

a **Giles v Royal National Institute of
Blind People and others**
[2014] EWHC 1373 (Ch)

b CHANCERY DIVISION
BARLING J
9 APRIL, 2 MAY 2014

c *Deed of variation – Execution of deed within two years of death of testator – Rectification – Deceased’s will leaving real property and residual estate to her sister – Sister dying shortly after first Deceased – Sister’s will leaving residuary estate to four charities – Solicitor seeking to execute deed of variation so that sister gave up entitlement to Deceased’s estate in favour of charities so as to avoid liability to inheritance tax – Actual effect of deed only redirecting entitlement to Deceased’s*
d *residuary estate and not real property – Whether appropriate to order rectification of deed of variation.*

The claimant, a solicitor, was administratrix of the estate of H and executrix of the estate of H’s sister, E. H died in February 2006. E died in September 2007. In April 2005, H had made a will. E was the beneficiary of H’s will in two
e respects: (1) as beneficiary of a specific devise of real property (‘the Property’); and (2) as residuary beneficiary. Inheritance tax was payable out of the residual estate. E benefited under H’s will, both in respect of the Property and as the residual legatee. Inheritance tax was calculated, on an initial basis as at March 2007, in such a sum which left very little by way of residue prior to other
f expenses of the estate. E had also made a will in April 2005, the structure of which was very similar to that of H. Leaving aside specific legacies, and of gifts which lapsed as a result of H (and another sister) predeceasing her, E left the residue of her estate to four charities equally. Although gifts to charity were exempt from charge to inheritance tax, the combined effect of the two wills was that the Property and H’s residue passed first to E on H’s death, and only
g on E’s death did they pass to the four charities. Thus, the gifts that ultimately benefited the four charities attracted inheritance tax, albeit indirectly. The claimant was aware that, by virtue of s 142^a of the Inheritance Tax Act 1984, it was possible to effect a deed of variation within two years of death in order to redirect gifts passing under a will. She wrote to each of the four charities proposing a deed of variation to the effect that E gave up her entitlement to the
h estate of H in favour of the four charities, so as to make H’s estate totally exempt from liability to inheritance tax. A deed of variation was subsequently executed. The deed did not, however, redirect to the four charities E’s entitlement to H’s whole estate, but only the gift of the residue of H’s estate. It did not purport to affect the Property in any way, and did not have any effect on the inheritance tax chargeable on the Property. The claimant brought a
j claim before the court to rectify the deed, on the basis that it did not properly record her intention as set out in the letters sent to the four charities. The Revenue and Customs Commissioners were made aware of the claim for rectification, and did not oppose it.

^a Section 142, so far as material, is set out in Annex 1, below.

Held – The criteria for rectifying the deed of variation so that it reflected the clear intention of the claimant at the time it was made were satisfied. The claimant's intention in executing the deed of variation was clear from the contemporaneous documents, particularly the letters sent to the four charities. The intended effect of the deed had been to redirect the whole of E's entitlement to H's estate, howsoever arising, to the four charities, thus rendering E's estate totally exempt from liability to inheritance tax. It followed that there was convincing proof of error. Moreover, the effect of the deed of variation did not reflect the clear intention of the claimant (and beneficiaries). It was no bar to rectification that in executing the deed of variation it was undoubtedly an objective of the claimant to relieve the four charities of the indirect burden of inheritance tax. The claimant's intention had been proved with the requisite precision. The case was one where there existed potential issues which affected the rights of those concerned. There was no need for an actual dispute to exist, and it was irrelevant that the rectification of the deed was sought or consented to by all interested parties. In the circumstances of the case it was right to grant the relief sought (see [25], [28], [30], [31], [34], [36], [38], [45]–[47], below).

Racal Group Services Ltd v Ashmore [1995] STC 1151 applied.

Notes

For deeds of variation generally, see Simon's Taxes C1.206B.

Cases referred to in judgment

Allnutt v Wilding [2007] EWCA Civ 412, 9 ITEL R 806; *affg* [2006] EWHC 1905 (Ch), 9 ITEL R 381.

Ashcroft v Barnsdale [2010] EWHC 1948 (Ch), [2010] STC 2544, 13 ITEL R 516.

