[2010 JLR 169]

IN THE MATTER OF THE EXETER SETTLEMENT

IN THE MATTER OF THE REPRESENTATION OF AIB JERSEY TRUST LIMITED

ROYAL COURT (Birt, Bailiff and Jurats de Veulle and Tibbo): January 21st, 2010

Trusts-creation-certainty-must be certainty of beneficiaries, i.e. court or trustees able to ascertain whether or not person is beneficiary-if no beneficiaries under trust, certainty not provided by power to add anyone as beneficiary and trust void-possible object of power not beneficiary unless or until power exercised in his favour

A trustee sought a declaration that a trust was valid or an order for its rectification.

A discretionary trust had been established in 1983. The parties had intended the trust to be executed with no named beneficiaries but with a particular charity as the ultimate default beneficiary. Unfortunately, the solicitor who completed the trust deed failed to add the charity as the default beneficiary and the trust was therefore executed without any beneficiaries. There was a power under the trust to add any person as a beneficiary (except an excluded person, which included the settlor). That power had been exercised in 1984 to add the intended beneficiaries.

It was well established that a trust would not be valid without, *inter alia*, certainty as to its objects, *i.e.* unless it were possible for the trustees or the court to ascertain whether or not any particular person was a beneficiary.

The trustee sought a declaration that the trust was valid. It submitted that (a) the existence of the power to add anyone as a beneficiary provided sufficient certainty as to the beneficiaries; (b) alternatively, the initial failure to define the beneficiaries had been rectified in 1984 when the power to add the intended beneficiaries had been exercised; and (c) it was possible to construct a *Quistclose* trust on the facts of this case. If the court did not accept those submissions, the trustee sought rectification of the trust.

Held, ordering rectification of the trust:

(1) The trust had been void from the outset as there had been no defined beneficiaries in whose favour any of the discretionary powers could have been exercised, nor a default beneficiary. The power to add any person as

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a beneficiary (except an excluded person) did not provide sufficient certainty as to the beneficiaries. A beneficiary of a discretionary trust was a person in whose favour a discretion to distribute income or capital could be exercised. A possible object of a power to add beneficiaries was not a beneficiary unless or until the power were exercised in his favour. Until that moment, the trustees could not distribute income or capital in his favour and he had none of the rights of a beneficiary. Although there might be little practical difference between, on the one hand, a trust with a small class of beneficiaries with a power to add anyone in the world as a beneficiary and, on the other hand, a discretionary power to distribute trust income and capital to anyone in

the world-*i.e.* in each case the trustees could ultimately distribute in favour of anyone in the world-there was an important difference in principle: in the former case the trustees would have to exercise a power to appoint a person as a beneficiary before a distribution could be made to him (paras. 28–32).

(2) Furthermore, it could not be said that the consequence of the failure to define the beneficiaries had been a resulting trust in favour of the settlor which remained subject to the power to add beneficiaries and that the trust had become validly constituted once that power had been exercised in 1984 to add the intended beneficiaries. In the absence of any beneficiaries, the trust was void. There was no trust in accordance with the trust deed and the assets were held on a resulting trust for the settlor absolutely. There was therefore no power to add beneficiaries. Beneficiaries could not be added to a trust that did not exist (para. 34).

(3) Nor could a *Quistclose* trust be constructed on the facts of the present case. A *Quistclose* trust would arise if *A* paid or transferred money or property to *B* so that *B* held the money or property in trust for *A* subject to a power for *B* to apply the money or property for a stated purpose. In the present case, the settlor had intended to transfer the money to the first trustees to hold on the trusts set out in the trust deed. She had not intended to retain any interest in the trust funds; on the contrary, she was an excluded person under the trust. The failure of the execution of the trust did not alter the settlor's purpose and intention (para. 35).

