Rep of BB

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Esq., Jurats Clapham, Milner
Judgment Date:	28 July 2011
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Text

[2011] JRC 148

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, Esq., **Commissioner, and** Jurats Clapham **and** Milner.

IN THE MATTER OF THE REPRESENTATION OF BB, A AND C

AND IN THE MATTER OF D RETIREMENT BENEFIT TRUST

AND IN THE MATTER OF AN APPLICATION PURSUANT TO ARTICLE 51 OF THE TRUSTS (JERSEY) LAW 1984, AS AMENDED

Between
BB, A and C
Representors

and
E
First Respondent
F
Second Respondent

and

G
Third Respondent

Advocate R. J. MacRae **for the Representors (Advocate** L. J. Buckley **appeared in respect of the Costs Judgment appended hereto)**.

Advocate B. Lincoln **for the Third Respondent**.

Authorities

In the Matter of A [2011] JRC 008.

Lewin on Trusts 18th edition.

Travis v Illingsworth (1865) 2 Dr & Sm 344.

In the Matter of A [2011] JRC 008.

Trusts (Jersey) Law 1984, as amended.

Re the Representation of Royal Trust (BVI) Limited and Cornel Baptiste (unreported) 29th October 1990.

In the matter of the Exeter Settlement [2010] JLR 169.

Breadner & Others v Granville-Grossman & Others [2000] EWHC Ch 224.

Hastings Bass

Lewin on Trusts 18th edition.

Jasmine Trustees Limited v Wells & Hind [2007] EWHC 38 (Ch).

Landau v Anburn Trustees and Others [2007] JRC 084.

THE COMMISSIONER:

1 This judgment is concerned with how the Court should best deal with two invalid appointments of trustees.

2 On 25 th March 1992, D, which carried on business in England, established the D Retirement Trust ("the Trust") to provide benefits for its employees. The first trustee was the third respondent, G. D was ultimately beneficially owned by the first and second respondents who are brothers.

3 D was defined under the Trust as the "Principal Employer" with power pursuant to Clause 12 to appoint new or additional trustees, the relevant parts of Clause 12 being in the following terms:-

> *"12.1 The Principal Employer has the power to appoint new or additional Trustees or a body corporate as sole Trustee and to remove Trustees and to appoint replacements.* These powers will be exercised by Instrument. They may be exercised without giving any reason and without any limitation as to the number of trustees.
>
> …..
>
> *12.4 Any Trustee may by one month's notice to the Principal Employer and any co-Trustees declare that he wishes to resign, whereupon the Principal Employer shall procure that if there is no co-Trustee in office willing and able to continue as Trustee a new Trustee shall be appointed in place of the outgoing Trustee and such appointment and resignation shall take effect on the expiry of such notice."*

4 In or around 1996, the first and second respondents, who were the only beneficiaries (members), retired from work and placed the holding company of D into liquidation. Because they had retired, G advised by letter dated 28 th January 1997 that there was no longer any requirement under the Trust for the appointment of a replacement "Principal Employer".

5 On 17 th June 1997, G, having conducted a review of its business, gave one month's written notice to D of its retirement as trustee pursuant to the provisions of Clause 12.4. It recommended the appointment of B who carry on trust business in Guernsey.

6 On 3 rd November 1997, D, G and A entered into an instrument of appointment and retirement of trustees by which G retired as trustee and A was appointed as trustee ("the first appointment"). D was defined in this instrument as the "Principal Employer". Preamble G recited that the Principal Employer had determined to appoint the new trustee and it exercised that power under Clause 2 of the instrument as follows:-

> *"2. In exercise of the aforementioned power and of every and any other power it enabling the Principal Employer hereby appoints the New Trustees to be trustees of the Retirement Trust in place of the Retiring Trustees and the Principal Employer the Retiring Trustees and the New Trustees hereby agree that such appointment shall have immediate effect."*

7 It would appear that the instrument had been sent to D in England and was returned with the seal of D affixed in the presence of two signatories.

8 On 9th January 1998, a further instrument was entered into between D, A, BB and C under which D was again defined as the "Principal Employer" and it exercised its powers under Clause 12.1 of the Trust to appoint BB and C as additional trustees ("the second appointment").

9 It would appear that once again this instrument had been sent to D in England and was returned with the seal of D affixed in the presence of two signatories.

10 In 2009, the representors came to discover that, unbeknownst to them and G, D had in fact been dissolved on 30th April 1996 before the first and second appointments were entered into.

