[2019 Gib LR 13]

IN THE MATTER OF THE KLEIN FAMILY SETTLEMENT

LEVY, N.Z. ROTHSCHILD and J. ROTHSCHILD (as trustees of the KLEIN SETTLEMENT) v. D.T. KLEIN, K. KLEIN and G. KLEIN

SUPREME COURT (Yeats, Ag. J.): December 20th, 2018

Trusts—rectification—discretion of court—four requirements to rectify voluntary settlement: (a) convincing proof to counteract evidence of different intention represented by document; (b) flaw in document such that effect not given to parties' intention; (c) specific intention of parties must be shown; and (d) issue capable of being contested between parties—adult siblings' funds rectified to add siblings and issue as discretionary beneficiaries of one another's funds as originally intended

Trustees sought a declaration that a payment out of the trust assets was valid or, alternatively, rectification of certain trust provisions.

Mrs. Marthe Klein had a son and three daughters. Her assets had been held by Dr. D. Rothschild for her benefit and, in the event of her death, for her descendants. After Mrs. Klein's death in 1988, it was decided to formalize the relationship and settle the assets into a trust. As separate provision had been made for the daughters, the assets held by Dr. Rothschild were held for the son, Patrice Klein, and his issue. A trust was settled in 1994 for the benefit of Patrice Klein's four children: Daniel, Karen, Francois (who died in 2018) and Gabrielle. The funds were held on trust for the beneficiaries who were over the age of 25 in equal shares absolutely but provision was made in cl. 5(1) of the trust deed for the trustees to appoint a beneficiary's share to a new trust for the benefit of that beneficiary, their spouse and issue.

When each of Patrice Klein's children reached the age of 25, a new trust was settled for them. The four new trusts were known as Daniel's Fund, Karen's Fund, Francois's Fund and Gabrielle's Fund. The beneficiary of each fund was defined as "any person actually or prospectively entitled to any share in the capital or income of [the sibling's] Fund." The discretionary beneficiaries of the first three funds were the named sibling, their spouse or widow, their children and remoter issue. In Gabrielle's Fund, the definition of discretionary beneficiary included the named sibling, their spouse or widow, their children and remoter issue and also the other three siblings and their issue. The claimants submitted that Gabrielle's Fund properly reflected the trustees' intentions and that, by error, the first three funds failed expressly to include the other siblings and their issue as discretionary beneficiaries.

In October 2016, the trustees made a payment of US$56m. to Karen out of the trust funds. The other siblings agreed to the making of the payment. At the time of the payment the trust held the US$56m. cash and other assets of some £29.8m. Karen therefore received more than a quarter share of the assets. The trust did not, however, hold the entirety of the family's wealth, with assets of over £200m. in other trusts.

The trustees were originally advised that the payment to Karen could properly be made even though she was not a beneficiary of Daniel's Fund or Francois's Fund. However, subsequent advice suggested that it was not technically permissible. The trustees therefore brought the present proceedings seeking (1) a declaration that the payment to Karen was within the scope of their powers as trustees and was valid; (2) further or in the alternative, an order for rectification of certain provisions in Daniel's Fund, Karen's Fund and Francois's Fund so as to include all defendants and Francois as well as their issue as beneficiaries in each of the funds; and (3) a declaration that cl. 5(1) of the trust deed permitted the adding of the defendants and Francois to the class of beneficiaries of the funds. The defendants did not oppose the claim.

The court was satisfied that when the trustees set up the four funds, their intention was that the children of Patrice Klein were to be named as discretionary beneficiaries in each other's funds. This followed Mrs. Klein's approach to the management of the family wealth.

The trustees submitted that (a) the payment to Karen was made on the basis that she was prospectively entitled to a share in her siblings' funds and was therefore within the class of beneficiaries of all of the funds; (b) there was considerable doubt as to whether the original advice was correct; (c) in respect of cl. 5(1), the inclusion of all siblings as discretionary beneficiaries was for the benefit of the named sibling of a particular fund, and it was permissible for the other siblings and their issue to be added as discretionary beneficiaries of the funds; and (d) the court should order rectification of the funds.

Held, ruling as follows:

(1) The claim for a declaration that the payment to Karen was within the scope of the trustees' powers as trustees of the trust would be dismissed. The original advice given to the trustees was wrong. The ultimate default provision in the funds could only be interpreted as meaning that the funds not disposed of in the event of the discretionary beneficiaries' death were held on the terms of the original trust. The terms of the original trust were that the assets were vested in the particular sibling absolutely and they would therefore be held for his or her estate. Karen was not a prospective beneficiary of the funds held in Daniel's Fund and Francois's Fund when the payment was made. The trustees did not have power to make the payment to Karen (paras. 17–23).