Co-operative Insurance Society Ltd v Centremoor Ltd [1983] 2 EGLR 52, CA.

Racal Group Services Ltd v Ashmore [1995] STC 1151, 68 TC 86, CA; *affg* [1994] STC 416.

Swainland Builders Ltd v Freehold Properties Ltd [2002] EWCA Civ 560, [2002] All ER (D) 314 (Apr).

Vallings v Gibbon [2013] EWHC 2862 (Ch).

Wills v Gibbs [2007] EWHC 3361 (Ch), [2008] STC 808.

Claim

Melinda Giles, in her capacity as administratrix of the estate of Hilda Bolton and as executrix of the estate of Ellen Bolton, brought a claim to rectify a deed of variation executed in November 2007 purporting to redirect gifts to Ellen under Hilda's will to four charities, who were residual beneficiaries under Ellen's will, so as to exempt Hilda's estate from inheritance tax. Hilda Bolton died in February 2006, and Ellen Bolton died in September 2007. The four charities, who were also defendants to the claim, but who did not oppose it, were the Royal National Institute of Blind People, the Royal Society for the Prevention of Cruelty to Animals, the Cats' Protection League and the People's Dispensary for Sick Animals. The Revenue and Customs Commissioners were notified of the claim and indicated that they did not wish to be joined as a party. The facts are set out in the judgment.

David Yates (instructed by *Kennedys Law LLP*) for the claimant.

- a* The defendants were not represented.

Judgment was reserved.

2 May 2014. The following judgment was delivered.

b **BARLING J.**

INTRODUCTION

- c* [1] This is a claim brought under Pt 8 of the Civil Procedure Rules ('CPR') for rectification of a deed of variation dated 24 November 2007 ('the deed of variation') which purported to alter the provisions of the will of Hilda Elsie Bolton with a view to reducing the incidence of inheritance tax, pursuant to s 142 of the Inheritance Tax Act 1984.

- d* [2] The claim for rectification is not opposed by any of the defendants ('the four charities') or by the Revenue and Customs Commissioners ('HMRC'). A claim for refund of inheritance tax has been made and will trigger a repayment insofar as the application for rectification is successful. I have been shown correspondence from HMRC indicating that they did not wish to be joined as a party and do not oppose the application.

- e* [3] Neither the four charities nor HMRC were represented at the hearing. The claimant was represented by Mr David Yates, to whom I am grateful for his helpful analysis of the relevant principles and case law. In addition to his skeleton argument, he also supplied a short supplemental note after the hearing.

BACKGROUND

- f* [4] The claimant, Melinda Giles, brings the claim in her capacity as the administratrix of the estate of Hilda Elsie Bolton and as executrix of the estate of Hilda's sister, Ellen Mary Bolton. The background is set out in the claimant's witness statement dated 31 October 2013 ('the witness statement').

[5] Hilda was born on 21 October 1908 and died on 6 February 2006. Ellen was born on 5 November 1914 and died on 11 September 2007. There was a third sister, Anne, who died on 11 October 2006. However, the present matter arises out of the interaction of the wills of Hilda and Ellen.

- g* [6] On 4 April 2005 Hilda made a will ('Hilda's Will'). Ellen was the beneficiary of Hilda's Will in two respects:

- (1) as beneficiary of a specific devise of a property, 43 Crosby Road, Westcliff on Sea, Essex ('the Property'), under cl 2(a) of Hilda's Will; and
- (2) as a residuary beneficiary under cl 5.

- h* [7] Clause 7 of Hilda's Will provided that 'the Inheritance Tax payable on my death in respect thereof shall be payable out of my Residuary Estate in exoneration of the specific legacies given by this my Will'.

- j* [8] As I have said, Hilda died on 6 February 2006 whilst Ellen lived until 11 September 2007. Consequently, Ellen benefited under Hilda's Will, both by cl 2(a) in respect of the Property and as the residuary legatee. The inheritance tax due on Hilda's estate was calculated, on an initial basis as at March 2007, in the sum of £254,595, taking account of the then nil rate band of £275,000. This would have left very little by way of residue prior to other expenses of the estate.