11 In their representation to the Court, the representors sought the following relief:-

(i) a declaration as to the validity or otherwise of the first and second appointments;

(ii) confirmation of their respective appointments under the first and second appointments with effect from the date of the first and second appointments respectively;

(iii) ratification of their actions taken during the period of their administration of the Trust to date and confirmation that they are entitled to remuneration during that period and

(iv) that they ought fairly to be excused wholly from any breach of trust which may have occurred as a result of the defective appointments.

12 G were convened to the application and its advisers Mourant Ozannes wrote to Carey Olsen, who act for the representors, on 16th May 2011 questioning whether the Court had the power to confirm these appointments retrospectively and asking whether Carey Olsen had considered applying on behalf of the representors for rectification of the first and second appointments, citing the decision of this Court in *In the Matter of A* [2011] JRC 008 as authority.

13 On 27th June 2011, Mourant Ozannes gave Carey Olsen written notice of its intention to apply at the hearing for rectification of the first appointment. No formal application was filed as it was considered that it fell within the scope of the prayer of the representation seeking *"such further orders as the Court considers fit."* The Court was content to accept the application on that basis. There was, however, no affidavit in support of the application

upon which we comment later.

14 The representors rested on the wisdom of the Court in relation to G's application for rectification of the first appointment but in the event that it was successful sought an order seeking rectification of the second appointment in a similar manner.

15 The Court heard G's application for rectification first, followed by the representors' application for ratification and relief reserving its decision on both.

Invalidity of the appointments

16 D did not exist at the time the first and second appointments were entered into. It was not in issue therefore that those appointments were invalid and we so declare.

Rectification

17 G's application is based on the following two contentions-

(i) That since there was no Principal Employer in existence, G was able to appoint a successor trustee under the relevant statutory provision which at the time was Article 13(1) of the Trusts (Jersey) Law 1984, as amended ("the Trusts Law").

(ii) G's true intention in entering into the first appointment was to divest itself of its trusteeship in favour of A. It had the power to do so owing to Article 13(1) of the Trusts Law whereupon it could resign. However, owing to a mistaken belief that the Principal Employer was still in existence, G executed a deed which did not have that effect. The case is analogous to the recent decision of the Court in *Re A* and the deed should be rectified.

18 Taking the first contention, Article 13(1), as it was in 1997, read as follows:-

"(1) Where the terms of a trust contain no provision for the appointment of a new or additional trustee the trustees for the time being or the last remaining trustee or the personal representative or the liquidator of the last remaining trustee may appoint a new or additional trustee."

19 The Trust did contain provision for the appointment of new trustees as set out in clause 12 and at first blush Article 13(1) appears unhelpful. However, in a very short judgment in the case of *Re the Representation of Royal Trust (BVI) Limited and Cornel Baptiste* (unreported) 29th October 1990, the Court gave Article 13(1) a very wide interpretation. In that case it would seem that the protector, who had the power to appoint trustees, had abandoned those powers although it is not clear how. The trustees sought confirmation

from the Court of their appointment as trustees. Le Cras, Commissioner, in what was clearly an unopposed application, said this:-

> ***"It seems to me clear that the language of Article 13(1) is devised for the purpose of avoiding the expense of resort to the Court and the Court therefore in construing this provision is justified in adopting a construction which will give a larger effect than the bare words immediately provide.*** The point here is that the trust deed did contain a provision for the appointment of a new or additional trustees but by the abandonment by the protector now contains no provision and in my view it therefore falls within the ambit of Article 13(1) of the Trusts (Jersey) Law."

20 Mr Lincoln argued that in practical terms the Trust also did not contain a provision for the appointment of a new trustee. Under the terms of the Trust, the trustee could not appoint a new Principal Employer. Pursuant to Clause 15, ***"an Employer"*** or ***"holding company"*** may agree to become a Principal Employer with the consent of the Principal Employer unless it has been dissolved (as is the case here). However, under the definition of ***"Employer"***, the approval of the Principal Employer is required in order to become an Employer in the first place and that approval cannot now be obtained. In any event, with the retirement of the only two beneficiaries, there was no incentive or commercial need for the appointment of a new Principal Employer.