(2) Clause 5(1) of the trust deed provided that ". . . the Trustees shall have power during the Trust Period as respects the Share of any Beneficiary . . . to declare such fresh trusts (including discretionary or protective trusts) in respect of all or any part of such Share for the benefit of the Beneficiary and any spouse widow widower child children or remoter issue . . ." On a strict reading of the provision, the other siblings were not included in the class of persons who could be appointed as beneficiaries. It was only the named sibling, spouse and issue who were amongst the class of objects permitted to benefit. The court was, however, satisfied that the inclusion of the siblings and their issue was of benefit to the named sibling in a particular fund. Whilst the named sibling remained the primary beneficiary, it was in his or her interest for the other siblings to be named as objects in order to give the trustees a flexibility which, in all the circumstances of this particular family's wealth, would benefit them all. In construing the term "benefit" the court was able to look at the circumstances of the case. The court concluded that the trustees would have been able to appoint all the siblings and their issue in each of the individual funds, as they did with Gabrielle's Fund, and consequently the declaration sought by the trustees in para. (3) of the claim would be granted (paras. 27–32).

(3) The court would grant the declaration sought by the trustees that the funds be rectified so as to include all siblings and their issue as discretionary beneficiaries. The evidence proved an intention to include all siblings and their issue as beneficiaries in all of the funds. The logical conclusions was that it had not been achieved due to drafting error. It was relevant that Gabrielle's Fund correctly recorded what the court had found to be the trustees' intentions. The four conditions which must be satisfied in order to rectify a voluntary settlement were (1) there must be convincing proof of the trustees' intentions to counteract the evidence of a different intention represented by the document itself; (2) there must be a flaw in the written document such that it did not give effect to the parties' intention, as opposed to the parties merely being mistaken as to the consequences of what had been agreed or intended; (3) the specific intention of the parties must be shown; and (4) there must be an issue

capable of being contested between the parties notwithstanding that all relevant parties consented. The court had no doubt as to the first condition, namely convincing proof of the trustees' true intentions and that it was not reflected in the funds. As to the second, the non-inclusion of the siblings and their issue was a drafting error. Such a mistake thwarted the trustees' ability to manage the funds as originally intended. Thirdly, the specific intention of the trustees was identifiable. Fourthly, there was an issue capable of being contested as between the trustees on the one hand and the beneficiaries on the other. If rectification of the funds was not ordered, the payment to Karen was made in breach of trust. Furthermore, rectification was also necessary to ensure that the future management of the funds could be effected in accordance with the trustees' intentions. The representative of the minor and unborn children of Daniel and Francois supported the claim for rectification. They were also beneficiaries of the additional trusts worth approximately £200m. The court had no hesitation in determining that a prudent adult would consider the trustees' application for rectification of the relevant funds to be of benefit to the minor and unborn beneficiaries. As rectification operated from the outset, the relevant clauses in the funds would be rectified which took effect from the dates when the respective funds were established (paras. 34–44).

Cases cited:

(1) *Allnutt* v. *Wilding*, [2007] EWCA Civ 412; [2007] WTLR 941, applied.
(2) *CL*, *Re*, [1969] 1 Ch. 587, considered.
(3) *Giles* v. *Royal Nat. Inst. for the Blind*, [2014] EWHC 1373 (Ch); [2014] BTC 24; [2014] STC 1631; [2014] STI 1910, applied.
(4) *Halstead's Will Trusts*, *Re*, [1937] 2 All E.R. 570, considered.
(5) *Pilkington* v. *Inland Rev. Commrs.*, [1964] A.C. 612; [1962] 3 W.L.R. 1051; [1962] 3 All E.R. 622, considered.
(6) *RBC Trustees* v. *Stubbs*, [2017] EWHC 180 (Ch), considered.
(7) *Racal Group Servs. Ltd.* v. *Ashmore*, [1995] STC 1151, applied.
(8) *Remnant's Settlement Trusts*, *In re*, [1970] Ch. 560; [1970] 2 All E.R. 554, considered.
(9) *Weston's Settlements*, *In re*, [1969] 1 Ch. 223; [1968] 3 All E.R. 338; [1968] T.R. 295; (1968), 47 A.T.C. 324, considered.
(10) *Wright* v. *Gater*, [2011] EWHC 2881 (Ch); [2012] 1 W.L.R. 802; [2012] STC 355; [2011] STI 3431; [2012] WTLR 549, considered.

Legislation construed:

Trusts (Private International Law) Act 2015, s.3:

"The Gibraltar courts have jurisdiction where—

. . .

(b) a trustee of a foreign trust is resident in Gibraltar . . ."

A. Holden for the claimants;
L. Baglietto, *Q.C.* for the defendants;

K. King and *K. Navas* for the minor and unborn children of D.T. Klein and the late F. Klein.

1 **YEATS, Ag. J.:** By a Part 8 Claim Form issued on September 17th, 2018, the claimants, as trustees of the Klein Family Settlement (which I shall refer to as "the trust"), seek the following principal relief:

(i) A declaration that a payment made to Karen Klein, the second defendant, in October 2016 from the trust's assets was within the scope of their powers as trustees and was valid;

(ii) Further or in the alternative, an order for rectification of certain provisions in sub-funds known as "Daniel's Fund," "Karen's Fund" and "Francois's Fund," established by appointment from the trust, so as to include all defendants and their late brother Francois Klein as well as their issue as beneficiaries in each of these sub-funds.

