SUPREME COURT OF QUEENSLAND

CITATION:	*Benaroon Pty Ltd v Larmar & Ors* [2020] QCA 62
PARTIES:	**BENAROON PTY LTD** ACN 009 990 381 (appellant) **v** **YVONNE MARGARET LARMAR** (first respondent) **EAGLE II PTY LTD** ACN 095 769 725 (second respondent) **EARL HOWARD LARMAR** (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:	Appeal No 14224 of 2018 SC No 9647 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 274 (Martin J)
DELIVERED ON:	3 April 2020
DELIVERED AT:	Brisbane
HEARING DATE:	30 May 2019
JUDGES:	Fraser and Morrison and Philippides JJA
ORDER:	**The appeal be dismissed with costs.**
CATCHWORDS:	EQUITY – GENERAL PRINCIPLES – MISTAKE – EQUITABLE REMEDIES – RECTIFICATION – WHERE UNILATERAL MISTAKE – where the directors of the trustee appellant caused a family trust to be created – where the settlor of the trust had no independent intention as to how the trust was to operate and the settlor's only intention was whatever the directors of the trustee appellant wanted –

where the primary judge dismissed an application for rectification of the trust that was made on the basis that the trust deed (and its practical effect) did not conform with the actual intention of the directors of the trustee appellant – whether the primary judge erred in failing to find that the evidence before the Court provided clear and convincing evidence as to the trustee's intention when the trust was created – whether the primary judge erred in not finding that there was sufficiently clear and convincing evidence that, when the trust deed was executed, the directors of the appellant trustee and the First Appointor, intended that he and his then wife should have been listed as beneficiaries of the family trust

Franklins Pty Ltd v Metacash Trading Ltd (2009) 76 NSWLR 603; [2009] NSWCA 407, cited
Lister v Hodgson (1867) LR 4 Eq 30, cited
Public Trustee v Smith [2008] NSWSC 397, cited
Sanwick Pty Ltd v Kalyk [2016] NSWSC 100, cited

COUNSEL: F L Harrison QC, with A J Anderson, for the appellant
R T Whiteford for the first respondent
No appearance for the second to ninth respondents

SOLICITORS: Tobin King Lateef Lawyers for the appellant
McCullough Robertson Lawyers for the first respondent
No appearance for the second to ninth respondents

[1] **FRASER JA:** I agree with the reasons for judgment of Philippides JA and the order proposed by her Honour.

[2] **MORRISON JA:** I have read the reasons of Philippides JA and agree with those reasons and the order her Honour proposes.

[3] **PHILIPPIDES JA: Background** This is an appeal by Benaroon Pty Ltd (Benaroon) who, in its capacity as trustee of the Larmar Family Trust (the LFT), brought an unsuccessful application for rectification[1] of the trust deed of the Larmar Family Trust (the trust deed).

[4] The trust deed was executed on 3 March 1977, immediately following the incorporation of Benaroon. At the time of its incorporation, Benaroon's directors were Mr Earl Larmar and his then wife, Suzanne Larmar. She ceased to be a director in 2006, following finalisation of property settlement proceedings between herself and Mr Larmar, leaving Mr Larmar as its sole director and secretary.

[5] The application for rectification of the trust deed was brought by Benaroon after over 40 years of operation on the basis that the trust deed did not conform with the actual intention of Mr Larmar when he caused the LFT to be created. It was brought in circumstances where, since its creation, Benaroon had made distributions including to Mr Larmar and to Suzanne Larmar[2] and subsequently, to Margaret

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1 *Benaroon Pty Ltd v Larmar & Ors* [2018] QSC 274 (Reasons).

2 Distributions were shown to have been made to Suzanne Larmar in the income years 2000 to 2004.

Larmar, the current wife of Mr Larmar, to whom Benaroon distributed part of the net income of the LFT in the income years 2008 to 2017.

[6] In the absence of rectification of the trust deed to add Mr Larmar as a beneficiary, any distribution to him (and his former and current spouses) will have been made without authority. Rectification is opposed by Margaret Larmar, in relation to whom the Australian Taxation Office took the view, after an audit, that she would be entitled to a tax refund if not a beneficiary of the LFT, but would have a tax liability of nearly $8 million if she is a beneficiary.