[9] Ellen, too, had made a will dated 4 April 2005, the structure of which was very similar to that of Hilda ('Ellen's Will'). Leaving aside the details of specific

legacies, and of gifts which lapsed as a result of both Hilda and Anne a
predeceasing her (none of which is material for present purposes), by cl 6 of
her will Ellen left the residue of her estate to the four charities equally.

[10] Although gifts to charities are and were exempt from charge to b
inheritance tax by virtue of s 23 of the 1984 Act, the combined effect of the
two wills was that the Property and Hilda's residue passed first to Ellen on
Hilda's death, and only on Ellen's death did these pass to the four charities.
Thus, the gifts which ultimately benefited the four charities attracted c
inheritance tax, albeit indirectly.

[11] In the witness statement the claimant, who is a solicitor, says that in 2007
she was aware of the possibility of taking advantage of s 142¹ of 1984 Act by
effecting a deed of variation within two years of the date of death in order to
redirect gifts passing under a will. Under s 142 such a variation would take c
effect for inheritance tax purposes as at the date of death. In this regard the
claimant was apparently aware that if such a deed of variation were used to
redirect all of Ellen's entitlement under Hilda's Will to the four charities, there
would be no inheritance tax at all to pay on Hilda's estate, since the total of
chargeable transfers arising from Hilda's death would be less than Hilda's then d
available nil rate band of £275,000, and the redirected gifts of the Property and
the residue would enjoy relief under s 23 of the 1984 Act. In other words, the
sums otherwise due by way of inheritance tax would accrue to the four
charities under Hilda's Will (as deemed to be amended by the deed of
variation).

[12] Accordingly, following Ellen's death on 11 September 2007 the claimant, e
in the name of the firm of solicitors in which she is a partner, wrote to each of
the four charities proposing a deed of variation. Exhibited to the witness
statement is a copy of the letter dated 5 November 2007 which was sent to the
Royal Society for the Prevention of Cruelty to Animals ('RSPCA') (the letters to
the others being in identical terms). That letter contained the following: f

'However, a bigger picture occurs to us. If as Personal Representative of f
the late Ellen Mary Bolton our Melinda Giles were to enter into a Deed of
Variation in respect of the late Ellen Mary Bolton's entitlement to the
estate of the late Hilda Bolton, this could save a considerable amount of
Inheritance Tax. We are therefore drafting a Deed of Variation to the effect
that Ellen Mary Bolton give up her entitlement to the estate of her late g
sister in favour of the same charitable beneficiaries who are entitled to the
estate of herself, i.e. Ellen Bolton. This should make the first estate, i.e. the
estate of Hilda Bolton, totally exempt for Inheritance Tax ...'

[13] There are two significant features of that passage: first, the proposed
deed of variation is intended to have the effect of Ellen '[giving] up her h
entitlement to the estate of [Hilda]'; second, it is anticipated that the deed of
variation will render Hilda's estate '*totally exempt*' from liability to inheritance
tax (my emphasis).

[14] Of the four charities, three replied to the claimant indicating their broad
agreement to the proposal. There was no response from the Royal National
Institute of Blind People (RNIB). j

[15] On 24 November 2007 the deed of variation was executed by the
claimant. This document had been drafted by the claimant herself.

¹ Section 142, so far as relevant, is at Annex 1 to this judgment.

a [16] On 5 December 2007 the claimant, as administratrix of Hilda's estate, signed four memoranda of appropriation ('the memoranda') purporting to appropriate the Property to the four charities in part satisfaction of what was described in the memoranda as their respective quarter shares in the residue of Hilda's estate. The memoranda expressly refer to Hilda's Will as 'varied by the Deed of Variation'.

b [17] The claimant's firm wrote to HMRC on 11 December 2007 enclosing the deed of variation. The letter states:

**'Re: Hilda Elsie Bolton, deceased
43 Crosby Road, Westcliff on Sea**

c Further to this matter we attach Deed of Variation in duplicate for noting and return and it will be noted that this will have an effect on the Inheritance Tax being charged for this property and we therefore look forward to receiving amended calculations and refund.'

d [18] Two features of this letter should be noted: first, the writer is clearly under the impression that the deed of variation has an effect on the inheritance tax chargeable in respect of *the Property*; second, the writer believes that the effect in question will result in a refund of inheritance tax by HMRC.