(iii) A declaration that cl. 5(1) of the deed establishing the trust does in fact permit the adding of the defendants and the late Francois Klein to the class of beneficiaries of the sub-funds.

The trust

2 Mr. Pinchas Lehmann was a German Jew who in the 1930s, in the face of Nazi persecution, entrusted parts of his wealth to the Rothschild family who were family friends living in Switzerland. After the war, the arrangements continued with the Rothschild family holding the assets that Mr. Lehmann had entrusted to them for the benefit of members of the Lehmann family. In due course Mr. Lehmann's daughter, Mrs. Marthe Klein, inherited the totality of her family's wealth (as well as other assets inherited from family on her mother's side). All her assets were then held by Dr. Dani Rothschild ("Dr. Rothschild") for her benefit and, in the event of her death, for her descendants. Mrs. Klein had a son and three daughters. She died in 1988.

3 After her death it was decided to formalize the relationship and settle the assets onto a trust. As provision for Mrs. Klein's daughters had been separately made, the assets held by Dr. Rothschild were held for her son, Mr. Patrice Klein, and his issue. In the event, on July 3rd, 1994, Dr. Rothschild settled the trust for the benefit of Patrice Klein's children. The trustees were Nathan Zwi Rothschild who is Dr. Rothschild's son, Bernard Muller, who died on May 15th, 2004 and Jocelyne Schischa, a sister of Patrice Klein. (Mrs. Schischa resigned as a trustee on September 10th, 2009.) Josef E. Rothschild, who is also a son of Dr. Rothschild, was appointed as a trustee on September 10th, 2009 and James Levy, C.B.E., Q.C. was appointed a trustee on November 8th, 2012.

4 Pursuant to cl. 1(e) of the trust deed, the beneficiaries of the trust are Patrice Klein's four children, namely Daniel Theodore Klein, Karen Liss (*née* Klein), Francois Klein and Gabrielle Pine (*née* Klein). I shall refer to them by their first names. (Daniel, Karen and Gabrielle are the defendants to this claim. Francois died in June 2018.) The funds subject to the trust are held on trust for the beneficiaries who are over the age of 25 years in equal shares absolutely but provision was made in cl. 5(1) of the trust deed for the trustees to appoint a beneficiary's share onto a new trust for the benefit of that beneficiary, their spouse and issue.

5 When all four of Patrice Klein's children reached the age of 25, and before they were 26, new trusts were settled for each of them in accordance with the power of appointment contained in cl. 5 of the trust deed. The four new trusts are known as Daniel's Fund, Karen's Fund, Francois's Fund and Gabrielle's Fund, respectively. The discretionary beneficiaries of the first three of these funds are the named sibling, their spouse or widow, their children and remoter issue living at the time of the creation of the fund or born within the trust period. The fourth of these funds, namely Gabrielle's Fund, has the same definition of discretionary beneficiary except that it also includes the other three siblings and their issue as discretionary beneficiaries of that fund. The claimants say that Gabrielle's Fund properly reflects the trustees' intentions and that, by error, the first three of the funds to be set up failed to expressly include the other siblings and their issue as discretionary beneficiaries.

6 In October 2016, the trustees made a payment of US$56m. to Karen out of the trust funds. Karen had been resident in Israel for a period of time and this entitled her to receive these moneys without liability to tax in the United Kingdom. The other siblings agreed to the making of the payment. At the time of the payment, the trust held the US$56m. cash together with other assets worth a further £29.8m. approximately. In light of the value of the assets held upon the trust at the material time, the effect of the payment to Karen was that she received more than a quarter share of the trust's assets.

7 As has been explained, Gabrielle's Fund included Karen as a beneficiary of that fund. However, Karen was not expressly included as a beneficiary in Daniel's Fund or Francois's Fund. Notwithstanding, the trustees were originally advised that the payment could properly be made. However, subsequent advice suggests that it was not technically permissible. They therefore bring these proceedings seeking either a declaration that the payment was in fact properly made or, alternatively, rectification of Daniel's Fund, Karen's Fund and Francois's Fund so as to include all siblings as discretionary beneficiaries of each of these funds. The defendants do not oppose the claim and Mr. Lewis Baglietto, Q.C., who appeared for the defendants, was not instructed to make any submissions.

8 Although in accordance with cl. 9 of the trust deed the governing law of the trust is English law, this court is able to determine the claim because one of the trustees, namely James Levy, is resident in Gibraltar. (See s.3 of the Trusts (Private International Law) Act 2015.)

The trustees' intentions

9 Mrs. Klein's intentions have been placed at the heart of the submissions by the trustees. Although the settlor was Dr. Rothschild, it was of course Mrs. Klein's wishes and intentions that were being brought into play by him. The trustees rely on the witness statements of James Levy, Nathan Rothschild and Patrice Klein in support of their claim and to evidence Mrs. Klein's intentions as to how the assets were to be applied. I have carefully considered these.

