Nedgroup Trust (Jersey) Ltd Nedgroup Private Wealth Fiduciary Services Ltd v A and B and C and D and Advocate F. B. Robertson, appointed pursuant to Rule 4/4 of the Royal Court Rules 2004 to represent the interests of the minor, unborn and unascertained beneficiaries

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Marett-Crosby, Crill
Judgment Date:	09 June 2014
Neutral Citation:	[2014] JRC 126A
Reported In:	[2014] JRC 126A
Court:	Royal Court
Date:	09 June 2014

Text

[2014] JRC 126A

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner and**Jurats Marett-Crosby**and**Crill

IN THE MATTER OF THE REPRESENTATION OF NEDGROUP TRUST (JERSEY) LIMITED AND NEDGROUP PRIVATE WEALTH FIDUCIARY SERVICES LIMITED

AND IN THE MATTER OF THE ELB VOLUNTARY SETTLEMENT AND THE JLB

VOLUNTARY SETTLEMENT

Between
Nedgroup Trust (Jersey) Limited Nedgroup Private Wealth Fiduciary Services Limited
Representors
and
A
First Respondent

and

B
Second Respondent

and

C
Third Respondent

and

D
Fourth Respondent

and

Advocate F. B. Robertson, appointed pursuant to Rule 4/4 of the Royal Court Rules 2004 to represent the interests of the minor, unborn and unascertained beneficiaries
Fifth Respondent

Advocate M. H. D. Taylor **for the Representors.**

Advocate A. Kistler **for the First, Second, Third and Fourth Respondents.**

Advocate L. K. A. Richardson **appeared for Advocate Robertson.**

Authorities

Trusts (Jersey) Law 1984.

Rutland v Doe d Whythe [1843] 10 Cl & Fin 419, 441 .

Law of Property Act 1925.

S Trust [2011] JLR 375 .

Dicey, Morris & Collins The Conflict of Laws, 14th ed. (2006.

Dervan and another v Concept Fiduciaries Limited and others 30th November 2012

Judgement 38/2012.

CC Limited v Apex Trust Limited [2012] (1) JLR 314 .

The International Trust (3rd edition) Jordans 2011.

Trusts (Guernsey) Law 2007.

Re Butlin's Settlement Trusts [1976] Ch 251 .

Rectification, the Modern Law and Practice Governing Claims for Rectification for Mistake.

The C Trust [2008] JRC 071 .

Trust — rectification sought by the representors of two deeds of appointment.

THE COMMISSIONER:

1 The representors seek the rectification of two deeds of appointment made in respect of two family settlements which we will refer to as "the ELB Settlement" and "the JCB Settlement" respectively and "the Settlements" together. The Settlements were both settled with funds derived from the family patriarch on 31 st March, 1988, with the same settlors and original trustees.

2 The Settlements were in the same terms, save that under the ELB Settlement, in default of and subject to a wide overriding power of appointment contained in clause 3, the trustees were to pay the income of the trust fund to ELB (a grand-daughter of the family patriarch) for her life (with power to pay her the capital) and thereafter to hold the capital and income for JCB (a grand-daughter of the family patriarch) absolutely should she attain the age of eighteen years. Under the JCB Settlement, in default of and subject to a wide overriding power of appointment contained in clause 3, the trustees were to pay the income of the trust fund to JCB for her life (with power to pay her the capital) and thereafter to hold the capital and income for ELB absolutely, should she attain the age of eighteen years.

3 The Settlements are governed by English law in these terms (clause 33(2)):–

> ***"…the rights of the beneficiaries hereunder and the rights and duties of the Trustees and the construction and effect of every provision of this Deed shall be determined according to the laws of England which shall constitute the proper law of this Settlement but they shall be subject to the exclusive jurisdiction of the Court of the place where this Settlement is from time to time administered which shall be the forum of administration for the time being of this Settlement."***

4 The representors are the current trustees of the Settlements. They are both Jersey

incorporated companies carrying on business here and from where the Settlements are administered. The Court accordingly has jurisdiction under the terms of Article 5(b) and (d) of the Trusts (Jersey) Law 1984 as amended.