21 The approach of the Court in *Re Royal Trust* was to construe Article 13(1) with regard to its statutory purpose in a practical way, examining whether in fact the trust deed contained a power to appoint new trustees, not whether in theory it did. We agree with that approach, namely that Article 13(1) applied both where there are no provisions at all in the terms of the Trust for the appointment of trustees and where there are provisions which cannot in practice provide for or lead to the appointment of a new trustee. We accept that in the circumstances of this case the Trust did not have provisions that would in practice lead to the appointment of a new trustee and therefore accept Mr Lincoln's contention that at the time of the first appointment, G had the power under Article 13(1) to appoint new trustees.

22 Turning to the second contention, rectification is a discretionary remedy and the test is well settled as follows:-

> (i) The Court must be satisfied that as a result of a genuine mistake the trust deed does not carry out the true intentions of the parties.
>
> (ii) There must be full and frank disclosure.
>
> (iii) There should be no other practical remedy (see *In the matter of the Exeter Settlement* [2010] JLR 169).

23 Mr Lincoln submitted that the facts of this case are analogous to those in *Re A*. In that case, there were four similar settlements which made provision for the appointment of a protector

and for the protector, or failing the protector the trustee, to have the power to appoint new trustees. Protectors had been appointed to three of the settlements, but not the fourth, which was the subject of the application. Lawyers drafted four deeds of appointment and retirement of trustees in which the protector was shown as *"the appointor"* exercising the power to appoint the new trustee. The lawyers were not clear from their instructions whether a protector had been appointed to the fourth trust and drew this to the attention of the retiring trustee. The name of the appointor was therefore left blank in the draft. Without responding to the lawyers' query, the retiring trustee and the new trustee simply executed the draft in the form it had been sent to them. If this appointment was invalid, then a further appointment of trustees which took place subsequently stood to fail as well. In the meantime, the retiring trustee had been struck off the register of companies, leaving this fourth trust potentially with no trustee at all from that date.

24 In what was an unopposed application, the Court approached the matter as a simple drafting error in the instrument:-

> ***"15. Applying that test, we were satisfied that there had been a genuine mistake. J intended to retire as trustee of the G Settlement in favour of K and it was J that had the power to appoint new trustees. The 2000 instrument was executed by the two relevant and necessary parties, namely J, which had the power to appoint new trustees and K, which had agreed to be appointed. The reference to the protector in the draft should have been deleted and J described as the Appointor."***

25 In the case before us, the first appointment was also signed by the two necessary parties, namely G the retiring trustee which had the power to appoint new trustees under Article 13(1) of the Trusts Law and A which was the new trustee. There was clearly a genuine mistake in that neither party appreciated that the Principal Employer no longer existed. As a result of this mistake, Mr Lincoln submitted that the first appointment did not carry out the true intentions of the parties, which was that G would resign and A would be appointed as trustee.

26 We were provided with a copy of the first appointment with the amendments necessary to rectify the instrument, principally the deletion of D as a party, an amended recital showing the power of appointment as vesting in G and G exercising the power to appoint the new trustee.

27 The first part of the test for rectification requires the Court to ascertain the true intentions of the parties. Whilst it is clear from the face of the instrument that G intended to resign as trustee, did it intend to exercise the power to appoint the new trustee? There was no discussion in the judgment in *Re A* as to the extent to which, in rectifying a document, the Court can impute to a party an intention it may not have had. According to the judgment in *Re A*, the evidence was that the directors could not remember the circumstances in which the instrument of appointment was signed but it may be reasonable to observe that it must have been within the knowledge of the retiring trustee that no protector had been appointed

and that consequently, under the terms of the fourth settlement, the power of appointment of new trustees vested in it. In the absence of any recollection from those involved at the time, it may be not unreasonable therefore to presume that the retiring trustee had the intention to exercise the power it must have known it had.

28 By contrast in this case when G signed the first appointment, it is difficult to say that it did so with the intention of exercising a power of appointment it did not at that time know it had. It had given D one month's written notice under Clause 12.4 of its intention to retire, placing the obligation upon D to appoint its successor, as provided in Clause 12.4 and as recited in the preamble to the first appointment. On the face of the instrument, it signed in order to retire and to receive the benefit of indemnities from the new trustee. Thus, whilst it might be said that in *Re A*, because of the knowledge that can reasonably be imputed to the retiring trustee, it had the intention of appointing a new trustee, in this case it is difficult to say that it was G's true intention to do anything other than to retire. As for A, its intention, again from the face of the instrument, was to be appointed trustee by D and to give indemnities to G

