfied that that is a very different situation from that which comes before me. What I am not satisfied of, on the evidence, was that there was any relevant intention on the part of anyone to include a reading-back statement for the purposes also of Capital Gains Tax. There is no reference to Capital Gains Tax, or any other tax, in the attendance note. Given the high standard of convincing proof required in a claim for rectification, I am not satisfied that a case to rectify the Deed of Variation by including any reference to the statement required by section 62(7) of the Taxation of Chargeable Gains Act 1992 has been made out.

46. Mr Oughton has faithfully discharged his duty, imposed upon him by Her Majesty's Revenue & Customs, by referring me extensively to passages in the judgement of Peter Gibson LJ in the case of *Racal v Ashmore* (previously cited). He has cited extensively from the judgement at pages 1155C to 1158B. I accept Mr Oughton's submission that that judgement is no bar to the claim for rectification in the present case. That case is authority for the propositions that, to found a claim for rectification, there must be a real issue between the parties, and that the burden of proof rests with the party claiming rectification; and it was not satisfied in that case.

47. I am satisfied that the relevant law on this subject is accurately summarised at paragraph 3--169 of *Hodge on Rectification*, first edition, (2010):

"The court cannot rectify a document merely because it fails to achieve the fiscal objectives of the parties to it, or (if the document is of a unilateral nature) of the grantor or covenantor. A mere misapprehension as to the tax consequences of executing a particular document will not justify an order for its rectification. The specific intention of the parties (or the grantor or covenantor) as to how the objective was to be achieved must be shown if the court is to order rectification. The court will order the rectification of a document only if it is satisfied that: (1) it does not give effect to the true agreement or arrangement between the parties, or the true intention of the grantor or covenantor; and (2) there is an issue, capable of being contested between the parties, or between the covenantor or grantor (on the one hand) and the person he intended to benefit (on the other); it being irrelevant, first, that rectification of the document is sought, or event consented to, by all of them; and, second, that rectification is desired because it has beneficial fiscal consequences. Conversely, the court will not order rectification of a document as between the parties, or as between the 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. The need for there to be an issue between the parties before rectification can be ordered derives from the difficult decision of the Court of Appeal in the earlier case of *Whiteside v Whiteside* [1950] Ch 65. The need for there to be an issue between the parties was considered by Rimer J in *Wills v Gibbs* at paragraph 27. There, he observed that, in the absence of rectification, the deed was a lifetime potentially exempt transfer by the beneficiary. If he were to die within seven years, the transfer would result in at least significant, and possibly substantial, Inheritance Tax becoming payable. If the deed was varied as asked, the effect would be that it would not itself be a taxable disposition. An immediate issue which arose between the beneficiary (on the one hand) and the executors (on the other) was the extent to which, under the unrectified deed, the beneficiary could insist on all the property comprised within the gift being transferred to him immediately, without awaiting the expiry of the seven year period. That was because all the assets subject to the deed were currently held by the executors, and, that being so, they would retain a concurrent liability for any Inheritance Tax payable in consequence of the transfer. They would therefore need to retain the assets by way of security against any Inheritance Tax which might prove to be payable on the Deed of Variation in the event of the original beneficiary dying within the seven years; whereas they would have no such need if the deed was rectified as sought. There was also said to be a contingent issue between the two beneficiaries – the original and the substituted – as to whether it would be one or other of their personal representatives who should bear the Inheritance Tax payable in the event of the death of one of them within seven years of the Deed of Variation.

49. I am satisfied, in the present case, that there are real issues which fall to be resolved between the parties if an order for rectification is made. There will be a repayment of a substantial sum by way of Inheritance Tax or, alternatively, if the sum has not yet been paid, there will be a release from the liability for Inheritance Tax in a substantial sum because a gift to a widow made by a document taking effect as part of the will is an exempt transfer. The gift will also affect the cumulative total of transfers of value should any of the three sons fail to survive for seven years from the Deed of Variation. So, for those reasons, I am satisfied that, as with *Wills*

v Gibbs, there are live issues between the parties which will be resolved by an order for rectification.

50. Finally, Mr Oughton addressed me on the additional point raised by HMRC as to the potential application of section 142(3) of the Inheritance Tax Act. Mr Oughton has submitted that the case cited of *Lau v Revenue & Customs Commissioners* is a decision on its own particular facts, which establishes no general proposition of law beyond the fact that the onus of proof on the issue of consideration rests with the taxpayer. Mr Oughton has taken me in detail through the decision, citing paragraphs 21, 35 to 36, and 46 to 47. He submits that the expression “any consideration in money or money’s worth” is a technical expression which requires a bargain which is sufficiently definite. He submits that it does not include a generalised intention to give sums of an indefinite amount at an indefinite time in the future, which gives rise to no legally enforceable obligation, and where the widow could, without adverse consequences to herself, change her mind at any time.
51. I accept those submissions. I accept Mr Oughton’s overarching submission that the question of whether the Deed of Variation will fall foul of section 142(3) of the Inheritance Tax Act is a matter for a future decision by the First-Tier Tribunal. It is not an issue that can be decided by this court, entertaining the present claim for rectification. Mr Oughton recognises that the court should refuse rectification where the relief would serve no useful purpose, or where it would involve an obvious illegality. However, he submits that the court should rectify the deed, and then allow the deceased’s executors, and the Revenue, to argue out the potential applicability, or otherwise, of section 142(3) before the First-Tier Tribunal, which is the proper forum for such a dispute.
52. I accept that submission. It seems to me that it would be appropriate to include in the Order Mr Oughton’s suggested qualification: that the court is, by granting rectification, expressing no opinion upon whether the requirements of section 142(3) of the Inheritance Tax Act are satisfied in relation to the Deed of Variation as rectified.
53. For those reasons, I will make an order in the terms sought by Mr Oughton, but with the omission of any reference to the provisions of section 62, and its relevant subsections, of the Taxation of Chargeable Gains Act 1992. There is to be no order as to costs as between the claimants and the defendants. As stated at the end of the first-named claimant’s witness statement, they are to be picked up by the insurers for the draftsman of the Deed of Variation. Such an approach is entirely consistent with the approach of the Supreme Court in *Marley v Rawlings (No. 2)*, relating to a contested claim, which went all the way to the Supreme Court, for the rectification of a will.
54. What I will, however, do is direct that the order should contain a provision that the claimants are to obtain a transcript of the court’s judgement as part of the costs of this litigation. I suspect that such a transcript will be required for the purposes of any future dispute with Revenue & Customs over the validity and effect of the Deed of Variation (as rectified). It is only right that a transcript of this judgement should be obtained for those purposes as part of the costs of the litigation, which will then fall on the original solicitor’s insurers.