[7] Essentially, the application sought rectification of the trust deed to include Mr Larmar as a named beneficiary for the purposes of cl 3(a)(i) which gives Benaroon the power and discretion, before 30 June each year, to:

> "Pay the whole or any part of the net income arising from the Trust Fund in the annual accounting period ending on that 30th day of June to all or any one or more of the Beneficiaries 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;"

[8] The term "the Beneficiaries" is defined to mean the persons referred to in the second schedule to the trust deed. Those named as beneficiaries in that schedule include the children of Mr Larmar. However, Mr Larmar is not himself named in the schedule and, as a result, he is not a beneficiary for the purposes of cl 3(a)(i) and, consequently, neither his first nor second wife can be a "spouse of a beneficiary" for the purposes of that clause.

[9] The application, as amended, sought orders that:[3]

> "5. A declaration that the trust deed of the Larmar Family Trust made 3 March 1977 does not express the true intention of the trustee when it executed the trust deed;
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> 6. The trust deed of the Larmar Family Trust made 3 March 1977 is rectified by adding:
>
> (a) 'Earl Howard Larmar' at the top of the list of names in each of the Second, Third and Fourth Schedules; and
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> (b) at the end of the Second Schedule:
>
> 'The trustees of any other trust (however created) the capital or income of which is or may be held in whole or in part (and whether absolutely contingently or otherwise) for anyone or more of the beneficiaries hereinbefore mentioned, provided that no part thereof is or may be held for the settlor;
>
> 'Any company any shares in which are held by or on behalf of any one or more of the beneficiaries hereinbefore mentioned'.

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3 AB2 at 39-40.

or in the alternative, by substituting a deed in the form of the trust deed for the Reeves Family Trust, but with the following changes:

(a) the date is to be 3rd March 1977;

(b) the settlor is to be Earl Raymond Reeves;

(c) the trustee is to be Benaroon Pty Ltd;

(d) 'EARL HOWARD LARMAR' is to be substituted for 'EARL RAYMOND REEVES';

(e) clauses 4(b), (j), (k), (l) and (m) are to be omitted; and

7. Such further or other order as to the Court seems just."

[10] Notwithstanding the relief sought in the amended application extracted above, the Notice of Appeal did not include those orders sought in the alternative at para 6. However, during oral submissions, Senior Counsel for Benaroon foreshadowed amending the Notice of Appeal to seek another form of order, being that the LFT deed be rectified in accordance with the Smith & Fitzgerald deed[4], or alternatively a form of relief whereby changes to the Reeves deed were further particularised if that deed were to be adopted as alternatively sought in the amended originating application.[5]

[11] In the Further Amended Originating Application subsequently provided to this Court, the appellant seeks the following orders in the alternative:

"7. In the alternative to the orders sought in paragraph 6, the trust deed is rectified to conform to the form of the trust deed for the Reeves Family Trust, being the deed at 2 RB 458 contained in exhibit GDW-4 to the affidavit of Glenn Daniel Weekes filed 7 November 2018 CFI-18 but with the following changes:

(a) the date of the deed (at 2 RB 458) is to be the 3rd day of March 1977;

(b) the settlor (at 2 RB 458) is to be Earl Raymond Reeves of 853 London Road, Chandler, Queensland, 4155;

(c) the trustee (at 2 RB 458) is to be Benaroon Pty Ltd;

(d) 'EARL HOWARD LARMAR' is to be substituted for 'EARL RAYMOND REEVES' wherever appearing in paragraph 4(a) at 2 RB 459, and 4(c), (d), (e) and (h) at 2 RB 459;

(e) the name 'Suzanne Larmar' is to be substituted for the name in clause 4(b) at 2 RB 459;

(f) the names 'David Earl Larmar', 'Paul Andrew Larmar', 'Stephen Anthony Larmar' and Tania Marie Larmar' are

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4 AB2 at 469.

5 AB2 at 39-40.

to be substituted for the names in clauses 4(j), (k), (l) and (m) at 2 RB 460;

(g) the following be added at the end of clause 4 at 2 RB 460:

'(n) any charitable or religious bodies'.