10 At the hearing, Mr. Holden referred me to a number of passages in these witness statements which he submitted were particularly relevant. At paras. 27 and 28 of his witness statement, Mr. Levy says as follows:

> "[27] Mrs Klein's intentions in relation to the Trust, as attested to by Mr Klein and Nathan Rothschild, were that her son's children were to benefit equally from the Trust fund. As Mr Rothschild explains in his evidence, these wishes were expressed to Dr Rothschild during his lifetime while he was still managing the Assets.
>
> [28] I understand from Mr Klein and Mr Rothschild that this overarching principle of equality would extend to any new trust created by the trustees from the Trust Fund. In particular, my understanding is that Mrs Klein wanted to ensure that the Assets that were ultimately settled on the Trust were always available to each beneficiary. Accordingly, it is my firm belief that Mrs Klein would not have wished the Trust of the Assets to be partitioned, such that some of the Beneficiaries would have access to part of the Trust Fund to the exclusion of the others. It is simply not how she wished her family wealth to be administered. She did not want the situation to arise where one of the Beneficiaries' share had increased in value but not the others. Rather, everyone was to be capable of benefitting equally. The fundamental rationale behind this approach was to ensure harmony amongst the beneficiaries and a sense of responsibility for each other."

11 Nathan Rothschild, who is the only one of the original trustees who remains a trustee, says the following at para. 8 of his witness statement:

> "[8] Mrs Klein was the 'matriarch' of the Klein Family and she was concerned not only with the financial well-being of her family but, more importantly to her, for their emotional well-being and a warm and caring relationship between the siblings. She wanted any trustee

> to have flexibility to be able to help out those Beneficiaries who needed more assistance. Her life experiences had taught her that not all of her grandchildren would necessarily have the same earning capacity, standard of living or number of children. She therefore wanted any trustee to have the ability to have flexibility in distributing the wealth of (sic) created by the Assets."

12 A memorandum dated January 7th, 2004 and made by Nathan Rothschild features as a significant document in the claimants' claim. It is said to have been created to record Mrs. Klein's intentions prior to the creation of the funds. (Mrs. Klein had of course passed away in 1988 so the memorandum was prepared many years later.) The memorandum is entitled "Klein Family Settlement" and provides as follows:

> "In anticipation of implementing the powers given to the Trustees to settle funds for each of the children of Patrice Klein (between the age of 25 and 26 years) it is important to note that one of the main intentions of Mrs Marthe Klein is that all discretionary beneficiaries are to remain with the same rights even though technically a deed of appointment will be eventually be entered for each of Patrice Klein's children.
>
> To be clear discretionary beneficiaries under each of the appointments must therefore include the other 3 siblings and their descendants. Therefore, the Trustees have agreed that all appointments to New Trusts will include all beneficiaries.
>
> The first such appointment will be Daniel Klein in the near future and the same will apply to all other children's appointment."

13 At paras. 14 and 15 of his witness statement, Nathan Rothschild says the following with regards to the setting up of the funds and this memorandum:

> "[14] I will now explain the setting up of the Funds for each of the Beneficiaries. As Mr Levy correctly explains the trustees of the Trust had the power to create the funds under the Trust Deed after the 25th and before the 26th birthdays of each of the Beneficiaries. My understanding and that of my co-trustees at the time was that although each beneficiary was entitled to a quarter part absolutely, the creation of a discretionary fund for each of them, with the primary purpose of benefitting that beneficiary, would allow the Trustees to distribute assets with discretion across the beneficial class. This would be the correct way of following Mrs Klein's wishes: equality but with flexibility.
>
> [15] . . . I made a note of a discussion between the Trustees at the time in contemplation of the establishment of Daniel's Fund which was done in March 2004. As I have previously explained the Funds

would be for each of the Beneficiaries but would also include their siblings as part of the beneficial class. It is clear that this must have been the main part of our discussions as this is the only point I noted down. This was a file note I kept at the time for my personal use since I knew there would be further funds to establish and the main decision for the Trustees would be the identity of the beneficiaries of each of the Funds."

14 This is supported by the evidence of Patrice Klein. At paras. 6, 7 and 9 of his witness statement he says:

"[6] In relation to material wealth in particular, she was very clear in her view that in life it was never certain who would make money or otherwise. She wished that the family wealth accumulated originally by her father would be put to family use. By this she meant that it would be available for the family as required. Of course, her vision was that her children would make their own way in life but she was acutely aware that they may not all become financially successful. The family wealth would be available to assist those who from time to time needed help.

[7] In terms of the Trust and the Assets, she would always tell me that although each of her grandchildren would get an equal share, she would wish to allow all to benefit, potentially, from each other's share. Some of her grandchildren would inevitably become more financially successful than others but since the wealth originated from the family, the other siblings should not be excluded from benefitting from that wealth."

"[9] . . . my consent was required before the Funds could be established. I do recall discussing the concept of the Funds with the Rothschilds at the time that Daniel's Fund was to be settled. I remember discussing with them that all my children would be beneficiaries of his Funds as per my mother's wishes. I naturally assumed that this would be the case. I realise that it was not drafted as such but that can only be due to a drafting error as it was very clear in my mind what had been discussed and agreed. When I signed my consent I must not have checked carefully enough to realise the error."