5 The Settlements were two out of nine trust arrangements which had been established with funds derived from the family patriarch for the benefit of his children, grandchildren and further issue. The trustees looked to him for guidance when administering all nine family trusts.

6 In or about February 2004 and prior to their appointment as trustees, the family patriarch informed the representors that he wished there to be a rebalancing or reapportionment of the funds held by all nine family trusts by way of transferring assets between them, so as to even out the distribution of wealth amongst the family.

7 In or about September 2004 and following the representors' appointment as trustees, the family patriarch informed the representors that it was no longer his wish that assets be moved amongst the family trusts but he wished rather that the trustees allocate percentage proportions to specific beneficiaries within each individual family trust, including each of the Settlements. He produced to the representors a copy of a document headed *"Family Rules"* that had been signed by all of the adult members of the family, the objectives of which were to ensure:–

(i) that the capital provided for the benefit of the family be protected;

(ii) that the family capital would grow at a steady rate;

(iii) that the family capital and its income would be fairly distributed from time to time among the members of the family. Whenever the actual income received by each person was not considered to be equitable as against the income received by others, a rebalancing would be necessary so far as that could be achieved without incurring Capital Gains Tax.

8 The Family Rules set out a detailed process for rebalancing, so that the income received by each member of the family would be equitable.

9 During his meetings with the representors, the family patriarch from time to time expressed the wish that the capital within the family trusts should be retained by the representors in their capacity as trustees and that he would be quite happy if the family capital were protected *"in perpetuity"* and never distributed. It was his wish expressed to the representors that the family members should be entitled to benefit only from the income derived from the trustees' careful investment of the capital of the family trusts rather than from their capital.

10 In or about September 2003, the family patriarch instructed an English solicitor named Geoffrey Shindler of Halliwells, a firm of solicitors in England, to provide tax advice in relation to the family trusts.

11 In November 2004, Mr Shindler sent to the representors two draft deeds of appointment which provided for the appointment of the trust funds of the Settlements amongst named family members in specified proportions and at the expense of ELB and JCB. The operative wording in each deed was as follows:–

> *"The Appointors, in exercise of the power of appointment conferred by Clause 3 of the Settlement and of all other relevant powers HEREBY APPOINT AND DECLARE irrevocably that the Trust Fund shall, from the date of this Deed, be held as to both capital and income upon trust for the following beneficiaries in the proportions set opposite their respective names absolutely."*

12 It can be seen that this purports to be an outright distribution to the family members concerned, terminating the Settlements which, as we will come to in a moment, we are satisfied from the evidence before us, was not the intention of the family patriarch or the representors. The intention was that the trust funds should remain subject to the overriding power of appointment contained in Clause 3 thus keeping the Settlements alive.

13 The representors noted from the drafts that some of the family members named were not within the beneficial class of the Settlements and they were then requested by both ELB and JCB in writing to add them as beneficiaries, pursuant to the power contained within the Settlements which is in the following terms:–

> *"6. The Trustees shall have power at any time or times during the Trust Period by deed recoverable or irrevocable endorsed on these presents to declare that any person or class of persons therein specified shall during the remainder of the Trust Period or for such shorter period as may be specified be included in the class of Discretionary Objects hereinbefore defined."* (our emphasis)

14 Deeds of addition were duly executed on 18 th March, 2005, adding these family members as beneficiaries to each of the Settlements, but they were not *"endorsed on these presents"*. On 21 st March, 2005, the deeds of appointment were duly executed.

15 Following the execution of the deeds of appointment, the representors continued to administer the Settlements on the basis that they were subject to the overriding power of appointment in clause 3 and had not been terminated by outright distributions to the family members. Income was paid to the family members concerned and annual accounts were produced on that basis.