[19] The Property was sold soon afterwards, in December 2007. The claimant states in the witness statement that she believed she was selling the property as a bare trustee for the four charities, having exercised a power of appropriation.

e THE DEED OF VARIATION

f [20] Contrary to the apparent intention set out in the letter to the four charities, the deed of variation did not redirect to them Ellen's entitlement to Hilda's estate. On its wording the deed of variation redirected to the four charities only the gift of *the residue* of Hilda's estate. Therefore in other respects the terms of Hilda's Will, and in particular the specific devise of *the Property* to Ellen, were unchanged for the purposes of s 142. Contrary to what was stated in the letter to HMRC, the deed of variation had no effect at all on the inheritance tax chargeable on the Property; it did not purport to affect the Property in any way. Since the refund of tax anticipated by the claimant in her letter to HMRC was wholly linked to the redirection of *the Property*, the deed of variation did not result in any entitlement to a refund. It achieved no saving of inheritance tax at all.

g [21] In addition, the deed of variation contains two obvious errors of a clerical nature. First, para 3 of the recitals refers to 'cl 4' of Hilda's Will when it should refer to 'cl 5'. Second, there is a reference, in substantive cl 4, to 'the Inheritance Tax Act 1979'. No such Act exists. The reference should be to the 1984 Act. The court is also asked to rectify these clerical errors.

THE MAIN CLAIM FOR RECTIFICATION

j [22] The claimant submits that the wording of the deed of variation did not properly record her intention, or indeed the intention and/or understanding of the four charities to whom the claimant circulated the draft deed under cover of the letter dated 5 November 2007. Because only the residue was redirected, rather than all of Ellen's entitlement under Hilda's Will, the Property (subsequently agreed with HMRC to be worth £415,000 at the date of Hilda's death) remained within the charge to inheritance tax, thereby defeating the object of the exercise undertaken by the claimant.

[23] In these circumstances it is submitted by the claimant that the deed of variation can and should be rectified by the court in the proper exercise of its discretion. a

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. b

[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. c

(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). d

(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). e

(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). f

(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— g

‘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.) h

a APPLICATION OF THE CRITERIA IN THE PRESENT CASE

[26] It is necessary to consider these criteria in the context of the facts in this case, none of which is actually disputed.

Convincing proof of error

b [27] Quite apart from her evidence in the witness statement, the intention of the claimant in executing the deed of variation is established beyond doubt in the light of the contemporaneous documents, and in particular her letters to the four charities of 5 November 2007 (see [12] and [13], above), her letter of 11 December 2007 to HMRC (see [17] and [18], above) and the memoranda (see [16], above).

c [28] These documents establish that the deed of variation was at all times intended to achieve the following: the *whole* of Ellen's entitlement to Hilda's estate, however arising, (and not just the residue) should be surrendered and redirected to the four charities; Hilda's estate would thereby be rendered 'totally exempt' from liability to inheritance tax, producing an entitlement to a refund from HMRC; this would be achieved, wholly or mainly, by the effect of the deed of variation on the inheritance tax chargeable in respect of *the Property*.

e [29] It is also clear that the claimant, in her capacity as Hilda's administratrix, could not have believed herself in a position to appropriate the Property to the four charities in part satisfaction of their respective quarter shares in the residue of Hilda's estate, unless she believed that the Property formed part of that residue, as opposed to being subject to the original specific devise. This further evidences the claimant's belief that by the deed of variation she had redirected the Property to the four charities, so that it formed part of the residue of Hilda's estate.

f [30] There is therefore in my view no doubt as to what the claimant intended to achieve by the deed of variation or as to what she believed at the time it had achieved. There is no evidence of a contrary intention on anyone's part. In particular, three of the four charities expressed their agreement with the claimant's aim and proposed course of action in response to her letter of 5 November 2007.

g [31] I therefore consider that the requirement of 'convincing proof of error' is satisfied.