15 Although no live evidence was given at the hearing, the written evidence is clear and uncontroverted and I have no hesitation in accepting this. I am therefore able to conclude that although the trust provided that each of the siblings would be entitled to a one quarter share of the trust funds absolutely on attaining the age of 25 (but subject to the power of appointment of further trusts as provided for by cl. 5(1)), the settlor's intention was that the entirety of the assets were to be held for the benefit of each and every one of Patrice Klein's children. Furthermore, when the

trustees exercised their power of appointment to set up the funds, the intention of the trustees was that each of the said children of Patrice Klein were to be named as discretionary beneficiaries in each other's funds. This followed Mrs. Klein's approach to the management of the family wealth.

Declaration that the payment was within the scope of the trustees' powers

16 The trustees made the payment to Karen having received advice from counsel. The trustees were subsequently advised by different counsel that they may not in fact have had the power to make the payment. They therefore seek a declaration confirming the validity of the payment. The basis upon which it was said that the trustees were able to effect the payment is the following.

17 Each of the deeds appointing the funds contain an identical definition of "beneficiary" (separate to the definition of "discretionary beneficiary"). In Daniel's Fund this is contained in cl. 1.3 and reads as follows:

> "'Beneficiary' shall mean any person actually or *prospectively* entitled to any share or interest in the capital or income of Daniel's Fund." [Emphasis added.]

18 Each of these deeds also contains an identical ultimate default trust provision. For example, in Daniel's Fund, cl. 2 provides that if Daniel's fund is not disposed of, the fund "shall be held upon the trusts of the settlement" [the settlement is what I refer to as "the trust"]. In the event, inconceivable as it may be, that a particular sibling, his spouse, children and remoter issue all die, the assets held by the fund would then be held on the terms of the trust.

19 Clause 3 of the trust deed provides as follows:

> "The Trustees shall hold the Trust Fund and its income on trust for such one or more of the Beneficiaries [the four siblings] as shall within the Trust Period attain the age of 25 years or shall be living and under that age at the expiration of the Trust Period and if more than one in equal shares absolutely but subject to clause 5 below."

20 Therefore, it is argued that in the event that one of the siblings' funds fails entirely, the remaining siblings would be the beneficiaries of that share. Consequently, Karen is prospectively entitled to a share in her siblings' funds and as a result is within the class of beneficiaries of all of the funds. On the strength of that analysis the payment to Karen was made.

21 Whilst he is content to leave the matter in the court's hands, Mr. Andrew Holden, who appeared for the trustees, submitted that the court should not in fact make the declaration. There is, he suggests, a difficulty

with the advice originally given to the trustees. For the original advice to be correct, if the ultimate default provision in one of the funds is engaged, the assets would theoretically have to be held on a new trust on terms identical to the original trust and not upon the original trust. This is because the assets held by the fund had already vested in the particular sibling absolutely before the fund was created. If the assets in the fund were then to revert to the original trust they can only revert to that sibling and his estate. They are at that point no longer capable of being distributed amongst other beneficiaries. In light of that analysis, Mr. Holden submits that there is considerable doubt as to whether the advice originally given to the trustees is correct. I agree. In my judgment, the ultimate default provision in the funds can only be interpreted as meaning that the funds not disposed of in the event of the discretionary beneficiaries' death are held upon the terms of the original trust. The terms of the original trust are that the assets were vested in the particular sibling absolutely and these would therefore be held for his or her estate. Karen was therefore not a prospective beneficiary of the funds held in Daniel's Fund and Francois's Fund at the time that the payment was made.

22 Ms. Kira King, who appeared on behalf of the minor and unborn children of Daniel and the late Francois, did not disagree with Mr. Holden's submissions on the matter. In her written submissions she had in fact advanced different arguments to reach the same conclusion. As I have decided that the advice given to the trustees was wrong and that consequently they did not have the power to make the payment to Karen, I need not consider these further arguments.

23 The claim for a declaration that the payment to Karen was within the scope of the trustees' powers as trustees of the trust is dismissed.

24 Alternatively, the trustees seek the rectification of Daniel's Fund, Karen's Fund and Francois's Fund so that they all include all the siblings and their issue as discretionary beneficiaries of the respective funds. (As has been observed already, Gabrielle's Fund includes all siblings and their issue as discretionary beneficiaries.) If rectification is granted then this validates the payment made to Karen because rectification has retrospective effect. The trustees also seek the rectification in any event so that any future exercise of their powers under the funds can be effected in accordance with Mrs. Klein's objectives.

Clause 5(1) of the trust deed

25 Before considering rectification it is necessary to consider cl. 5(1) of the trust deed in some detail. The relevance is that, at first glance, cl. 5(1) does not appear to permit the trustees to include the other siblings and their issue as discretionary beneficiaries of the funds. If I therefore

determine that cl. 5(1) does not permit the inclusion of the other siblings and issue, then the application for rectification fails at the first hurdle.