16 In 2009, new accountants appointed by the representors advised that the deeds of

appointment had in fact appointed out the funds absolutely to the family members concerned, thus terminating the Settlements. The accountants advised that on the basis of outright distributions, Capital Gains Tax in the amount of £527,810.27 would be payable by the family members concerned in proportion to the distributions made to them. The beneficiaries and HM Revenue and Customs were notified.

17 In March 2011, the representors and the beneficiaries issued proceedings in England against Halliwells (which was then in administration), for breach of their duty of care in preparing the deeds of appointment.

18 In their answer filed on 19 th August, 2011, Halliwells denied negligence, but asserted in the alternative that the plaintiffs had failed to mitigate their loss by not applying to the Royal Court to have the deeds of appointment set aside. The proceedings were then stayed pending this application.

Substantive relief

19 The representors are seeking the following substantive relief:–

(i) A determination of the validity of the deeds of addition.

(ii) A declaration as to the true construction of the deeds of appointment as executed.

(iii) If necessary, rectification of each of the deeds of appointment; or

(iv) An order that the deeds of appointment be set aside and declared to be of no effect for mistake.

Evidence

20 The Settlements being governed by English law, the representors filed two affidavits of English law by Paul Bernard Matthews, an English solicitor advocate, who is a consultant of the firm of Withers LLP and part-time professor of law at King's College, London. He is co-editor of Underhill and Hayton's Law of Trusts and Trustees and the co-author of The Jersey Law of Trusts.

21 As to the factual issues, the Court received affidavits from the family patriarch, Mr Christopher Roscouet of the representors, Mr Justin Thomas formerly of the representors, Ms Helena Pace, who was a trust officer at the time the deeds of appointment were executed, ELB and JCB.

Validity of the deeds of addition

22 Pursuant to Clause 33(2) of the Settlements, this falls to be governed by English law. The issue here is that the two deeds of addition were not *"endorsed"* on the relevant deed of settlement, nor even stapled or even fixed to the deed of settlement.

23 Mr Matthews advises that English law allows for a settlor to stipulate whatever formalities he wishes for the due execution of a power, and subject to one point, unless these formalities are complied with, the power has not been validly exercised (*Rutland v Doe d Whythe* [1843] 10 Cl & Fin 419, 441).

24 The one point referred to relates to section 159(1) of the Law of Property Act 1925 which provides:–

> ***"A deed executed in the presence of and attested by two or more witnesses (in the manner in which deeds are ordinarily executed and attested) is so far as respects the execution and attestation thereof, a valid execution of a power of appointment by deed or by any instrument in writing, not testamentary, notwithstanding that it is expressly required that a deed or instrument in writing, made in exercise of the power, is to be executed or attested with some additional or other form of execution or attestation or solemnity."***

25 The two deeds of addition were executed in the presence of and attested by two witnesses and so the question arises as to whether they are powers of appointment for the purposes of Section 159(1). It is helpful to set out the advice of Mr Matthews which is as follows:–

> *"This provision however applies only to "a power of appointment".* So the question is whether the power to add further persons to a class of objects is a "power of appointment". Some may consider that this phrase can only refer to a power to allocate property or a share in property to certain persons. But "appoint" and "appointment" are ordinary English words that can mean simply "choose" and "choice" respectively. So on that basis a power to choose need not be restricted to a power to one to give property to one or more persons. It could apply to any power to *make decisions which affect the property, including the power to add members to a discretionary class.*
>
> *20. I have found no useful authority on the meaning of this phrase in the section, whether in cases or in textbooks or commentaries. In Megarry & Wade, The Law of Real Property, 8th ed, para 9–116 (on limitation) a power of appointment is defined as a "power for the person to whom it is given … to appoint property to such persons … as he may select." But that view is expressed in a particular context. A suggestion in Lewin on Trusts, 18th ed 2008, para 29–171 (without supporting authority), that the section applies to all powers has been amended (again without citation of authority) in the most recent cumulative supplement to that work, so leaving that work now expressing the view that the section applies only to 'powers of appointment'. Those are the words used in the section, and*

therefore this takes us no further.