Error as to intended effect of document as opposed to consequences

h [32] The distinction drawn in the second criterion is between a mistake as to the effect of an instrument, and a misapprehension of what the fiscal or other consequences are of a document which does not in fact misimplement the parties' or donor's intention. A good illustration of this distinction is to be seen in a decision of the Court of Appeal which is the second of the two authorities HMRC wished to be drawn to the court's attention in this case.

j [33] In *Allnutt v Wilding* [2007] EWCA Civ 412, 9 ITEL 806 the Court of Appeal held that there had been no mistake as to the effect of creating a discretionary trust. Rather there was a misapprehension that creation of a discretionary trust meant that the transfers of assets into such a trust were a potentially exempt transfer, as opposed to being subject to an immediate lifetime charge to inheritance tax. It was therefore not possible to rectify the settlement deed so as to create an interest in possession trust instead. Rimer J put the matter as follows at first instance ([2006] EWHC 1905 (Ch), 9 ITEL 381):

[23] The case is therefore one in which I find that Mr Strain intended to execute a settlement in exactly the form that Mr Wilding drafted. In so far as he was labouring under any sort of mistake when he did so, his mistake was not as to the language, terms, meaning or effect of the settlement. His only mistake was that a payment of the £550,000 to it would be a potentially exempt transfer.

[24] In my judgment a mistake of that nature is not one which the court has any jurisdiction to rectify. Since, for reasons given, Mr Strain must be assumed to have understood the meaning and effect of the substantive trusts and powers of the settlement he executed, and to have intended to execute a settlement in that form and having the legal effect it did, there is no error in the drafting of the settlement (or in his understanding of it) that calls for correction. Mr Strain's only mistake was in relying on Mr Wilding's implicit advice that the payment of money to that settlement would be a potentially exempt transfer. That was wrong, and apparently negligent, advice. But in the circumstances of the case the remedy of rectification is not available to cure the damage it has caused.'

[34] The present case does not in my judgment fall foul of this obstacle. Here the effect of the deed of variation did not reflect the clear intention of the claimant (and beneficiaries), namely to redirect the entirety of Ellen's entitlement under Hilda's Will to the four charities, rather than just her entitlement in respect of the residue. In these circumstances it is no bar to rectification that in executing the deed of variation it was undoubtedly an objective of the claimant to relieve the four charities of the indirect burden of inheritance tax.

Specific intention

[35] In relation to this issue, 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 LJ agreed.'

See also *Wills v Gibbs* [2007] EWHC 3361 (Ch) at [25], [2008] STC 808 at [25] per Rimer J (as he then was), *Ashcroft v Barnsdale* [2010] EWHC 1948 (Ch), [2010] STC 2544, and *Vallings v Gibbon* [2013] EWHC 2862 (Ch).

[36] I have already found that in the present case the claimant has established what was actually intended to be the effect of the deed of variation, namely to redirect the entirety of Ellen's entitlement under Hilda's Will to the four charities, rather than just her entitlement in respect of the residue. In my view that intention has been proved with the requisite precision, even though, as the claimant indicates in the witness statement, there may be more than one route to achieving this within the deed of variation.

[37] The claimant submits that if rectification of the deed of variation is granted, it should be implemented by providing for the deletion of cl 2(a) of