8. In the alternative to the orders sought in paragraph 7, the trust deed is rectified to conform to the form of the trust deed at 2 RB 469 contained in exhibit GDW-5 to the affidavit of Mr Weekes referred to in paragraph 7 above (being a deed prepared by Smith & Fitzgerald Solicitors dated 1 July 1978), but with the following changes:

(a) the date of the deed (at 2 RB 487) is to be the third day of March 1977;

(b) the settlor (at 2 RB 487) is to be Earl Raymond Reeves;

(c) the trustee (at 2 RB 487) is to be Benaroon Pty Ltd;

(d) the name of trust (at 2 RB 487) is to be Larmar Family Trust;

(e) the primary beneficiaries are to be: 'Earl Howard Larmar and Suzanne Larmar and any natural or adopted children of Earl Howard Larmar and Suzanne Larmar who are born prior to the Perpetuity Date;

(f) the secondary beneficiaries are to be: 'The trustees of any other trust (however created) the capital or income of which is or may be held in whole or in part (and whether absolutely contingently or otherwise) for any one or more of the beneficiaries hereinbefore mentioned, provided that no part thereof is or may be held for the settlor, and any company any shares in which are held by or on behalf of any one or more of the beneficiaries hereinbefore mentioned' and

(g) the principal is to be Earl Howard Larmar; and

9. Such further or other order as to the Court seems just."

[12] While initially seeking before the primary judge and in submissions before this Court that rectification not include Suzanne Larmar, by correspondence dated 7 June 2019, Benaroon now seeks orders for rectification that include her as a beneficiary, as can be seen at subpara 7(e) of the Further Amended Originating Application extracted at para [11] above.

The primary decision

Relevant principles

[13] There was no contest at trial that Mr Reeves, as settlor, had no relevant intention and the primary judge inferred that the parties were content to proceed on the basis

that it should be taken that the settlor's intention was whatever Mr Larmar wanted.[6] Accordingly, his Honour considered[7] the case fell within the special class of case mentioned in *Sanwick Pty Ltd v Kalyk*,[8] where rectification may be ordered on the basis of a unilateral mistake. His Honour cited[9] the following statement of principle by Stevenson J:[10]

> "An example of the 'special class' to which Mason J [in *Maralinga Pty Ltd v Major Enterprises Pty Ltd*[11]] 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."

[14] His Honour proceeded[12] on the basis, accepted by the parties, that in order that the trust deed be rectified, Benaroon was required to meet the following criteria referred to in *Public Trustee v Smith*:[13]

> "… 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." (emphasis added; citations omitted)

Evidence as to intention

[15] The primary judge set out the following evidence concerning Mr Larmar's intention:[14]

> "[19] [Mr] 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.
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> [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.

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6 Reasons at [11].
7 Reasons at [11].
8 [2016] NSWSC 100.
9 Reasons at [6].
10 [2016] NSWSC 100 at [16].
11 (1973) 128 CLR 336.
12 Reasons at [8].
13 [2008] NSWSC 397 at [71].
14 Reasons at [19]-[26].

[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."

Whether clear and convincing evidence

[16] In considering whether he was able to be satisfied that there was clear and convincing evidence that the actual intention as to the effect of the deed was different from the effect which the instrument did have, his Honour made the following observations:[15]

> "[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 [Mr] 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

15 Reasons at [27]-[31].

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 [Mr] 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'."

[17] His Honour concluded at [35] that the "available evidence [was] uncertain in many respects" and could not be "described as either clear or convincing" and therefore dismissed the application. In so doing, his Honour reasoned as follows:[16]

"[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

16 Reasons at [33]-[34].

> 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."

[18] I add that, before this Court, the appellant's position in relation to the addition of Suzanne Larmar was that it was not seeking to include her name in the rectification of the trust deed but it would not oppose such an order if the Court thought it should be made.[17]

Grounds of appeal

Grounds 1 to 5

[19] Grounds 1 to 5 of the notice of appeal alleged error in failing to find that the evidence before the Court provided clear and convincing evidence as to the trustee's intention. On behalf of Benaroon, it was submitted that it was Mr Larmar's intention alone that needed to be considered and that the evidence was more than sufficient to counteract "the inherent probability"[18] that the written instrument truly represented Mr Larmar's intentions.

[20] In contending that Mr Larmar's intention was the sole relevant matter, reliance was placed on Mr Larmar's affidavit evidence that, at all relevant times, he made all of Benaroon's decisions. It was submitted that it should be concluded that Mr Larmar was the governing mind and will of Benaroon, notwithstanding that it was conceded that the description in his affidavit of his role as "managing director of Benaroon" was not able to be relied upon.