29 Some assistance can be gleaned from *Breadner & Others v Granville-Grossman & Others* [2000] EWHC Ch 224. In that case, the trustee had failed to exercise a power of appointment in favour of the son of the settlor before the power expired. It was argued that the trustees had a duty to consider exercising the power before it expired and if they had done so, would have exercised it in favour of the settlor's son; contentions accepted by the court. Instead, by failing to exercise the power, the trust fund had vested indefeasibly in the son and three of his cousins. The Court was urged to extend the principle in Hastings-Bass to bring about that which the trustees would have done if they had given proper consideration to the exercise of the power. Quoting from the judgment of Park J at paragraphs 62 and 63:-

> ***"62 So far as the present case is concerned, the most important point about the Hastings-Bass principle is that it has been developed and explained as a principle whereby the courts will hold to have been ineffective something which the trustees have in fact done.*** In this case, by way of contrast, Mr Warren's argument would involve the court imposing on the trustees, or at least on the trust fund, something which the trustees did not do, but which Mr Warren says that they would have done if they had taken all proper considerations into account. Mr Warren recognises that what he contends for is not an application of the Hastings-Bass principle, but would be a new principle. However, he says that it is a natural and logical development from Hastings-Bass and urges me to adopt it .
>
> ***63 In my judgment, however, there is a very big difference between, on the one hand, the courts declaring something which the trustees have done to be void, and, on the other hand, the courts holding that a trust takes effect as if the trustees had done something which they never did at all.*** It is a big step from Hastings-Bass, not a small one, and I am not willing to take it, especially when I would be changing the beneficial interests and depriving the cousins of what I consider to be their property, however unpalatable it may be to the trustees that it is

> the cousins' property. I also believe that such indications as are to be found in the authorities are that the court may undo something which the trustees have done, but will stop short of doing something which the trustees might have done but did not do. In Hastings-Bass itself the court noted (at pp 41–42) that the court was not being asked to exercise any discretion, but only to determine whether the trustees had validly exercised their discretion. In Mettoy Warner J observed (at p 64) that, if a case arose where the trustees had done something but, if they had taken all relevant factors into account, would have done something quite different, the court should declare void what they had done. There is no suggestion that the court would or might substitute the different thing which it thinks that the trustees would have done themselves. To do that would not be much different from what Mr Warren wants me to do. I do not think that Warner J would have done it, and I will not do it either."

30 Whilst we are not concerned in this case with the principle in Hastings-Bass, the same point could be made, namely that in the exercise of its discretion, the Court should not rectify the first appointment as if G had done something which it never did at all, i.e. exercise a power it did not know it had.

31 Mr MacRae, who has not had an opportunity to give proper consideration to G's application, offered to provide the Court with further written submissions, but for reasons we come to, we do not think it necessary to hear further argument on the issue of the true intentions of the parties.

32 There is no affidavit in support of the application for rectification. Mr Lincoln informed us that inquiries had been made but no documents or files had been found. The business of G had been sold in 2007 and any records would either have gone to the purchaser or would have gone to the new trustee, A when it was appointed. There was a discussion about people who would have been involved at G at the time and whether they had been contacted but Mr Lincoln's central point was that the first appointment itself says everything that needs to be said both about the mistake and the intentions of the parties. H, a director of G was present in Court and would have either given evidence or sworn an affidavit if one was required. On the facts of this case, the Court would not have rejected the application on the grounds of non disclosure but wishes to stress the point that applications should ordinarily be supported by an affidavit so that the Court can be satisfied, on evidence, that there has been full and frank disclosure.

33 Before deciding whether to exercise its discretion to order rectification, the Court went on to consider the other remedies available.

Ratification and relief

34 As a consequence of the first and second appointments being invalid, G have remained as the validly appointed express trustee of the Trust and the representors have from the dates

of their respective purported appointments become trustees *de son tort*. The consequences are made clear in Lewin on Trusts 18 th edition at paragraph 14.53:-

> ***"A purported appointment ….*** has no effect on the identity of the validly appointed express trustees immediately before the appointment. Although it may be easy enough to cure a defective appointment when the defect becomes apparent, the consequences of an ineffectual appointment … can be very serious for the trust, trustees and some or all of the beneficiaries, both because of the tax consequences and effect on transactions with third parties, and because of the effect on exercise of powers conferred on trustees between the time of the ineffective appointment and the time when the defect is cured. A trustee purportedly appointed under an invalid appointment will be chargeable as a trustee de son tort. But it is, at best, doubtful whether an invalidly appointed new trustee, though a trustee de son tort, will be able validly to exercise powers, especially dispositive powers, conferred on the trustees by the trust instrument."