21. Nor does the statutory context help much. Part VI of the Law of Property Act 1925 is headed simply "Powers", and contains six sections. Three of them (155, 156, 160) refer simply to 'powers'. One (157) refers to 'power of appointment over property', and one (158) refers to 'power to appoint any property'. Section 159 is the only one to refer to 'power of appointment' without referring to property. One could for example argue that ss 157 and 158, by specifically referring to 'property', when the others do not, implicitly suggest that the other sections are not restricted to powers concerning property. But that is a rather slender basis for taking a view. On the whole, I just think the other sections do not help in the construction of s 159.

22. Modern judges do tend to seek to validate rather than invalidate exercises of power if they properly can. Hence I would expect an English Chancery judge to be sympathetic to the view that s 159 should be capable of being prayed in aid, because on the ordinary meaning of the words used it seems to cover the case, and there is no authority to require a different view. It is therefore the view that I adopt. Accordingly the deeds of addition are valid, according to English law, "as to the execution and attestation thereof" by the two corporate trustees, despite non-compliance with the requirement of endorsing them on the deeds of settlement themselves."

26 The Court accepts the advice of Mr Matthews on this issue, and accordingly we find that the deeds of addition are valid.

True construction of the deeds of appointment

27 Again, this falls to be determined under English law. Mr Matthews does not directly deal with the point, as his advice proceeds on the basis that the deeds of appointment did appoint the trust funds out to the beneficiaries absolutely. In our view, we need no advice on English law in this respect as the effect of the words used is clear. The trust fund was *"irrevocably"* appointed to be held as to both capital and income on trust for the beneficiaries in their respective shares *"absolutely".*

Rectification of each of the deeds of appointment

28 The representors seek to invoke the equitable jurisdiction of the Court to rectify the deeds of appointment or to set them aside for mistake, forms of relief that can be characterised as restitutionary in nature. In either case, an order of the Court would result in the restoration of the capital benefits or powers (or both) obtained by the family members named at the expense of ELB and JCB.

29 In the case of In the matter of the *S Trust* [2011] JLR 375, the settlor, who was domiciled in

England, had transferred shares in a French company to a Jersey company, which then settled the same on trusts governed by English law but administered in Jersey. The settlor applied to have the transfer set aside for mistake, and the Court held that the proper law of the restitutionary obligation was the law of Jersey, where the enrichment occurred. The Court referred to Rule 230 of Dicey, Morris & Collins The Conflict of Laws, 14th ed. (2006):–

> ***"(1) The obligation to restore the benefit of an enrichment obtained at another person's expense is governed by the proper law of the obligation.***
>
> ***(2) The proper law of the obligation is (semble) determined as follows:***
>
> > ***(a) If the obligation arises in connection with a contract, its proper law is the law applicable to the contract;***
> >
> > ***(b) If it arises in connection with a transaction concerning an immovable (land), its proper law is the law of the country where the immovable is situated (lex situs);***
> >
> > ***(c) If it arises in any other circumstances, its proper law is the law of the country where the enrichment occurs."***

30 Quoting from the judgment of Sir Philip Bailhache, Commissioner, at paragraph 15:–

> ***"This is not a case where the alleged obligation arises in connection with a contract or in connection with immovable property.*** Nor is it a case where a beneficiary is seeking to enforce a claim arising under a trust, which would ordinarily be governed by the choice of law rules for trusts. This is a case falling within the "other circumstances" mentioned in Rule 230. The proper law of the obligation is accordingly the law of the country where the enrichment occurs."

31 He went on to say:–

> ***"In addition, it seemed to us just and convenient that, if the representor obtained the relief which she was seeking, enforcement of the restitutionary obligation should be dealt with in accordance with the law of the country where the trustee was incorporated."***

32 The enrichment in the case before us occurred in England, where all the beneficiaries who have benefited from the deeds of appointment reside, and therefore, following the *S Trust*, English law should apply. English law is also, of course, the proper law of the Settlements.

