SUPREME COURT OF QUEENSLAND

CITATION:	*Benaroon Pty Ltd v Larmar & Ors* [2018] QSC 274
PARTIES:	**BENAROON PTY LTD** ACN 009 990 381 (Applicant) **v** **YVONNE MARGARET LARMAR** (first respondent) **THE LARMAR TRUST No. 3** (second respondent) **THE KINGDOM MINISTRIES TRUST** (third respondent) **NARELLE LARMAR** (fourth respondent) **ANNA O'LEARY** (fifth respondent) **ZACHARY O'LEARY** (sixth respondent) **CALEB COULTER** (seventh respondent) **ASHEN O'LEARY** (eighth respondent) **ROWAN HILL** (ninth respondent)
FILE NO/S:	BS No 9647 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 November 2018
DELIVERED AT:	Brisbane
HEARING DATE:	9 November 2018
JUDGE:	Martin J
ORDER:	**1. The Application is dismissed.**
CATCHWORDS:	EQUITY – GENERAL PRINCIPLES – MISTAKE – EQUITABLE REMEDIES – RECTIFICATION – WHERE UNILATERAL MISTAKE – where a family trust was caused to be created by a director of the

trustee applicant – where the settlor had no independent intention as to how the trust was to operate and acted on the instructions of a director of the trustee – where it is contended that the trust deed does not conform with the actual intention of a director of the trustee at the time of creation of the trust – where the applicant has the settlor's consent to bring the application for rectification – whether there is clear and convincing evidence that at the time the trust was created the director of the trustee had an actual intention as to the effect of the trust which was different from the practical effect of the instrument

Butlin's Settlement Trusts [1976] 1 Ch 251
Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd (1995) 41 NSWLR 329

GE Capital Finance Australasia Pty Ltd v Federal Commissioner of Taxation (2011) 219 FCR 420
Maralinga Pty Ltd v Major Enterprises Pty Ltd (1973) 128 CLR 336
Public Trustee v Smith [2008] NSWSC 397
Sanwick Pty Ltd v Kalyk [2016] NSWSC 100

COUNSEL:	F L Harrison QC and A J Anderson for the applicant RT Whiteford for the first respondent
SOLICITORS:	Tobin King Lateef Lawyers for the applicant McCullough Robertson Lawyers for the first respondent

[1] In March 1977 the Larmar Family Trust was created. The applicant (Benaroon) is the trustee. Benaroon was incorporated on 2 March 1977, with Earl Larmar and his former wife, Suzanne Larmar, as the original directors. Since its creation Benaroon has made distributions to, among others, Earl, Suzanne and his current wife – Margaret, the first respondent. After more than four decades of operation the trustee now says that the trust deed does not conform with the actual intention of Mr Larmar when he caused the trust to be created.

[2] The applicant seeks rectification of the trust deed by, among other things, the addition of Earl Larmar's name to the list of beneficiaries. If the trust deed is not rectified to include Earl Larmar as a beneficiary then any distributions to him and to his spouse will have been made without authority. If it is so rectified, then it will operate to make his former wife and his current wife beneficiaries at the relevant times.

[3] The application is opposed by Margaret Larmar. Following an audit conducted by the Australian Tax Office, the ATO has formed the view that if Margaret Larmar is not a beneficiary, then she is entitled to a tax refund. If she is a beneficiary, then the ATO says that she has a tax liability of nearly $8 million.

Principles applicable to the rectification of a trust deed

[4] The doctrine of rectification applies to both bilateral and unilateral trust transactions.[1]

[5] The prerequisites for granting the remedy were considered by Mason J (as he then was) in *Maralinga Pty Ltd v Major Enterprises Pty Ltd*[2] where he said that there had been a firm insistence on the requirement that the mistake as to the writing must be common to the parties and not merely unilateral except in cases of a special class.

[6] That statement was picked up by Stevenson J in *Sanwick Pty Ltd v Kalyk*[3] where at [16] he said:

> "An example of the 'special class' to which Mason J referred is a voluntary settlement creating a trust where the settlor has no independent intention as to how the trust is to operate and who acts on the instruction of, or at the request of the proposed trustee; or, as here, the person who in substance stands behind the trustee."

[7] This trust deed falls within that description. It was not one in which the terms of the trust represent a bargain between the settlor and some other person or persons.

[8] Both parties accepted, as do I, that for a trust deed to be rectified:

> "… there must be **clear and convincing evidence** that at the time the trust deed was executed the trustee and the settlor had an actual intention as to the effect which the deed was intended to create which was different from the effect which the instrument did have in a clearly identified way … . It must be **demonstrated with clarity** that the parties had **a sufficiently precise intention** that the court can determine both the substance and the detail of the precise variation to be made to the wording of the instrument …"[4] (emphasis added)

Who may seek rectification?