(4) The trust deed would, however, be rectified by inserting the charity by name. The court was satisfied that, as a result of a genuine mistake by the solicitor in failing to insert the charity so that a valid trust would have been created, the trust deed did not carry out the true intentions of the parties and of the settlor in particular; there had been full and frank disclosure; and the trustee's arguments as to validity having failed, there was no other practical remedy. Rectification was a discretionary remedy and delay could be a relevant factor. Although a long time had passed since the execution of the trust, the court was satisfied that once the issue came to light any further delay was not such as to lead it to refuse the remedy, given that all the parties had acted in good faith since 1983 on the assumption that the trust was valid. As rectification took effect from the date of the instrument, the trust had therefore been validly constituted

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since 1983 and the exercise in 1984 of the power to add the intended beneficiaries had also been valid (paras. 37–42).

Cases cited:

(1) *Barclays Bank Ltd.* v. *Quistclose Invs. Ltd.*, [1970] A.C. 567; [1968] 3 W.L.R. 1097; [1968] 3 All E.R. 651, distinguished.

(2) *Hay's Settlement Trusts*, *Re*, [1982] 1 W.L.R. 202; [1981] 3 All E.R. 786, considered.

(3) *Knight* v. *Knight* (1840), 3 Beav. 148; 49 E.R. 58, referred to.

(4) *McPhail* v. *Doulton*, [1971] A.C. 424; [1970] 2 W.L.R. 1110; [1970] 2 All E.R. 228; (1970), 114 Sol. Jo. 375, referred to.

(5) *Manisty's Settlement*, *Re*, [1974] Ch. 17; [1973] 3 W.L.R. 341; [1973] 2 All E.R. 1203, referred to.

(6) *Rawcliffe* v. *Steele*, 1993–95 MLR 426, not followed.

(7) *Twinsectra Ltd.* v. *Yardley*, [2002] 2 A.C. 164; [2002] 2 W.L.R. 802; [2002] 2 All E.R. 377, distinguished.

Legislation construed:

Trusts (Jersey) Law 1984 (Revised Edition, ch.13.875, 2007 ed.), art. 10(1): "A beneficiary shall be-

(a) identifiable by name; or

(b) ascertainable by reference to-

(i) a class, or

(ii) a relationship to some person . . ."

Text cited:

Lewin on Trusts, 18th ed., para. 8.44, at 270 (2008).

R.J. MacRae for the representor;
Mr. L appeared in person.

1 **BIRT, BAILIFF:** This is an application by the trustee of a discretionary trust seeking a declaration as to the validity of that trust, alternatively an order for rectification. The application is supported by the adult beneficiaries. H.M. Revenue and Customs in the United Kingdom has been notified of this application and of the hearing date.

2 The court received affidavits from Mr. Anthony Crowe, a director of the representor, Mr. Verner Southey, Ms. Anna Austen of Payne Hicks Beach and two affidavits from Mr. L. The court also heard oral evidence from Mr. Southey. In addition, the court heard evidence as to the position of the settlor, who is now in her eighties, and why she had not produced any evidence or appeared before the court. Having had the opportunity of seeing and hearing Mr. Southey give evidence, the court considered him to be an honest and reliable witness. From a combination of the affidavits and the oral evidence, the court finds the facts to be as set out below.

Factual background

3 In 1983, Mr. L and two colleagues decided to set up a new insurance broking company. The three of them consulted Mr. Southey, who was an English solicitor then with the firm of Elborne Mitchell in London. He advised that there would be taxation advantages if the shares in the new company were to be owned by a discretionary trust established by a non-domiciled and non-resident individual. Each of the three ("the promoters") decided to proceed in this way and the plan therefore was to have three discretionary trusts, each one owning the shares intended to benefit the family of the particular promoter.

4 Mr. L had a half-sister who was domiciled and resident in France, having married a Frenchman. She agreed to his request to establish a trust and contribute the initial fund of £390. Apparently very little capital was required to commence the business.

5 Mr. Southey emphasized that the settlor of each trust must contribute the funds and must not be reimbursed by the relevant promoter. Mr. Southey also advised that each trust should initially be established with a charity as the only named beneficiary. There would be power to add

additional beneficiaries and the promoter and his family would be added as beneficiaries thereafter. His initial suggestion was that the British Red Cross should be the named charity.