33 In *Dervan and another v Concept Fiduciaries Limited and others* 30th November 2012 Judgement 38/2012, the Royal Court of Guernsey declined to follow the *S Trust* (and *CC Limited v Apex Trust Limited* [2012] (1) JLR 314). In that case, the first applicant, who resided in England, sought to set aside transfers of shares in an English company to a Guernsey company to be held upon the terms of an English proper law trust (for the

remuneration of the employees of the English company). The second applicant was the same English company, which had paid £500,000 to the same Guernsey company for the same purpose. Having considered the 1984 Hague Convention on the Law applicable to Trusts and on their Recognition, Article 4 of which provides that "the Convention does not apply to preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee", McMahon, Deputy Bailiff, looked for guidance from The International Trust (3rd edition Jordans 2011) by Professor Harris and adopted the *lex situs* route. Registered shares have their *situs* in the country where they may be dealt with and where the register is kept. On that basis, it being registered shares in an English company that were transferred, the *lex situs* was the law of England, which he found was the applicable law (which also corresponded with the choice of law on the face of the impugned deed of assignment). We observe that applying the *lex situs* route would probably have led to the Court in the *S Trust* applying French law as the subject matter of the transfer in that case were shares in a French company.

34 In relation to the transfer of money by the same English company, he found that it constituted trust money in the hands of the Guernsey company that received it, which trust, applying section 3 of the Trusts (Guernsey) Law 2007, had its closest connection with English law, because the funds were intended to go into a trust governed by English law and because of the ongoing connection with the English company and its objective of establishing a remuneration trust for the benefit of its employees.

35 Rejecting the approach of the Jersey Court in the *S Trust* and its reliance on Rule 230 and noting that there was no reference in the *S Trust* to the Hague Convention, to the learning thereon of Professor Harris or the equivalent in the Trusts (Jersey) Law 1984 of section 65 of the Trusts (Guernsey) Law 2007, namely Article 49, McMahon said this as between applying the ***"contracts approach"*** in Rule 230(2)(a), which he preferred, or as was found in the *S Trust* the ***"other circumstances"*** approach in Rule 230(2)(c):–

> ***"41. The general explanation for clause (2)(a) of the Rule is contained in paragraphs 34–020 and 34–021 [of Dicey, Morris and Collins]:***
>
> ***"Although the obligation to restore an unjust benefit does not arise from a contract, it may, and very frequently does, arise in connection with a contract.*** This is the case where a party seeks to recover money paid pursuant to an ineffective contract, e.g. by reason of a failure of consideration or as a repayment of money paid under an illegal contract or where he claims a quantum meruit for work done or services rendered under a contract which turned out to be void. In all these and similar cases, it is submitted that the existence and the scope of the obligation to restore the benefit are in principle governed by the law which governs the contract, or by what would have been the governing law of the contract, if it had been validly concluded.
>
> ***Thus stated, the choice of law for dealing with the consequences of a contract being void, or being avoided, or being discharged for frustration, will be the law which governed the real or supposed contract and pursuant***

to which the avoidance or discharge was brought about."

42. The commentary continues (at paragraphs 34–023 and 34–024):

"If the parties have expressly chosen the law to govern the contract, it is realistic to suppose that, had they given the matter any thought, they will have expected this law also to deal with the remedial consequences if the contract is ineffective or has failed.

…if the contract is void on account of a common and fundamental mistake as to the subject matter of the contract, there may be no objection to giving effect to an express choice of law: the parties may have been clear in their intention that Ruritanian law should govern the contract and any consequences of its invalidity, even though they were mistaken as to the existence of the subject matter of the contract. The nature of the invalidity does not appear to impugn the express choice of law…"

Further, the comment offered by Zweigert and Müller-Gindullis in their chapter on Quasi-Contract in Lipstein's International Encyclopedia of Comparative Law is quoted, seemingly with endorsement, at para. 34–025.

"…the application of the law which governs the contract 'does not imply that the legally distinct claim for unjustifiable enrichment is to be treated as if it were a contractual claim. It means only that the claim for unjust enrichment is determined by the same law as that which governs the underlying transaction in order to apply as far as possible one legal system only to all aspects of a unitary situation'."