- a* the Hilda's Will, which made the specific devise of the Property to Ellen. It is clear that this, when combined with the deed of variation's existing redirection of the residue of Hilda's estate to the four charities, would achieve the claimant's original intention. I also accept that this is the route which is most consistent with the premise upon which the memoranda were made.
- b* *Issue capable of being contested*
[38] As I have already indicated, there is no need for an *actual* dispute to exist, and it is irrelevant that rectification of the instrument in question is sought or consented to by all interested parties.
[39] In the present case the only party adversely affected by the proposed
- c* rectification is HMRC and, as stated earlier, they have indicated that they do not wish to be joined and do not object to the claim. None of the four charities nor HMRC has appeared or been represented before me.
[40] I note that on 7 November 2013 the claimant and the four charities signed a draft consent order providing for rectification of the deed of variation. Mr Yates told me that this was done without taking account of the fact that
- d* rectification is a discretionary remedy. He submits, and I agree, that the signing of this draft order is not effective in the absence of the court's approval, and that it does not affect one way or another the existence of an issue capable of dispute.
[41] Mr Yates submits that here the following issues are capable of being
- e* contested:
(1) what the entitlement of the four charities is under the deed of variation itself; in particular, whether the deed of variation was effective in gifting the Property directly to the four charities;
(2) what the entitlement of the four charities is under Ellen's Will; and
(3) the negligence claim intimated in a letter dated 16 November 2011 by
- f* the four charities against the claimant and/or her solicitors in relation to the drafting of the deed of variation.
[42] In expanding upon these points, Mr Yates argues in relation to point 1, that had the claimant not also been the executrix of Ellen's Will (under which the four charities benefited) there would have been an issue whether, quite
- g* apart from the deeming provision of s 142, the deed of variation gifted the Property to the four charities.
[43] As to point 2, Mr Yates submits that again this depends upon the effect of the deed of variation, which is in turn dependent on this claim for rectification. The deed of variation (if rectified) would have reduced the amount of inheritance tax payable by Hilda's estate because, for inheritance tax purposes,
- h* the four charities would have been treated as entitled to the Property under Hilda's Will (as well as to any other residue). However, Ellen was up to and at the time of her death on 11 September 2007 the relevant beneficiary of Hilda's Will, both under cl 2(a) and cl 5. The deed of variation was only made in late November 2007. Whatever the actual effect of the deed of variation (ie whether it gave rise to a 'real world' entitlement in favour of the four
- j* charities, independently of Ellen's Will), if the document is rectified it will mean that the four charities will either receive Ellen's entitlement to Hilda's estate free of inheritance tax under the deed of variation, or by virtue of Ellen's Will, or a combination of the two. Currently, the claimant has accounted for inheritance tax to HMRC in relation to Hilda's estate. This reduces the value of Ellen's entitlement to the residue of Hilda. Unless and

until rectification is granted, the claimant will have no right to a refund from HMRC (in respect of Hilda's estate), the estate of Ellen will remain diminished, and the four charities will not be able to receive moneys which have been paid to HMRC. a

[44] Mr Yates further submits that point (3) is a genuine and substantive dispute which can be seen as both a freestanding issue for present purposes, and/or as evidencing the reality of the potential issues under points (1) and/or (2). Any such negligence action will only arise to the extent that the deed of variation remains unrectified. b

[45] In my view Mr Yates is correct in submitting that there exist here potential issues which affect the rights of those concerned. This is not a case where, to borrow the words of Vinelott J in *Racal* 'their rights will be unaffected and ... the only effect of the order [of rectification] will be to secure a fiscal benefit'. c

[46] It follows that this criterion, too, is satisfied in the present case.

CONCLUSION

[47] In the light of the matters discussed above I consider that the criteria for rectifying the deed of variation so that it reflects the clear intention of the claimant at the time it was made, are satisfied, and that in all the circumstances it is right to grant the relief. Although the claimant acknowledges in the witness statement that there has been some lapse of time from the date the error was discovered (October 2008) to when steps were first taken to approach HMRC (November 2012), I am satisfied that the delay has not caused prejudice of any significant kind, and certainly not such as to lead me to decline the relief sought. d
e

THE ORDER

[48] Accordingly I propose to order rectification of the deed of variation in the terms of the draft order at Annex 2 to this judgment, which was discussed during the hearing. The rectification so ordered includes consequential amendments to the recitals of the deed of variation to reflect the content of its schedule, as well as correction of the clerical errors referred to at [21], above. f

Order accordingly.

Aaron Turpin Barrister. g

ANNEX 1 TO THE JUDGMENT

'142. Alteration of dispositions taking effect on death

(1) Where within the period of two years after a person's death— h

(a) any of the dispositions (whether effected by will, under the law relating to intestacy or otherwise) of the property comprised in his estate immediately before his death are varied ...

by an instrument in writing made by the persons or any of the persons who benefit or would benefit under the dispositions, this Act shall apply as if the variation had been effected by the deceased ... j

(2) Subsection (1) above 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.