6 According to Mr. L, he explained this to his sister ("the settlor") and she expressed a wish that the named charity should be the Royal National Lifeboat Institution ("RNLI") rather than the Red Cross. This was communicated back to Mr. Southey.

7 Mr. Southey instructed an assistant in his office to prepare three standard discretionary trusts, one for each of the promoters. The trusts were expressed to be governed by the law of Jersey. There were standard provisions enabling the trustees to pay income or capital to any of the beneficiaries during the trust period and, at the expiry of the trust period, the trust fund was to be held on trust for the beneficiaries then living, with an ultimate default trust in favour of a charity.

8 The format of the trust deed was to make extensive use of schedules. Thus, the settlor was described at the beginning of the document as the person named in Schedule 1 and the first trustees were described as being the persons named in Schedule 2.

9 Clause 1 defined the "beneficiaries" as being any of the persons within the class described in Schedule 4 of the deed or added to the class pursuant to the power to add beneficiaries conferred by the trust deed, but excluding in either case a person who was an excluded person. "Excluded person" was defined as including the settlor and any spouse of the settlor. Clause 19 dealt with the trusts at the end of the trust period and cl. 19.2

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stated that, in default of any beneficiaries living at the expiry of the trust period, the trust fund would be held for the charity named in Schedule 7.

10 Mr. Southey arranged for the first trustees to be two individuals in Jersey. The first was Mr. Barry Ching, who was one of the partners in a Jersey firm of stockbrokers with whom Mr. Southey had had dealings. The second was Mr. Peter Hackforth, who was a colleague of Mr. Ching. As it was intended that the whole of the trust fund would be used to subscribe for the shares in the new company, it was agreed that Mr. Ching and Mr. Hackforth would not charge a fee and that the administration of the trusts would later be transferred to a Swiss fiduciary company known as Fides if the venture proved to be successful. Sadly, Mr. Ching is not fit to provide any evidence and Mr. Hackforth is deceased.

11 Mr. Southey travelled to Paris on business for another client but arranged to see the settlor in order for her to execute the trust which was to be called the Exeter Settlement ("the trust"). He was somewhat disconcerted on taking the documents out of his briefcase to find that a number of the schedules had not been completed. Thus, he had to insert in manuscript, in the presence of the settlor, the name and address of the settlor in Schedule 1 and the amount of the trust fund (£390) in Schedule 3. The names of the first trustees had already been typed in Schedule 2. He deliberately left Schedule 4 ("the beneficiaries") blank as this was part of the plan. However, he also omitted to insert anything in Schedule 7, where there was a heading "charity" and where the name of the RNLI should have been inserted. The deed was one of those where the signature page came halfway through the document before any of the schedules. He wrote in the name of the settlor on the signature page and witnessed her signature. He also procured the settlor's signature to a letter of wishes which stated that the settlor wished the class of beneficiaries to be enlarged so as to include Mr. L, his sons, his wife and any persons who would be his heirs either under his will or

if he should die intestate. The letter contained provisions about consulting Mr. L and also stated that it was the settlor's wish that any charity within the class of potential beneficiaries under the trust should only benefit if there should be no other persons within the class of beneficiaries. Mr. Southey received £390 from the settlor and returned with the executed trust deed, the signed letter of wishes and the initial trust fund. The trust deed was subsequently executed by the two trustees and returned to Mr. Southey at which time it was dated June 10th, 1983. The initial trust fund was used to subscribe for the shares in the insurance broking company.

12 Mr. Southey freely admitted that he made an error. The intention of the settlor and all the other parties involved was that the RNLI should be inserted as the charity in Schedule 7. However, he omitted to do this. The settlor was relying upon him and executed it upon his advice. He has exhibited a redacted version of the trust deed setting up the trust for one of

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the other promoters and that has the name of a charity inserted in Schedule 7, thereby supporting his assertion that it was intended that Schedule 7 should be completed.