26 Clause 5(1) of the trust deed provides as follows:

> "Notwithstanding the trusts in Clause 3 above the Trustees shall have power during the Trust Period as respects the Share of any Beneficiary who shall have attained the age of 25 years and be living and under the age of 26 years by deed or deeds revocable or irrevocable executed prior to the Beneficiary attaining the age of 26 years and with such consent as is set out below to declare such fresh trusts (including discretionary or protective trusts) in respect of all or any part of such Share for the benefit of the Beneficiary and any spouse widow widower child children or remoter issue of such Beneficiary and with and subject to such terms and limitations and provisions for maintenance education advancement or benefit as the Trustees in their absolute discretion but without infringing the rule against perpetuities shall think fit."

(Clause 5(2) provides that the consent of Patrice Klein or, after his death, of Jocelyne Schischa (his sister) is required for such further trusts to be created.)

27 It is the words "for the benefit of the Beneficiary and any spouse widow widower child children or remoter issue of such Beneficiary" and in particular the words "for the benefit of the Beneficiary" which require analysis. On a strict reading of this provision, the other siblings are not included in the class of persons who can be appointed as beneficiaries. It is only the named sibling, spouse, and issue who are amongst the class of objects permitted to benefit. Nevertheless, the submission by Mr. Holden, supported by Ms. King, is that in this case the inclusion of all siblings as discretionary beneficiaries happens to be for the benefit of the named sibling of the particular fund. Consequently, it is perfectly permissible for the other siblings and their issue to be added as discretionary beneficiaries of the funds.

28 The starting point is that the trust does not hold the entirety of the family's wealth. There are other assets held on trust for the same beneficiaries. At para. 33(3) of his witness statement, James Levy says as follows:

> "In this regard, I would note that Line Trust Corporation Limited ('LTCL') the professional trust company associated with Hassans Law Firm (of which I am the Senior Partner) administers other trusts of very substantial value for the benefit of the Beneficiaries (well in excess of £200 million). I am aware that LTCL intend to take [the payment] into consideration when deciding whether to make further distributions to the Beneficiaries other than Karen from this very substantial family wealth. Indeed, I understand from Karen that she

> acknowledges that she has received a very sizeable distribution, and that this indeed should be taken into account by LTCL as trustee of the other trusts."

29 Mr. Holden submits that there is a benefit to all beneficiaries when one of them is able to take advantage of legitimate tax planning opportunities. In such a case, trustees can take a tax advantageous payment to one of the beneficiaries into account when determining what other distributions to make to the others, particularly when there are further trusts and assets from which payments can be made. I am therefore entreated to look at the whole picture and the entirety of the family's wealth when determining whether the inclusion of all the siblings in the individual funds is a *benefit*.

30 Counsel have referred me to a number of authorities in which the question of what a *benefit* means has been considered. In particular I was referred to *Pilkington* v. *Inland Rev. Commrs.* (5). That case concerned the statutory power of advancement and whether the exercise of that power could be said to be for the benefit of a beneficiary even if other persons receive an incidental benefit as a result of the advancement. Viscount Radcliffe said as follows ([1964] A.C. at 636):

> "It is true that, if this settlement is made, Miss Penelope's children, who are not objects of the power, are given a possible interest in the event of her dying under 30 leaving surviving issue. But if the disposition itself, by which I mean the whole provision made, is for her benefit, it is no objection to the exercise of the power that other persons benefit incidentally as a result of the exercise. Thus a man's creditors may in certain cases get the most immediate advantage from an advancement made for the purpose of paying them off, as in *Lowther v. Bentinc*; and a power to raise money for the advancement of a wife may cover a payment made direct to her husband in order to set him up in business *(In re Kershaw's Trusts).* The exercise will not be bad therefore on this ground."

31 Applying that rationale, it is therefore submitted that so long as the named sibling and his family remain as the principal beneficiaries of the particular fund, it is permissible for other siblings to also benefit. (In her written opinion of November 27th, 2018 Ms. King also refers to *Re Halstead's Will Trusts* (4). Farwell, J. held that the trustees in that case could make a settlement which would benefit the wife and children of the beneficiary of the trust even though they were not themselves objects of the trust.)

32 In this case I am satisfied that the inclusion of the siblings and their issue is of benefit to the named sibling in a particular fund. Whilst the named sibling remains as the primary beneficiary, it is in his or her interest for the other siblings to be named as objects in order to give the trustees a

flexibility which, in the circumstances of this particular family's wealth, would benefit them all. In my judgment, in construing the term "benefit" I am able to look at the circumstances of the particular case. I am not bound to apply an interpretation which is of universal relevance. I therefore conclude that the trustees would have been able to appoint all the siblings and their issue in each of the individual funds—as they did with Gabrielle's Fund—and consequently the declaration sought by the trustees in para. (3) of the claim form is hereby granted.