[21] It was then argued that, as regards Mr Larmar's intention, the evidence was clear that, when executing the trust deed, he intended that he, his then spouse Suzanne and any associated companies and trusts were to be able to receive distributions from the trust of annual net income, in accordance with cl 3 of the trust deed. It was said that the terms of the trust deed and the precedent instruction letter made it clear how that should have been done. Reliance was also placed on para 6 of Mr Larmar's standard precedent instruction letter to solicitors setting out the standard terms of instructions from Mr Larmar when establishing trusts for clients.[19]

[22] It was said that it was the recollection of both Mr Larmar and Ms Ryan that Mr Larmar intended to use a Smith & Fitzgerald deed as the precedent. Benaroon

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17 Appeal transcript 1-4, 1-5.

18 *Thomas Bates & Son Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505; [1981] 1 All ER 1077 at 1099.

19 Affidavit of ME Ryan, ex MER-3; AB2 at 379.

sought to overcome the difficulty presented by the fact that the deed from which Ms Ryan typed was not in fact the Smith and Fitzgerald deed, by submitting, as it did below, that it should be inferred that either Mr Larmar mistakenly gave Ms Ryan the wrong deed to copy from, or that she mistakenly copied from a deed, other than the one that Mr Larmar gave to her, and that neither picked up that mistake. That inference was said to be particularly evident from the fact that the trust deed as typed contains references in cl 22 to certain New South Wales legislation, which could have no relevance to the trust that Mr Larmar was intending to establish.[20]

[23] The trust deed also omitted a clause including the additional companies and trusts that the precedent letter suggested were intended to be included (in contrast to the Reeves trust deed[21] and the Smith & Fitzgerald trust deed[22]). Benaroon submitted that a further inference was that, in typing up the trust deed, Ms Ryan did not realise that she should have included the names of Mr Larmar and Suzanne Larmar in the second and other schedules, or that she needed to specifically type words to the effect of "any companies and trusts in which they [the beneficiaries] have an interest including the trustee company", contrary to Mr Larmar's intention when the trust was established.

[24] Notwithstanding the inferences contended for, Benaroon nevertheless also maintained that it should not be concluded that the parties did not intend to execute the trust deed that was actually executed. Rather, it was submitted that they were content to bind themselves to the numerous provisions in that deed that they did not specifically advert to, but that they knew were there. However, it was said that "in certain respects", the document as typed simply failed to give effect to Mr Larmar's specific intentions. In that respect, there was an "accidental omission" of his and Suzanne's names from the names of beneficiaries in the second, third and fourth schedules.

[25] It was submitted, referring to *Franklins Pty Ltd v Metacash Trading Ltd*,[23] that there was evidence before the primary judge of a mistake which extended beyond a strong suspicion to "convincing proof" that the trust deed did not conform to the parties' intention. Benaroon refuted the contention that the approach it urged amounted, in effect, to the trustee attempting to "re-write" the intentions upon which the LFT was established. Nor, it was argued, was this a case where the trustee was attempting to introduce a term, namely additional beneficiaries (or clauses), that it wished it had included at the time of establishment of the trust (as discussed in *Lister v Hodgson*).[24]

[26] Reliance was also placed on evidence before the primary judge said to constitute post-establishment conduct of Benaroon, as trustee, in exercising its discretion to distribute the net income according to what were said to be Mr Larmar's intention. This evidence comprised the LFT's tax returns for the income years 2000 to 2004 which showed distributions made to Suzanne Larmar, when she was Mr Larmar's

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20 Appellant's outline at [27]-[28].
21 Affidavit of GD Weekes, ex GDW-4, cl 4(f) & (g); AB2 at 460.
22 Affidavit of GD Weekes, ex GDW-5, cl 1(i) at p 15 and the "Secondary Beneficiaries" at p 32; AB2 at 470, 487.
23 (2009) 76 NSWLR 603 at [451].
24 (1867) LR 4 Eq 30 at 34.

spouse and a director of Benaroon.[25] It also included Benaroon's resolutions concerning the income years 2008 to 2017, distributing net income of the trust to Margaret Larmar[26] and corresponding LFT tax returns for the income years 2007 and 2009 to 2017.[27]

[27] It was submitted that the fact that Benaroon made ongoing distributions of net income of the LFT to Suzanne and then Margaret Larmar (who it was said Mr Larmar may be inferred to have substituted as a beneficiary pursuant to property settlement orders of the Family Court in 2006) supported the conclusion that it was Benaroon's intention that both Mr Larmar and Suzanne Larmar be named as beneficiaries when the trust deed was executed. Suzanne Larmar's name was not now sought to be included in view of the order 8.2 of the 2006 Family Court order, the intention of which was said to be to exclude her as a beneficiary of the trust.