13 No one noticed the error at the time and matters proceeded as anticipated. Thus, by deed dated June 14th, 1984, Mr. Ching and Mr. Hackforth were replaced as trustees by two individuals in Switzerland who were officers of Fides. By deed dated June 25th, 1984, the two Swiss trustees exercised the power conferred upon them by the trust deed to add to the class of beneficiaries. They added Mr. L, his wife, his sisters and parents and all persons who might inherit Mr. L's estate either by will or on intestacy. On April 11th, 1989, the representor (under its then name) was appointed as trustee in place of the two Swiss individuals and the representor has remained the trustee of the trust since then.

14 The shares in the insurance broking company were realized over a period and the assets of the trust, through an Isle of Man company, now comprise a portfolio of shares and two properties in the United Kingdom. Various distributions have been made over the years to some of the persons added as beneficiaries by the deed of June 25th, 1984.

15 Having had the opportunity of considering the affidavits and seeing and hearing Mr. Southey, the court has no hesitation in accepting that a genuine mistake was made at the time of execution of the trust. The intention was that the settlor should execute a document in which Schedule 4 ("the beneficiaries") remained blank but Schedule 7 ("the charity") contained the name of the RNLI. The effect of this would have been that there were no beneficiaries to whom income or capital could be applied during the trust period (until the power to add beneficiaries was exercised) but the trust would have been valid because of the default trust in favour of the RNLI. This was what was intended by the settlor pending the addition of Mr. L and his family as named beneficiaries at a later stage as envisaged in the letter of wishes.

The problem

16 As a result of the error in not inserting the RNLI in Schedule 7, there were no beneficiaries of the trust upon execution. It is trite law that, in order for a trust to be valid, there must be certainty of words, certainty of subject matter and certainty of objects (see *Knight* v. *Knight* (3) (3 Beav. at 172–173; 49 E.R. at 69)). This principle is reflected in art. 10(1) of the Trusts (Jersey) Law 1984, although that was enacted after the creation of the trust.

17 There is no difficulty in relation to the first two requirements. The trust deed makes it clear that a trust was intended and the trust fund was clearly identified in Schedule 3 and was paid over by the settlor. But who were the objects who could benefit from the trust? The trust deed defined

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the beneficiaries as being the persons in the class listed in Schedule 4 but that was left blank. The ultimate default beneficiary was defined as being the charity named in Schedule 7 but that was also left blank. It was therefore impossible for the trustees or the court to ascertain whether or not any particular person was a beneficiary of the trust, which is the accepted test for establishing the necessary certainty of objects (see *McPhail* v. *Doulton* (4)).

18 On the face of it, one might have expected the representor simply to seek rectification so as to correct the manifest error by inserting the name of the RNLI in Schedule 7, with such rectification taking effect as usual from the date of the trust. The representor seeks such a remedy if necessary. However, Mr. MacRae, whilst recognizing that the fact that no beneficiaries are identifiable or ascertainable from the face of the trust deed poses some difficulties for him, sought to argue that the court may nevertheless find the trust to be valid. He put forward a number of possible arguments, some with more enthusiasm than others.

19 The court has concluded that it cannot accept any of Mr. MacRae’s arguments as to validity but that an order for rectification can properly be made. In the light of that finding, we propose to deal fairly briefly with the arguments as to validity.

Validity of the trust

20 Mr. MacRae’s first argument is that the trust can be regarded as being validly constituted on June 10th, 1983, by reason of a combination of an oral declaration and the written instrument, namely the trust deed. The difficulty with this argument is that there is no evidence to suggest that this is what the settlor intended. On the contrary, it is clear that she intended the full terms of the trust to be contained in the trust deed. It was only because of an error that this did not happen.

21 As a second argument, Mr. MacRae relies upon cl. 26(1) of the trust deed. This provision confers a power upon the protector to add “any person or class of persons to the class of beneficiaries.” By virtue of cl. 25(5), the power is exercisable by the trustees if no protector has been appointed or there is a vacancy in the office of protector. No protector was ever appointed and therefore the power was exercisable by the trustees. He submitted that the existence of this power to add anyone in the world (except an excluded person) as a beneficiary is sufficient to provide sufficient certainty as to the beneficiaries.