Rectification of Daniel's Fund, Karen's Fund and Francois's Fund

33 Should I therefore order the rectification of Daniel's Fund, Karen's Fund and Francois's Fund so as to include all the siblings and their issue as discretionary beneficiaries? In *Allnutt* v. *Wilding* (1), Mummery, L.J. described rectification in the following terms ([2007] EWCA Civ 412, at para. 11):

> ". . . [R]ectification is about putting the record straight. In the case of a voluntary settlement, rectification involves bringing the trust document into line with the true intentions of the settlor as held by him at the date when he executed the document. This can be done by the court when, owing to a mistake in the drafting of the document, it fails to record the settlor's true intentions. The mistake may, for example, consist of leaving out words that were intended to be put into the document; or putting in words that were not intended to be in the document; or through a misunderstanding by those involved about the meanings of the words or expressions that were used in the document. Mistakes of this kind have the effect that the document, as executed, is not a true record of the settlor's intentions."

34 I have already determined that the evidence proves an intention to include all the siblings and their issue as beneficiaries in all of the funds. The logical conclusion is that this was not achieved due to a drafting error—in effect of words being left out of the written instruments. It is of course relevant that Gabrielle's Fund correctly records what I have found to be the trustees' intentions. I will at this stage observe that there is no evidence as to why this fund does in fact include all of the siblings as discretionary beneficiaries but I disregard any ulterior motive. The fund was appointed four years before the payment to Karen was effected and there is certainly no basis for suggesting that the "correcting" of Gabrielle's Fund and the payment to Karen may be linked.

35 In *Giles* v. *Royal Nat. Inst. for the Blind* (3), Barling, J. cited the criteria set out by the Court of Appeal in *Racal Group Servs. Ltd.* v. *Ashmore* (7) as the four conditions which must be satisfied in order to rectify a voluntary settlement, as follows ([2014] EWHC 1373 (Ch), at para. 25):

> "(1) While equity has power to rectify a written instrument so that it accords with the true intention of its maker, as a discretionary remedy rectification is to be treated with caution. One aspect of that caution is that the claimant's case should be established by clear evidence of the true intention to which effect has not been given in the instrument. Such proof is on the civil standard of balance of probability. But as the alleged true intention of necessity contradicts the written instrument, there must be convincing proof to counteract the evidence of a different intention represented by the document itself . . .
>
> (2) There must be a flaw in the written document such that it does not give effect to the parties'/donor's agreement/intention, as opposed to the parties/donor merely being mistaken as to the consequences of what they have agreed/intended; for example it is not sufficient merely that the document fails to achieve the desired fiscal objective . . .
>
> (3) The specific intention of the parties/donor must be shown; it is not sufficient to show that the parties did *not* intend what was recorded; they also have to show what they did intend, with some degree of precision . . .
>
> (4) There must be an issue capable of being contested between the parties notwithstanding that all relevant parties consent . . ."

36 In respect of the fourth criterion, the learned judge referred to the following passage in *Racal* which had been stated by Vinelot, J. at first instance and approved by Peter Gibson, L.J. (*ibid*.):

> "that there is an issue capable of being contested, between the parties or between a covenantor or a grantor and the person he intended to benefit, it being irrelevant first that rectification of the document is sought or consented to by them all, and second that rectification is desired because it has beneficial fiscal consequences. On the other hand, the court will not order rectification of a document as between the parties or as between a grantor or covenantor and an intended beneficiary, if their rights will be unaffected and if the only effect of the order will be to secure a fiscal benefit."

37 The first of the conditions is that there must be convincing proof of the trustees' true intention and that this is not reflected in the funds. Of that I have no doubt. The second is that there must be a mistake in the funds which does not give effect to the trustees' intentions. I have concluded that the non-inclusion of the siblings and their issue was a drafting error. Clearly, such a mistake thwarts the trustees' ability to manage the funds in the way that they had originally intended. The third condition is that the specific intention of the trustees must be identifiable.

Even if Gabrielle's Fund did not contain the inclusion of the other siblings, I would have had no difficulty in determining how the trustees' intention was to be evidenced.

38 As to the fourth, it is submitted by Mr. Holden that there is indeed an issue capable of being contested as between the trustees on the one hand and the beneficiaries on the other. If rectification of the funds is not ordered then the payment to Karen was made in breach of trust. Furthermore, rectification is also necessary to ensure that the future management of the funds is effected as per the trustees' intentions. Although the effect of rectification will in the first instance be a fiscal benefit to Karen it is not the only effect of the order. Flexible management of the funds will allow any of the siblings and their issue to benefit from the family wealth as and when required, as was Mrs. Klein's wish.

The interests of the minor and unborn children of Daniel Klein and the late Francois Klein

39 As I have indicated, Ms. King has been instructed as independent counsel to represent the interests of the minor and unborn children of Daniel and the late Francois. (Karen's children are not represented as she was the one who benefitted from the payment. Gabrielle's children are similarly not represented because her fund already includes her siblings and their issue as discretionary beneficiaries.) Ms. King supports the application for rectification. At the hearing, she described that claim as "strong." Her principal submissions however understandably centred on whether rectification of the relevant funds is in the interests of the minor and unborn children. The obvious starting point is that it is not in their interests because they are discretionary beneficiaries of one half of the trust funds. However, the reality is that as the issue of the principal beneficiaries all they have is a *hope* in relation to those assets. Importantly, the minors are also beneficiaries in the additional trusts worth approximately £200m. that I have already referred to. Their interests therefore, like that of their parents, need to be looked at as a whole.