35 *Lewin* goes on to deal with the exercise by a trustee *de son tort* of administrative or dispositive powers or discretions at paragraph 42–79:-

> ***"Where, however, the acts in question, whether of an administrative or dispositive character, involve the exercise of powers or discretions, then serious problems arise.*** The exercise of a power or discretion by a trustee de son tort may be impugned either because retiring trustees were not effectively discharged from office having regard to the defective character of the appointment and did not participate in the exercise of the power or discretion, or because the power or discretion purportedly exercised by the trustee de son tort was not available to him because he had not been properly appointed. There is limited authority on the validity or otherwise of the exercise of powers and discretions by a trustee de son tort."

36 The status of a trustee *de son tort* was considered in *Jasmine Trustees Limited v Wells & Hind* [2007] EWHC 38 (Ch) where Mann J said this at paragraph 42:-

> ***"The status of a trustee de son tort is limited.*** He will be liable for breach of trust much as a properly appointed trustee would be but the doctrine is more about liabilities than anything else. The trustee de son tort will be obliged to hold the property for, and to account to, the beneficiaries, but on the other side of the coin will not have the powers of the trustee conferred by the settlement …" .

37 The representors, notwithstanding their defective appointments, remain accountable to the beneficiaries of the Trust as if they had been validly appointed as express trustees and this on the principle that a person who assumes an office ought not to be in a better position than if he were what he pretends; he is accountable as if he had the authority which has been assumed (see *Lewin* at paragraph 42–74).

38 In order to regularise the position the representors seek an order under Article 51 of the Trusts Law appointing them as trustee. They did not at the hearing suggest that such appointments be made retrospectively, rightly in our view. We should at the same time remove G as trustee.

39 We are then left with the actions taken by the representors as trustees *de son tort* from the date of their respective appointments to the present. The representors have helpfully provided us with a schedule setting out everything done by them, including appointments and distributions of capital and income to the beneficiaries. These they seek to have ratified pursuant to the Court's powers under Article 51 of the Trusts Law which permits the Court to make orders concerning *inter alia* "the exercise of any power, discretion or duty of the trustee" and "the conduct of the trustee".

40 There appears to be a dearth of authority on ratification. Mr MacRae drew our attention to an order made by the Court, Sir Philip Bailhache, Bailiff, presiding in a representation brought by Barclays Private Bank and Trust Company Limited in relation to the PDK Settlement on 1 st November 2004, in which the Court ratified the acts of the trustee *de son tort* in the following terms:-

> ***"The Court …. ratified the past acts of the representors since 28th October 1991 taken in its capacity as the purported trustee of the PDK Settlement, subject to any claim alleging breach of trust that any person beneficially interested under the PDK Settlement might be entitled to make"*** .

No judgment was issued by the Court when making that order.

41 Mr MacRae suggested that the lack of authority might simply be that it is trite law that the Court has the power to ratify the acts of trustees and regularly does so.

42 *Lewin* has the following passage on the powers of trustees to confirm the acts of trustees *de son tort* at paragraph 42–82:-

> ***"42–82 In some trusts, powers may be available to properly constituted trustees such as enables them to confirm the exercise of powers purportedly exercised by the trustee de son tort.*** While it would not be open to the properly constituted trustees to exercise powers of this character merely so as to save the trustee de son tort from liability, nonetheless the exercise of such powers may be justified so as to save the trust from the havoc that would be cause by any attempt to unscramble what was purportedly done by the trustee de son tort, and would have been properly done had there been no defect in his appointment. In a case where a settlement was de facto administered by the settlor who bought agricultural land in the name of the trustees and granted a tenancy, it was held, upon the purchase being affirmed by the trustees, that the tenancy bound them as well."

43 The definition of a trustee in Article 2 of the Trusts Law is wide enough to encompass a trustee *de son tort* and therefore the Court would have jurisdiction to make orders in relation to the representors under Article 51 of the Trusts Law. That article makes no express reference to ratification of past acts of trustees but if there is any doubt as to the Court's power to ratify the past actions of the representors under Article 51, then in our view, the Court has an inherent jurisdiction to do so.