22 He put his argument this way. He referred first to *Re Manisty’s Settlement* (5), where Templeman, J. held that a power to add persons to the class of beneficiaries in terms similar to those of cl. 26(1) was valid. For our part, we have no hesitation in accepting that the power contained in cl. 26(1) is a valid power to add beneficiaries. Mr. MacRae went on to

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refer also to cases such as *Re Hay’s Settlement Trusts* (2), where Sir Robert Megarry, V.-C. held that a power vested in trustees to hold the trust fund “. . . for such persons . . . as the trustees shall . . .

within 21 years from the date hereof appoint . . .” was a valid power of appointment in terms of certainty of objects ([1982] 1 W.L.R. at 212). This was because it was possible to say with certainty whether or not any particular person was the object of the power. There were in that case default trusts in favour of specified relatives of the settlor.

23 Mr. MacRae argued that there is no practical difference between (i) a discretionary power to distribute exercisable in favour of anyone in the world (which would be valid in accordance with *Re Hay*), and (ii) a discretionary power to add anyone in the world to a narrower class of beneficiaries in favour of whom a discretionary power to distribute can then be exercised.

24 In support of this, he referred the court to the Isle of Man case of *Rawcliffe* v. *Steele* (6). That was a case where there were fairly conventional discretionary powers and trusts which could be exercised in favour of the beneficiaries. The beneficiaries were defined as the Irish Red Cross and any person named in any nomination made pursuant to cl. 8(b)(i). That clause provided that the trustees could, with the protector’s consent, nominate one or more individuals not resident in the Isle of Man to be a beneficiary. It was therefore a conventional power to add beneficiaries.

25 Unfortunately, the relevant schedule, which should have contained the name of the protector, was never completed. There was therefore no protector and it followed that the trustees could not exercise the power to add beneficiaries in cl. 8(b)(i). The main issue before the court was whether the position of protector of that trust was a fiduciary one and therefore whether, in the same way as the court will not allow a trust to fail for want of a trustee, the court could save the trust by itself exercising a power to appoint a protector. The court held that it could and should do so. However, in passing, the court considered whether, even if a protector had been originally appointed in the trust deed, the provisions would have failed for lack of certainty of objects. The point appears to have been conceded but the court agreed that they would not. Thus, Acting Deemster Hegarty said this (1993–95 MLR at 475):

> “At the heart of this declaration of trust, therefore, there is a series of powers enabling the trustee to determine who should be included within the class of beneficiaries and to appoint both income and capital in favour of any one or more of such beneficiaries. However, these powers can be exercised only with the consent of the protector. *But for this further requirement, it was not contended that the trust would fail for uncertainty.* However, the primary contention put forward on behalf of the plaintiff was that, in the absence of a

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> protector, the class of beneficiaries could not be determined, nor could any appointment be made in favour of any such beneficiary.” [Emphasis supplied.]

26 Later, he said (*ibid.*, at 480):

> “Before departing from the topic of uncertainty, it is as well to add one or two further remarks. Subject to the argument based on the absence of any protector, *Mr. Steinfeld did not contend that the trusts in question would otherwise fail for uncertainty.* In other words, if a protector had been validly appointed, he would not have contended that any problem of uncertainty would have vitiated the trusts. Though we did not require argument on the point, it seems to me that the concession is well founded. As I have sought to indicate, the limitations would pass the conceptual certainty test which I have previously referred to.” [Emphasis supplied.]