Ground 6

[28] Ground 6 alleged an allied error in not finding that there was sufficiently clear and convincing evidence that, when the trust deed was executed in 1977, Mr Larmar, as the person who stood behind the trustee,[28] and the person named in the First Schedule to the trust deed as the First Appointor, intended that he and his then wife Suzanne should be beneficiaries of the LFT.

[29] It was argued, in particular, that the primary judge erred at [27] in finding that there was no evidence that any trust would be so worded that a future spouse of Mr Larmar would become a beneficiary. In that regard, it was said the trust deed that was executed relevantly encompassed future spouses of the beneficiaries at cl 3(a)(i) and (ii) and cl 4.

[30] It was also argued that his Honour erred at [28] in a number of respects:

(a) His Honour erred in failing to have sufficient regard to the precedent instruction letter, which Ms Ryan understood provided the basis for the trust deed she was instructed to prepare and in misreading the evidence as being to the effect that Mr Larmar gave the standard precedent instruction letter to her, rather than that it was a precedent letter she retained and used as a matter of course.

(b) His Honour also failed to infer that the letter exhibited to Ms Ryan's affidavit was indeed in the form used in 1977 when the trust deed was typed, this being able to be inferred from Ms Ryan's evidence and from the fact that the only change between the versions used both before and after the introduction of Australian Company Numbers was a reference to that number.

(c) His Honour further erred by creating an issue not raised by either party, and which, in any event, did not arise on the evidence, as to uncertainty as to who were to be capital, income and/or default beneficiaries, in particular when even if there had been any such uncertainty it would have been resolved by para 4 of the standard precedent instruction letter.

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25 Affidavit of EH Larmar, ex EHL-5; AB2 at 292-332.
26 Affidavit of EH Larmar, ex EHL-3, p 9-18; AB2 at 84-93.
27 Affidavit of EH Larmar, ex EHL-4, p 19-204; AB2 at 94-279.
28 *Sanwick Pty Limited v Kalk* [2016] NSWSC 100 at [16].

(d) Additionally, his Honour erred by treating it as relevant as to whether or not Ms Ryan was told how the trust deed was to be worded in relation to the inclusion of any future spouse of Mr Larmar, whereas the terms of the trust deed which was executed relevantly encompassed future spouses of the beneficiaries at cl 3(a)(i) and (ii) and cl 4.

[31] It was submitted that his Honour erred, at [32], by failing to have proper regard, in the absence of any contemporaneous writing (apart from standard precedent letter and the trust deed), to the intention of Mr Larmar.

[32] Further, his Honour erred by finding at [33] that there was uncertainty and a lack of a sufficiently precise intention as to the nature of the interest the beneficiaries were to have under the trust deed, in that, subject to [33] below, the only rectification required was the inclusion of the names of Mr Larmar and his then wife in the lists in the second, third and fourth schedules, and the inclusion of the above reference to companies, trusts and charities in the list in the second schedule.

[33] His Honour erred at [34] by failing to take account of the fact that, by order 8.2 of the order of the Family Court of 8 March 2005, the former Mrs Larmar (Suzanne) was ordered to "relinquish … [her] position as beneficiar[y]", and subsequently executed documentation designed to achieve that result, and accordingly finding that that if the trust deed were to be rectified to accord with the evidence it would need to include Suzanne Larmar's name as a beneficiary.

[34] Finally, his Honour erred by failing to have any, or any proper, regard to trust distribution resolutions made by Benaroon in the evident belief that the trust deed included Mr Larmar and the above companies, trusts and charities, and the tax returns recording the effect of those distributions.

Consideration

[35] As accepted at trial, the question in the present case was what the intention of the appellant was, and not that of the settlor, Mr Reeves. The appellant's case is that it is Mr Larmar's intention alone which is relevant in terms of ascertaining the intention of Benaroon. While it was maintained that it was Mr Larmar who was the "governing mind and will" of Benaroon, Mr Larmar was not Benaroon's managing director and it could act only by its directors. Benaroon's intention, as the first respondent submitted, was thus that of both of its directors at the relevant time, which included Suzanne Larmar.