[9] It is assumed in a number of authorities that rectification will be sought by the settlor. In *Re Butlin's Settlement*[5] Brightman J said that, in the absence of an actual bargain between the

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1 *GE Capital Finance Australasia Pty Ltd v Federal Commissioner of Taxation* (2011) 219 FCR 420 at [105]; *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329 at 345.

2 (1973) 128 CLR 336 at 350.

3 [2016] NSWSC 100.

4 *Public Trustee v Smith* [2008] NSWSC 397 at [71].

5 *Butlin's Settlement Trusts* [1976] 1 Ch 251.

settlor and the trustees, "a settlor may seek rectification by proving that the settlement does not express his true intention".[6] Those words were picked up in *Day v Day*[7] where Sir Terence Etherton C[8] said:

> "What is relevant in such a case is the subjective intention of the **settlor**. It is not a legal requirement for rectification of a voluntary settlement that there is any outward expression or objective communication of the settlor's intention equivalent to the need to show an outward expression of accord for rectification of a contract for mutual mistake."[9] (emphasis added)

[10] The evidence of Earl Reeves – the settlor – is relevant. He was a client of Earl Lamar and, after a conversation with him, the Reeves Family Trust was created – at about the same time as the Larmar Family Trust. Earl Reeves became the settlor of the Larmar Family Trust and Earl Larmar became the settlor of the Reeves Family Trust. In his affidavit, Mr Reeves deposes:

> "15. Around the time that the two trusts were created I did not know what the role of Settlor entailed, and I do not recall any specific discussions about me being the Settlor for the Larmar Family Trust. However, since Earl was my accountant, I would have signed whatever document I was given by him in relation to the Larmar Family Trust and, as such, I had no separate intentions regarding its structure."

[11] It was not in contest that Mr Reeves' had no relevant intention as settlor. He simply did what he was asked. I infer that both parties were content to proceed on the basis that, at the relevant time, it should be taken that the settlor's intention was whatever Mr Larmar wanted. This case falls within the class referred to by Stevenson J in *Sanwick.* In any event, it appears that the applicant has the settlor's consent to bring the application.

The creation of the trust

[12] On 2 March 1977 the applicant was incorporated and, on the following day, the trust was established. At that time Earl Larmar and Suzanne Larmar were married. They divorced in March 2001 and Suzanne Larmar ceased to be a director in October 2006 following the finalisation of property proceedings in the Family Court of Australia.

[13] It is not contested that Suzanne Larmar is, due to ill health, unable to provide any evidence about the matters in issue.

[14] At some unidentified time Earl Larmar married Yvonne Margaret Larmar. She has been referred to as Margaret by both parties.

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6 *Butlin's Settlement Trusts* [1976] 1 Ch 251 at 262.

7 [2014] Ch 114.

8 With whom Elias and Lewison LJJ agreed.

9 Day v Day [2014] Ch 114 at [22].

Who are the beneficiaries under the deed of trust?

[15] Clause 3 of the trust deed gives Benaroon the power and discretion, until the distribution date or the prior death of the survivor of Earl Larmar and Margaret Larmar, on or before the 30th of June each year, to pay or apply the whole or any part of the net income arising from the trust fund in the annual accounting period ending on that 30th June to or for the benefit of all or any one of the beneficiaries (which are defined), or the spouses of the beneficiaries, or such of the issue of the beneficiaries or the spouses of the issue of the beneficiaries as shall then be living as the trustee in its absolute discretion determines.

[16] The beneficiaries of the trust are defined to mean the persons referred to in the second schedule of the trust deed.

[17] The second schedule names a number of beneficiaries – both natural persons and institutes of learning. The named beneficiaries are the children of Earl Larmar. Earl Larmar is not named as a beneficiary and, as a result, neither his first or second wife comes within the definition of a beneficiary.

[18] In the years 2008 to 2017 Benaroon distributed part of the net income of the trust to Margaret Larmar. In the years 2000 to 2004 it can be established that distributions were made to his then wife, Suzanne.

What was intended?

[19] Earl Larmar's evidence was that he intended that the trust would be for the benefit of himself, his spouse, his children, grandchildren and "the usual remaining beneficiaries".

[20] His explanation for the deed not naming him as a beneficiary is as follows.

[21] At the relevant times, Mr Larmar was an accountant and a partner of the firm of White & Hancock. He would, in the ordinary course of his practice, assist clients to create trusts. Mr Larmar's firm used the services of a firm of solicitors called Smith & Fitzgerald. Smith & Fitzgerald developed a precedent for a trust deed which was used frequently by Mr Larmar.

[22] In 1975 Margaret Ryan became Mr Larmar's personal secretary and has remained in that position since then.