27 In the earlier passage to which the judge is there referring, he said this (*ibid.*, at 477–479):

"For my part, I am by no means satisfied that the underlying problem in this case is properly to be analysed as one of uncertainty of objects, although the forensic debate has been conducted on that basis both before the Acting Deemster and before this court. The identification of the recipients of capital and income under cll. 2, 3 and 4 involves three stages. First, it is necessary to determine the class of persons who are beneficiaries or who are entitled to be considered as candidates for selection as beneficiaries. This is to be ascertained from the terms of the declaration of trust itself. One potential beneficiary, namely the Red Cross Society, is already ascertained. The other potential beneficiaries are to be ascertained by a process of selection from amongst those persons identified at cl. 8(b)(i), namely the class of all 'individuals not resident in the Isle of Man.' I see no conceptual uncertainty in relation to this class, wide though it be. Though there may be evidential questions, which are immaterial for this purpose, it seems to me that there is no difficulty in principle in deciding whether any individual postulant is or is not within this class of persons.

The second stage involves a process of selection from this wide class of potential beneficiaries. By virtue of cll. 1(e)(2) and 8(b)(i), the trustee and the protector together have the power to select one or more persons from this wider class so as to form a sub-class of beneficiaries who thereby become the immediate objects of the powers of appointment set out in cll. 2, 3 and 4 of the declaration of trust . . . [I]t may never be exercised and no sub-class of beneficiaries may ever come into existence. Once again, however, I see no

difficulty in principle in applying the test of certainty to which I have already referred.

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The third stage is the exercise of the powers of appointment contained at cll. 2, 3 and 4 of the declaration of trust in favour of any one or more of this sub-class of beneficiaries. As these powers require the consent of the protector, in the absence of such an office holder no such appointment can be made either to members of that sub-class . . . or in favour of the Irish Red Cross Society . . .

In those circumstances, it seems to me that the true analysis of the situation brought about by the absence of a protector is not that there is some conceptual uncertainty amongst the potential objects of the powers of appointment, but that no potential objects other than the Irish Red Cross Society can ever come into being . . .

. . . It seems to me that the right analysis is that the trusts declared at cll. 2, 3 and 4 must, indeed, fail [in the absence of a protector] but that they do so because they are ineffectual rather than because they are uncertain. It seems to me that the position is no different from what it would have been if a protector had been appointed from the beginning but no nomination had ever been made by the trustee and protector and no appointment had been made prior to or on the vesting day under cll. 2, 3 and 4."

28 With respect to the Acting Deemster, it seems to us that the judgment elides the power of adding beneficiaries with the trusts and powers of appointment of income and capital amongst the beneficiaries. This is evidenced by his use of the expression "sub-class of beneficiary" to describe

those who have been added as beneficiaries and may therefore be in receipt of income or capital. In our respectful opinion, they are not a sub-class of beneficiary, they are the only beneficiaries. There is no wider class of beneficiary which includes persons who are the object of the power of addition, as the Acting Deemster seems to suggest.

29 In our judgment, one must return to first principles. A beneficiary of a discretionary trust is a person in whose favour a discretion to distribute income or capital of a trust may be exercised. Trustees may only exercise their power to distribute income or capital in favour of a person who is a beneficiary. It is the beneficiaries who are the objects of the discretionary trust. They must be sufficiently certain to satisfy the requirement as to certainty of objects.

30 A power to add beneficiaries is something completely different. It means what it says. A person who is a possible object of a power to add beneficiaries is not in fact a beneficiary unless or until the power is exercised in his favour and he is added as a beneficiary. Until that

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moment, the trustees may not apply income or capital for his benefit and he does not have any of the rights attached to being a beneficiary of the trust. The sole right that he has is as a possible object of the power to add beneficiaries.

31 We therefore respectfully disagree with the court in *Rawcliffe* (6) when it used the expression "sub-class of beneficiary," thereby implying that those who were merely objects of a power to add beneficiaries were themselves some sort of beneficiary. We understand the point which Mr. MacRae makes to the effect that there may not be a great practical difference between, on the one hand, having a small class of beneficiaries with a power to add anyone in the world as a beneficiary and, on the other hand, a discretionary power to distribute in favour of anyone in the world. In each case, the trustees can ultimately arrange to distribute in favour of anyone in the world. But there is an important difference in principle. In the former case, they will have to exercise a power to add a particular person as a beneficiary and only thereafter will they be entitled to exercise a power to distribute income or capital to that beneficiary.