43. In the light of this guidance, I take the view that, because both of the dispositions referred to in the Application were undertaken by virtue of Deeds expressed to be governed by English law, there is a strong argument in favour of concluding that the proper law of each is connected with the respective contracts. I am once again conscious of the need to distinguish between common law mistake, which is not being relied on, and the invocation of the equitable mistake jurisdiction of the Court. However, the general tenor of the commentary is that, if the parties to a contract have addressed their minds to the law they have chosen to govern the contract, then it is likely that they would, if they had also addressed their minds to it, have indicated that they expected that law to apply to dealing with the consequences that that contract fails. Whilst I accept Advocate Le Tissier's submission that "clause (2)(a) … does not state an inflexible rule which must be applied without exception to every case connected to a contract" (see Dicey, Morris and Collins, para. 34–028), I do not regard my approach as slavish adherence to the principle but rather its application to the particular facts of this case. Accordingly, with both Deeds having English law choice of law provisions, which are consistent with the overall flavour of what was happening, I would treat these matters as indicative that rule 230(2)(a) can be used to reach the

conclusion that the applicable law for any restitutionary obligation in respect of each disposition is English law.

44. In respect of Rule 230(2)(c), Dicey, Morris and Collins explains (at para. 34–030) that:

"The rationale for the traditional formulation of clause (2)(c) is that in the absence of a prior relationship between the parties to which reference may be made, or which may contribute to the identification of the proper law of the obligation to make restitution, the law of the place where the enrichment occurred may be expected to be that which has the best claim to be applied to any obligation to restore."

He went on to point out that there was a prior relationship in that case and observed at paragraph 46:–

"Although application of Rule 230(2)(c) would potentially result in the conclusion that the place of enrichment is Guernsey, I do note that in para. 34–052 of Dicey, Morris and Collins this is described as "a starting point" when faced with a case not falling within either of the other sub-clauses and "it is not to be applied whenever the centre of gravity of the factors relevant to the obligation indicates that the proper law is different."

36 The facts in this case can be distinguished from those in the *S Trust* and *Dervan*. In those cases, the Courts were concerned with transfers into a trust by persons outwith the jurisdiction; here, we are dealing with appointments out of two established Settlements, already governed by English law, by means of two deeds of appointments by necessary implication also governed by English law. The two deeds of appointment provide in clause 1 that "the definitions and rules of construction contained in the Settlement shall apply". By clause 33(2) of the Settlements, English law applies to the construction and effect of its provisions.

37 The important point, it seems to us, is that there was, in this case, a prior underlying relationship between the representors and the beneficiaries to whom the appointments were made and this was through the Settlements, which were expressly governed by English law. Although the appointments were not contractual in nature, the underlying transactions were governed by English law. Using the ***"contracts approach"*** in Rule 230(2)(a) we determine that English law should be applied to the obligation of the beneficiaries to make restitution in order to apply as far as possible one legal system to all aspects of a unitary situation and in order to retain consistency and harmony in the Court's approach. If we are wrong in this respect, then applying Rule 230(2)(c) leads to the same outcome.

38 Therefore we look to the advice of Mr Matthews on the English law to be applied, which is set out in paragraphs 23–33 of his first affidavit, which we would distil in this way.

39 Paragraph 25 of the affidavit of Mr Matthews sets out a *dictum* of Brightman J in *Re Butlin's Settlement Trusts* [1976] Ch 251, stating in essence that the Court has power to rectify a voluntary settlement, so that it expresses the free intention of the maker of the document, not only where particular words have been added, omitted or wrongly written as the result of careless copying but also:–

> ***"where the words of the documents were purposely used but it was mistakenly considered that they bore a different meaning from their correct meaning as a matter of true construction".***

40 This is so even if the maker had never been asked to approve a document in the rectified form (paragraph 26 of Mr Matthews' affidavit).

41 The mistake in the drafting of the document, whether by the maker or his advisers, may consist of leaving out words that were intended to be inserted into the document "or through a misunderstanding by those involved about the meanings of words or expressions that were used in the document" (paragraph 29 of Mr Matthews' affidavit).