[23] He said that when a client required the creation of a trust he would follow the practice of dictating a standard form letter to Smith & Fitzgerald requesting the preparation of a trust deed. The letter would ordinarily include: the proposed name of the trust, the details of the trustee, details of the settlor, details of the appointors, particulars of the discretionary nature of the trust, and details of the beneficiaries of the trust. He said that Margaret Ryan would type the letter which would be then sent to Smith & Fitzgerald.

[24] In his first affidavit, Mr Larmar said that, in or around early 1977, he had a conversation with Suzanne Larmar to the following effect:

"Earl Larmar: 'I want to establish a family trust as we have discussed previously for the benefit of ourselves and our family'.

Suzanne Larmar: 'I think that this is a good idea'."

[25] Mr Larmar also says that he had an intention to ensure effective tax distributions for the benefit of himself, his wife and their family and so wanted to establish a family trust. He says that he recalled that in or about early 1977 he said words to the effect to Margaret Ryan: "I want to establish a family trust for the benefit of myself my wife, our children, and grandchildren …" and he gave Margaret Ryan the instructions: "to use the Smith & Fitzgerald precedent deed to include me, my wife, my children and grandchildren and the remaining usual beneficiaries."

[26] Ms Ryan says that Mr Larmar gave her a Smith & Fitzgerald precedent together with a list of beneficiaries which included Mr Larmar, his wife, his children and any grandchildren. She says that she typed the trust deed and gave it to him.

Is there clear and convincing evidence?

[27] For the purposes of this application I am content to assume that Suzanne Larmar did, in fact, think it was a good idea to establish a family trust for the benefit of Earl Larmar, herself and their family. But there is no evidence as to what interests either she or Mr Larmar intended that they would have under such a trust. Were they to be beneficiaries of capital or income or both? Nor is it clear that she intended that any trust would be so worded that a future spouse of Mr Larmar would become a beneficiary. The only evidence is that she agreed with the proposition that the trust would be for the benefit of "ourselves and our family".

[28] Ms Ryan, while saying that she was given a Smith & Fitzgerald precedent and a list of beneficiaries, does not identify the precedent. In one of her affidavits she referred to a particular precedent but it could not have been used because it had a reference to an Australian Corporations Number and, thus, was too recent. In a later affidavit she produces an earlier version of that precedent letter but does not identify it as being the precedent she was given. She does not give evidence as to what she was told about who, if anyone, was to be a capital beneficiary or an income beneficiary or a default beneficiary. She does not say that she was told that the trust deed was to be worded in such a way that it would include a future spouse of Mr Larmar.

[29] Other trust deeds were produced by the applicant including one for the Reeves family. Mr Larmar is the settlor of that trust. There are significant differences in the two trust deeds and the Reeves Family Trust deed does not support the case for the applicant.

[30] It is submitted on behalf of the applicant that, notwithstanding the evidence of both Earl Larmar and Margaret Ryan that it was intended to use a Smith & Fitzgerald deed, the deed from which Margaret Ryan typed was not, it is argued, a Smith & Fitzgerald deed. That, it is said, is evident from the fact that the Larmar Family Trust deed contains references to New South Wales legislation which was and is irrelevant to the trust which was established.

[31] The applicant submits that an inference should be drawn that, when typing up the trust deed, Margaret Ryan did not realise that she should have included the names of Earl and Suzanne Larmar in the second schedule. Further, it is submitted that she did not realise that she needed to type specifically words to the effect of "any companies and trusts in which they [the beneficiaries] have an interest including the trustee company".

Conclusion

[32] The task for an applicant for rectification is not an easy one. The constant refrain in the authorities is that an applicant must provide "clear and convincing" evidence in order to support a successful application. It is not surprising that, after 40 years, Mr Larmar's recollection is not precise. It may be that a large part of what he says about his intention at the time is derived from a reconstruction of what he can recall. I do not, by that, imply that Mr Larmar has been dishonest. But, in the absence of any contemporaneous writing (apart from the trust deed) there is little to support his assertions.

[33] The evidence which is provided by the applicant is not clear. There is uncertainty as to the document which was provided as a draft or a precedent for Ms Ryan. There is uncertainty about the nature of the interest which Mr Larmar says the beneficiaries were to have under the trust. He is not in a position to say with the requisite degree of clarity what it was that he and his then wife agreed upon and put into place. Thus, the evidence does not establish a sufficiently precise intention such that the court can determine both the substance and the detail of the precise variation to be made to the wording of the instrument.

[34] The relief originally sought by Mr Larmar was to add as beneficiaries, trusts and companies associated with beneficiaries already mentioned. The amended originating application, though, seeks only to add Mr Larmar's name to the list of beneficiaries in the various schedules. If the trust deed were to be rectified to accord with the limited evidence available about the discussion between Earl and Suzanne Larmar then it would need to include Suzanne Larmar's name as a beneficiary. But that is not sought and would be inconsistent with the submissions advanced for the applicant.

[35] The available evidence is uncertain in many respects. It cannot be described as either clear or convincing. The application is dismissed.