40 The siblings' spouses all signed a letter to the trustees' solicitors (signed by three of the individuals on October 24th, 2018 and by the fourth on October 25th, 2018) consenting to the relief sought by the trustees. The letter provides as follows:

> "We the undersigned, wish to inform you that we are aware of the application made to the court in Gibraltar by the trustees of the settlement.
>
> We are also aware that as spouses of Mr P Klein's children, we and our children are beneficiaries of certain funds created out of the settlement.

> As members of the Klein family we have been informed of the nature of the application to the court to amend the funds and confirm that we consent to the relief sought by your clients, the trustees. We also consider that in the interests of the family as a whole the application is for the benefit of our children who are all minors."

41 Ms. King referred me to the case of *Wright* v. *Gater* (10), a variation of trust case concerning a minor beneficiary where Norris, J. had this to say ([2011] EWHC 2881 (Ch), at para. 11):

> "(e) One step towards objectifying the assessment of non-financial benefit would be to pose the question (based on that posed under different legislation in *Re Irving* (1975) 66 DLR (3d) 387):
>
> > 'Would a prudent adult, motivated by intelligent self-interest, and after sustained consideration of the proposed trusts and powers and the circumstances in which they may fall to be implemented, be likely to accept the proposal?'"

42 Counsel also referred me to the following authorities in which variations of trust concerned minor children: *Re Weston's Settlement* (9) where Lord Denning said ([1969] 1 Ch. at 245) that the court should not just look at the financial benefit to the minors but should also consider educational and social benefits; *In re Remnant's Settlement Trusts* (8), where Pennycuick, J. held ([1970] Ch. at 566) that "benefit" is not limited to financial benefit to the minors but included "benefit of any other kind"; and *Re CL* (2), where Cross, J. determined ([1969] 1 Ch. at 600) an arrangement could be for the minor's benefit even though it was financially to his detriment.

43 It seems to me that the approach identified by Norris, J. in *Wright* v. *Gater* (10) would also be an appropriate test in this case. At paras. 28 to 32 above, I determined that the inclusion of all the siblings in all of the funds would be for the benefit of all the beneficiaries. By extension, that applies to the minor and unborn children of Daniel and Francois. Furthermore, in considering whether a prudent adult would accept the proposals being made by the trustees, I also take into account the fact that all the parents of the minors consent to the applications and believe these to be in the best interests of the family and of the children themselves. In the circumstances I have no hesitation in determining that a prudent adult would consider the trustees' application for rectification of the relevant funds to be of benefit to the minor and unborn children of Daniel and Francois.

Conclusion as to the claim for rectification

44 In my judgment, the criteria for rectifying Daniel's Fund, Karen's Fund and Francois's Fund are satisfied and I should exercise my discretion

and grant the declaration sought by the trustees that these funds be rectified so as to include all siblings and their issue as discretionary beneficiaries. Rectification operates *ex tunc*, from the outset, as *per* Mummery, L.J. in *Allnutt* (1). The relevant clauses in the funds are therefore rectified and take effect from the dates the respective funds were set up.

Notification of H.M. Revenue and Customs in the United Kingdom

45 At the hearing I asked Mr. Holden if H.M. Revenue and Customs in the United Kingdom had been notified of the claimants' claim and invited to join the proceedings. He confirmed that the claimants had not notified HMRC and submitted that, in this case, it was unnecessary as the application was not focused on tax consequences. If the claimants' claim had failed then all that would have had to occur is that Karen would have had to repay the payment to the trust. (That may well be the case but I note that in Ms. King's opinion of November 27th, 2018 she appears to have been instructed otherwise and that tax consequences to the beneficiaries may have materialized.) In any event, it was further submitted that in rectification claims the policy of HMRC is simply to draw the court's attention to the test referred to in *Racal* (7) and *Allnutt* (1). To support that submission, Mr. Holden referred me to *RBC Trustees* v. *Stubbs* (6), where Rose, J. stated ([2017] EWHC 180 (Ch), at para. 36):

> "HMRC has chosen not to take an active role in the proceedings. In their letter of 21 July 2016 they say that they will not join in the application on the understanding that the Court is referred to the case of [*Racal*] and the authorities discussed by the Court of Appeal in that case and also to [*Allnutt*] . . ."

46 That passage does not of course say that this is the policy of HMRC even if, as Mr. Holden assured me, it does in fact reflect such a policy. I am however satisfied that in this case rectification is appropriate on the facts. The nature of the evidence is such that it is in my view unlikely that HMRC would have been able to assist the court save with the test that I should be applying in considering the application for rectification. I have little doubt that I have been referred to the correct test, namely that set out in *Racal* and *Allnutt*. I have therefore proceeded to make the declaration notwithstanding the fact that HMRC have not been notified of the application.

47 Counsel helpfully produced a draft order at the hearing the terms of which I am happy to approve.

Order accordingly.