42 The standard of proof is the civil standard of the balance of probabilities although sufficient evidence is required to overcome the inherent probability that a signed document represented the intentions of the maker, but his uncontradicted evidence may be sufficient (paragraph 27 of Mr Mathews' affidavit).

43 In paragraphs 31 and 32 of Mr Matthews' affidavit, he set out his opinion on the issue:–

> *"31. …where appointors exercise powers to achieve particular legal effects by the use of particular words which they are advised give effect to their intentions, but the words used are inapt to do so, then the intentions of the appointors have not been properly recorded in the documents which they executed, and accordingly rectification should in principle be available, subject to the usual defences (bona fide purchaser for value without notice, laches and acquiescence) and also any objection by a trustee …"*
>
> *"32. Therefore, if the Royal Court considered that the trustees had a particular intention (e.g. to create life interests but not to appoint capital) and were advised, wrongly, to use the words found in the 2005 instruments to do so, then according to English law those words could be rectified to give effect to that intention. If however the Court considered that the trustees intended to do what they did in the belief that it would achieve [the family patriarch's] desired rebalancing without affecting the ability to appoint capital in the future, and were induced to do so by mistake, then in English law rectification would be inappropriate, because the words used would have correctly recorded the trustees' intention, as in Allnutt v Wilding . On the other hand, the appointments might be capable of being set aside for mistake, as set out below.* On the evidence that I have so far seen in my opinion an English court would be more

likely to conclude in the former rather than the latter sense, but of course fact-finding is a matter for the Royal Court."

44 We have considered carefully the detailed evidence before us, which we are not going to set out in this judgment. It may seem surprising that trust officers, when reading the draft deeds of appointment, failed to appreciate their impact. Despite the very proper disclosure of one letter from Mr Shindler to the family patriarch that might indicate to the contrary, we are satisfied that they did fail to appreciate its impact, not just because of what we have been told as to their understanding, but by their subsequent conduct, which was entirely inconsistent with the Settlements having terminated and consistent with the Settlements continuing. The words used in the drafts prepared by Mr Shindler were inapt to give effect to their intentions, which were to create life interests and not to appoint capital.

45 We received detailed skeleton arguments from Advocate Kistler, on behalf of the adult beneficiaries and from Advocate Richardson on behalf of the minor, unborn and unascertained beneficiaries. Suffice it to say that both fully supported the application for rectification. This is, if we may say so, a remarkable family, none of whose members seek to take advantage from any windfall that may have come about as a result of what they perceive to be a mistake. Harmony for this family is a very important factor. They were all quite clear that outright distributions were never intended.

46 There is no evidence that any third parties would suffer any detriment as a result of an order for rectification. The beneficiaries have a probable Capital Gains Tax liability, which rectification would avoid. HMRC have been notified of the application and have not sought to be joined as a party, nor have they responded.

47 Applying English law to the facts, we have decided to exercise our discretion to rectify the deeds of appointment in the manner set out in the two drafts filed with the Court. That being the case, we have no need to go on to consider setting those appointments aside for mistake.

48 We did raise with Advocate Taylor the apparent delay in bringing this application. This was as a result of a culmination of factors including the liquidation of Halliwells, and conflicting advice as to where a remedy should be sought. In addition, issues arose over the validity of the Settlements themselves, which took time to resolve and there was an element of uncertainty as to the state of English law on mistake.

49 It seems that delay, unaccompanied by any prejudice to the respondents, can never disentitle an applicant to relief by way of rectification (see paragraph 5–06 of Rectification, the Modern Law and Practice Governing Claims for Rectification for Mistake by David Hodge QC). There was no prejudice to any of the respondents here and the significance of delay would therefore lie in its effect on the burden of proof which will become more difficult to discharge with the passage of years (see *The C Trust* [2008] JRC 071 at paragraph 13.)

In this case, much of the evidence is documentary and the representors have been able to discharge the burden of proof upon them.