(2A) For the purposes of subsection (2) above the relevant persons are—

(a) the person or persons making the instrument ...'

a ANNEX 2 TO THE JUDGMENT

IT IS ORDERED THAT:

1. The deed of variation dated 24 November 2007 made by the claimant in her capacity as executrix of the estate of Ellen Mary Bolton be rectified by the alterations reflected in the text of the deed of variation appended to this order,

b namely:

(a) Inserting the sentence 'By cl 2(a) of the Original Will the freehold of the property known as 43 Crosby Road (the Property) is devised to the Testator's sister Ellen Mary Bolton absolutely' at the beginning of cl 3 of the Preamble.

c (b) Substituting for the word 'cl 4' in cl 3 of the Preamble the word 'cl 5',
(c) Adding in cl 6 of the Preamble immediately after the words 'has agreed that' the following: 'both the Property and'.

(d) Substituting for the word '1979' in cl 4 of the Deed the word '1984'.

(e) Adding in the introductory words of the Schedule immediately after the words 'save that' the words 'cl 2(a) of the Original Will shall be deleted and'.

d 2. The first to fourth defendants' costs of and incidental to this claim, to be assessed on the standard basis if not agreed, are to be paid by the claimant.

3. There shall be no further order as to costs.

APPENDIX

e **THIS DEED OF VARIATION** is made the 24 day of November 2007 by **MELINDA GILES** of 1711 London Road Leigh on Sea Essex (hereinafter referred to as the executor)

WHEREAS

f 1. **HILDA ELSIE BOLTON** (the Testator) late of 43 Crosby Road Westcliff on Sea Essex died on 2 February 2006 leaving a will dated 4 April 2005 (the Original Will)

2. A Grant of Probate to the Estate of the Testator was granted to the Executor out of the Winchester District Probate Registry on 21 May 2007

g 3. By cl 2(a) of the Original Will the freehold of the property known as 43 Crosby Road (the Property) is devised to the Testator's sister Ellen Mary Bolton absolutely. By cl 5 of the Original Will the residue of the Estate is left to the Testator's sister Ellen Mary Bolton absolutely

4. The said Ellen Mary Bolton died on 11 September 2007 and by her last Will she appointed the said Melinda Giles to be her Executor

h 5. A Grant of Probate to the estate of Ellen Mary Bolton was granted to the said Melinda Giles out of the Winchester District Probate Registry on 23 November 2007

6. As Executor to the Estate of the late Ellen Mary Bolton the said Melinda Giles has agreed that both the Property and the residue of the Estate of the late Hilda Elsie Bolton should go to the residuary beneficiaries of the Estate of the said Ellen Mary Bolton

j **NOW THIS DEED WITNESSETH** as follows:

1. That the disposition of the Estate of the Testator on her death shall be varied as if the Testator had on the day of her death duly executed a Will on the terms of the Notional Will

2. The Executor on distributing the Estate of the Testator in accordance with the terms of this Deed will be fully discharged from her obligation as Executor

3. The party hereto undertakes to execute any necessary documentation to give effect to this Deed a

4. By her execution of the Deed the party hereto gives notice to the Board of the Inland Revenue of an election that the provisions of s 142 of the Inheritance Tax Act 1984 shall apply to this Deed so that the variation of the Disposition of the Estate of the Testator effected by this Deed shall be deemed to be a variation effected by the Testator b

5. It is hereby certified that this interest falls within category M in the Schedule to the Stamp Duty (Exempt Instruments) Regulations 1987

AS WITNESS whereof the party hereto has hereunto set her hand and seal the day and year first before written

THE SCHEDULE c

The Notional Will

The terms of the Notional Will are to remain the same as the Original Will save that cl 2(a) of the Original Will shall be deleted and cl 5 of the Original Will shall be replaced by cl 5 as follows:

5) **I GIVE DEVISE AND BEQUEATH** the residue of my Estate equally between the following four charities: d

a) **ROYAL NATIONAL INSTITUTE FOR THE BLIND**

b) **ROYAL SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS**

c) **CATS' PROTECTION LEAGUE** e

d) **PEOPLE'S DISPENSARY FOR SICK ANIMALS**