[36] Further, the appellant's submission that, at all material times, Mr Larmar made all of Benaroon's decisions is at odds with the evidence that Mr Larmar sought Suzanne's agreement prior to establishing the LFT. Further, both Ms Ryan and Mr Larmar's evidence was that Mr Larmar took the trust deed home for the specific purpose of discussing it with Suzanne. The trust deed was not taken home by Mr Larmar simply to be executed by Suzanne Larmar. It may reasonably be inferred that there was some discussion. However, Mr Larmar did not depose to the effect of those discussions. In particular, Mr Larmar did not state that there was any discussion or agreement that he and Suzanne be named beneficiaries or whether it was discussed that she be a named beneficiary or benefit as the spouse of a named beneficiary. Mr Larmar did not depose to having gone through the trust deed or any

part of it with his then wife. Nor was there evidence from Mr Larmar as to whether Suzanne read the trust deed or any parts thereof.

[37] Further, as the primary judge was correct to conclude, there was no clear and convincing evidence about Suzanne Larmar's intention concerning who would benefit from capital and who would benefit from income, that is, which names should appear in the second and third schedules. Nor did his Honour err in failing to find that there was clear and convincing evidence that Suzanne Larmar intended the LFT to include Mr Larmar's future spouses as beneficiaries. As the primary judge observed, Mr Larmar's evidence was that he intended the LFT to be for the benefit of "our family".[29] The primary judge did not err in overlooking that "the trust deed which was executed relevantly encompassed future spouses".[30] Such a submission is misconceived in that, on the evidence, the trust deed which was executed was simply never intended by Mr Larmar to be executed. Further, the Smith & Fitzgerald deed which he intended to be used contained no reference to spouses of beneficiaries.

[38] I add that it is evident that the evidence as to trust distributions that were subsequently made to the first respondent and others does not provide "clear and convincing proof" of the form which the trust deed was intended to take by both Mr Larmar and Suzanne. Nor does the Reeves Family Trust deed[31] assist the appellant given that it is quite different to the Smith & Fitzgerald precedent deed and the LFT deed. As the first respondent submitted, reference to it only adds to uncertainty about what form the trust deed was intended to take.[32] In any event, as mentioned, the appellant did not press any orders for rectification based on that document.

[39] Even leaving aside the difficulties arising from the absence of evidence as to Suzanne's intention concerning aspects of the trust deed, there is a further obstacle confronting the appellant. It stems from the evidence that it was Mr Larmar's intention to use the precedent Smith & Fitzgerald deed and that it was erroneously not used. On that basis, the trust deed would need to be rectified into the terms of the precedent Smith & Fitzgerald deed in order to conform with Mr Larmar's intention. However, the Smith & Fitzgerald precedent deed does not permit distribution of capital or income to spouses of the named beneficiaries, so that rectification in that form would not however authorise distributions to Margaret Larmar. As was submitted on behalf of the first respondent, to avoid this consequence, the appellant's submission is that it should not be concluded that the parties did *not* intend to execute the deed that they actually executed. Rather, it should be inferred that they were content to bind themselves to the many provisions of that deed that "they did not specifically advert to, but that they knew were there".[33]

[40] However, Mr Larmar has not sworn that he realised the deed executed was not the Smith & Fitzgerald precedent and intended the parties to be bound by any, and if so which, provisions in the deed actually executed. In effect, as the first respondent argued, what the appellant seeks to do is keep parts of a deed it did not intend to use (cl 3 and cl 4 with their reference to "spouses" of beneficiaries) and to rectify the deed to include Mr Larmar's name in the second, third and fourth schedules. But

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29 Affidavit EH Larmar, paras 22- 23; AB2 at 67-68.
30 Appellant's outline at [33](a).
31 Appellant's outline at [29].
32 See Reasons at [29].
33 Appellant's outline at [31].

that misconceives the function of the rectification jurisdiction, which is to reform the instrument so that it accords with the relevant intention, not to redraft it into a form it might have taken had the parties thought more about it at the time it was executed.

[41] I agree with the submissions made for the first respondent that no error has been demonstrated by the primary judge in refusing the application.

[42] I would therefore propose that the appeal be dismissed with costs.