44 The general principle guiding the Court in the exercise of its jurisdiction under Article 51 and of its inherent jurisdiction is the welfare of the beneficiaries and the competent administration of the trust in their favour. Where, as here, a trustee *de son tort* has acted in good faith, unaware that he has not been duly appointed to office, then applying that general principle, it seems to us that we should save the Trust from the havoc that may ensue from any attempt to unscramble what was purportedly done by the trustee *de son tort* by confirming and approving those actions (i.e. to ratify them), whilst at the same time preserving any claims the beneficiaries may have against the trustee *de son tort* for breach of trust assuming he had been validly appointed.

45 On the basis that the Court would ratify the actions of the representors in this way, Mr MacRae did not pursue on their behalf relief from personal liability under Article 45 of the Trusts Law. However Mr Lincoln, on the basis that rectification was not granted, sought such relief for G. Article 45(1) is in the following terms:-

> ***"The court may relieve a trustee either wholly or partly from personal liability for a breach of trust where it appears to the court that –***
>
> ***(a) the trustee is or may be personally liable for the breach of trust;***
>
> ***(b) the trustee has acted honestly and reasonably;***
>
> ***(c) the trustee ought fairly to be excused –***
>
> ***(i) for the breach of trust, or***
>
> ***(ii) for omitting to obtain the directions of the court in the matter in which such breach arose."***

46 In our view G is entitled to such relief. Although it had been put on notice that the holding company of D was in the final stages of liquidation, it did not administer or provide directors or other officers for D. Those who were concerned with its administration in England returned the first appointment sealed by D in the presence of two signatories, thereby representing its continued existence and it was not unreasonable for G to rely on that representation. It has therefore acted honestly and reasonably and ought fairly to be excused for any claim for breach of trust arising out of its failure to act as trustee after its purported resignation.

Decision

47 In the view of the Court, the appointment of the representors as trustees in the place of G, the ratification of their actions and the relief from liability of G provides a practical remedy for the invalid appointments and that, combined with our concern as to the propriety of rectifying an instrument in such a way as to give G an intention it did not have, leads us to decline rectification as a remedy.

48 The Court will therefore appoint the representors as trustees in the place of G, ratify their actions and relieve G from liability.

49 The Court has no difficulty in confirming that the representors are entitled to remuneration in accordance with their standard terms for the period from their respective purported appointments to the present, following the principles set out by the Court in *Landau v Anburn Trustees and Others* [2007] JRC 084. All of the parties proceeded in good faith and the representors have provided their professional services on the mistaken assumption that they have been validly appointed. Equity does not require and the First and Second respondents do not suggest that they should receive a windfall benefit by the Trust being administered free of charge when that is not what anyone envisaged.

50 We will wish to hear from counsel as to the precise form of the order and any conditions on the appointment of the representors as trustees and the retirement of G as trustee that ought fairly to be imposed.

COSTS JUDGMENT

THE COMMISSIONER:

1 The representors and Mourant & Co seek their costs on the trustee basis. The Court has found that the representors and Mourant & Co have acted in good faith and it would be inequitable in my view for them to have to pay personally for the costs of regularising the position of the trust.

2 The first and second respondents have written to the Court asking that Mourant & Co be held responsible for all costs and this on the basis that they say Mourant & Co should have ascertained the position of the principle employer having been put on notice that its parent was being placed in liquidation. However I can see no better way of making such enquiry other than by writing with the proposed deed to those administering the principle employer who must have known of its dissolution. For the deed to be sent back sealed and signed is the clearest representation that the principle employer still existed and in my view the representors and Mourant & Co were entitled to rely upon that.

3 It seems to me therefore that the first and second respondents, who ultimately beneficially own the principle employer, have only themselves to blame for the situation that arose and they should therefore, as beneficiaries, suffer the cost of putting this matter right.

4 I have no criticism of Mourant & Co raising the issue of rectification, in the light of the decision of the Court in *In the matter of A* [2011] JRC 008 and bearing in mind that rectification, being retrospective in effect, is the best remedy from the point of view of the trust, if that remedy was available.

5 Mr Buckley has referred me to Lewin on Trusts 18 th Edition, paragraph 21–28 and to the case of *Travis v Illingsworth* (1865) 2 Dr & Sm 344, from which it is clear that persons who have not been properly appointed as trustees, if they have acted in good faith, believing themselves to have been duly appointed, as is the position here for the representors, are entitled to indemnity in the same way as properly appointed trustees. Mourant & Co of course has been a properly appointed trustee, unbeknownst to it, all this time.

6 I therefore grant the applications and order that the representors and Mourant & Co shall have their costs of and incidental to this application on the trustee basis.