32 Returning to the facts of this case, there were no defined beneficiaries of the trust upon its creation in 1983. Not only were there no beneficiaries in favour of whom any of the discretionary powers could be exercised, there was no beneficiary of the trust in default. It is hard to imagine a clearer case of a failure as to the certainty of objects. It would be impossible to say in the case of any given person whether or not he was a beneficiary because there was simply no list or guidance as to what constituted a beneficiary. In the absence of rectification, the trust was therefore void from the outset.

33 As a development of his argument concerning the power to add, Mr. MacRae submitted that, even if the court were against him as at the point of the creation of the trust, the position was rectified on June 25th, 1984, when the power to add was exercised. He argued that the consequence of the failure to list or describe any beneficiaries in the trust deed was that there was a resulting trust for the settlor but that this remained subject to the power to add beneficiaries. Once that power was exercised, the trust became validly constituted.

34 We cannot accept this argument. In the absence of any beneficiaries the trust was void. There was no trust in accordance with this trust deed. The assets were held upon a resulting trust for the

settlor absolutely. The power to add also fell. One could not validly add beneficiaries to a trust which did not exist.

35 Finally, Mr. MacRae submitted that one could construct a *Quistclose* trust out of the facts of this case. Despite the imaginative arguments which he put forward, we are unable to see that the facts of this case can properly be brought within the fairly clearly defined requirements of a *Quistclose*

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trust. As summarized in *Lewin on Trusts*, 18th ed., para. 8.44, at 270 (2008), citing *Barclays Bank Ltd.* v. *Quistclose Invs. Ltd.* (1) and *Twinsectra Ltd.* v. *Yardley* (7), a *Quistclose* trust is one whereby *A* pays or transfers money or property to *B* so that *B* holds the money or property in trust for *A* subject to a power for *B* to apply the money or property for a stated purpose. That bears no relation to the situation here where the settlor intended to transfer the money to the first trustees to hold upon the trusts set out in the trust deed. She did not intend to retain any interest in the trust funds; on the contrary, she was an excluded person. The fact that, because of the error in completing the trust deed, the trust as executed failed, does not alter her purpose and intention.

36 For all of these reasons, we cannot accede to any of Mr. MacRae's arguments that the trust was valid despite the absence of any beneficiaries in the trust deed as executed.

Rectification

37 However, in our judgment this is a clear and obvious case for rectification. The test for rectification is well established 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 and the settlor in particular;

(ii) there must be full and frank disclosure; and

(iii) there should be no other practical remedy.

38 As already mentioned earlier, the court is in no doubt that there was here a genuine mistake in that the intention of the settlor and the trustees was that the RNLI should be inserted in Schedule 7, which would have meant that a valid trust was created. The failure to do so was a simple error in that Mr. Southey failed to notice that Schedule 7 had not been completed as required when he completed some of the other schedules in the settlor's presence.

39 As to the second aspect, we are satisfied that there has been full and frank disclosure. In particular, we have heard evidence concerning the position of the settlor.

40 As to the third requirement, we have considered Mr. MacRae's arguments on validity because if any of them had succeeded there would not have been any need to order rectification. However, given that they have not succeeded, there is no other practical remedy.

41 Rectification remains a discretionary remedy and delay can be a relevant factor. It is of course a long time since the execution of the trust deed but we are satisfied that, once the potential problem came to light, any further delay has not been such as to lead us to refuse the remedy,

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given that everyone has acted in good faith since 1983 on the assumption that the trust was valid.

42 In all the circumstances, we order the rectification of the trust by inserting in Schedule 7 the words: "The Royal National Lifeboat Institution (a charity registered in England and Wales with registered charity number 209603)." Rectification of course takes effect from the date of the instrument and the effect therefore will be that the trust has been validly constituted since June 10th, 1983 and accordingly the power to add beneficiaries was validly exercised.

Order accordingly.