

Judgment 3/2005

**Investec Trust (Guernsey) Limited (In re The
Pelican Trust) – Royal Court (Civil Action File
879) – 17 January, 2005**

Trusts (Guernsey) Law, 1989 – Trustee’s application for rectification of deed of settlement – no provision in deed for express power to accumulate income – principles to be applied in considering rectification application.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 17th day of January, 2005 before Geoffrey Robert Rowland, Esquire, Deputy Bailiff; present:- Derek Martin Le Page, Stephen Edward Francis Le Poidevin, Esquires, and Susan Mowbray, Jurats.

In the matter of

the PELICAN TRUST dated the 25th September, 1996

On the application of INVESTEC TRUST (GUERNSEY) LIMITED in the terms attached hereto;

WHEREAS on the 21st day of December, 2004, the Court heard Advocate St.J.A. Robilliard, Counsel for the Applicant and Advocate R.Clark, Counsel for the adult, minor and unborn beneficiaries, and GRANTED parts b) and d) of the said application, with the costs of both Counsel to be paid;

THE COURT, this day, handed down its reasons for the said decision in the terms attached hereto.

S. M. D. ROSS
Her Majesty’s Deputy Greffier.

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

In the matter of an Application by Investec Trust (Guernsey) Limited Applicant

Before Geoffrey Robert Rowland, Deputy Bailiff

And Jurats Le Page, Le Poidevin and Mowbray

Cases:

Kleinwort (Guernsey) Trustees Limited. In re. Darby's Settlement Trust, Royal Court 02.03.1989

In the matter of Ferguson and Centurion Trust Company Limited, Royal Court 10.12.1992

In Kleinwort Benson (Guernsey) Trustees Limited and others re. the Wilson Settlement, Royal Court 12.03.1998

Praxis Fiduciaries Limited in the matter of the Estate of Mr. A.Q.G. Gamble deceased, Royal Court 06.03.2003

Re: Butlin's Settlement Trust [1976] Ch 251

Whiteside v. Whiteside and Others [1949] 2 All ER 913

Thomas Bates & Son Ltd. v. Wyndham's (Lingerie) Ltd. [1981] 1 WLR 505

Racal Group Services v Ashmore and Others (1995) STC 1151

Legislation and Texts:

The Trusts (Guernsey) Law, 1989 as amended.

Lewin on Trusts, 17th ed p. 93

Snells Equity 30th ed ch. 43

Counsel

Mr. St. J. Robilliard for the Applicant

Mr. R. Clark for the adult, minor and unborn beneficiaries of the Settlement.

Introduction

1. Investec Trust (Guernsey) Limited (the Trustee) is the trustee of the Pelican Trust. It sought *inter alia* rectification of a Deed of Settlement.
2. On 21st December 2004 the Court granted the application for rectification and advised that it would hand down its reasons shortly thereafter. These are the reasons of the Court.

Background

3. The Settlement Deed (the “Settlement”) was executed on the 25th September 1996 and was made between Mr. K (the “Settlor”) and the Trustee. The proper law of the settlement is Guernsey Law and the Trustee is a Guernsey resident licensed trust company. The application was made with the full support of the Settlor who is not resident in Guernsey and is now both aged and infirm. The application was not opposed by or on behalf of the adult, minor and unborn beneficiaries.

The Settlement and the Application

4. Whilst the Settlor was Mr K it would seem that from the outset it was contemplated that it would be Mr C and members of his family who would be the beneficiaries of the Settlement.
5. The trusts of the Settlement which were material for the purposes of the application may be summarised as follows:-
 - (a) The Trustee may in its discretion pay the net income and principal of the Trust Fund to Mr. C. during his life.
 - (b) On Mr. C’s death the Trustee is to make available to his wife (Mrs C) certain realty if owned by the Trustee at that time. Subject thereto the Trust Fund is to be divided into two equal shares, A and B. From the A share Mrs. C. is to be paid the sum of £50,000 adjusted annually to reflect inflation. The Trustee has power additionally to pay to Mrs. C. so much of the income or principal of share A as is reasonable having regard to her other resources and the needs of the remaindermen.
 - (c) Upon Mrs. C’s death the A share is to be distributed in the same way as the B share.
 - (d) The Trustee is to divide the B share into equal subtrusts, one for each of the then living issue who are named in the Settlement with representation.
 - (e) On the expiry of the stated trust period the child or issue shall take his or their share absolutely. Until that time it is expressly stated that the trust share shall be accumulated with a discretion to the Trustee to pay income or principal to a child or issue as it shall deem necessary.
6. The deed was drafted by a US Attorney practising in London who had no Guernsey law expertise. The Settlement does not contain an express power to accumulate undistributed income during the lifetime of Mr. C. nor in the case of Share A during the lifetime of Mrs. C. should she survive her husband. Furthermore the Settlement does not permit the Trustee during the lifetime of Mr. C. to pay or apply all or any part of the income to one or more of the beneficiaries or to hold the same as an accretion to the Trust Fund.
7. Mr. C. is still alive. It was contended that in the absence of an express power to accumulate during the lifetime of Mr. C. and that of Mrs. C, should she survive him, the Trustee has been unable to be certain as to the proper construction of the Settlement. Hence the Trustee does not know for certain whether it is administering the Settlement in accordance with the intentions of the Settlor. The draftsman was of the belief that it was not necessary for the Settlement to contain an express power to accumulate during these two periods. He believed that there would be an implied power to accumulate.
8. The material provisions of section 43 of the Trusts (Guernsey) Law, 1989 (as amended) (“the Trust Law”) provide as follows (emphasis supplied):-

“(1) Subject to section 12, the terms of a trust may direct or authorise the accumulation for any period of all or part of the income of the trust.”

- (2) Subject to subsection (3) income which is not accumulated shall be distributed.
9. Section 12 of the Trust Law deals with the duration of the Trust and was also not material for the purposes of the application.
10. It would appear that the draftsman may not have been familiar with Guernsey law and in particular with the provisions of section 43 of the Trust Law. He was probably familiar with the laws governing trusts in a number of other jurisdictions where there is an implied power to accumulate income. Had he been familiar with section 43 he might have thought it sensible to put beyond doubt the accumulation of income issue by expressly providing a power to accumulate during the two lifetime periods.
11. The Trustee for the sake of completeness contended that without an express power to accumulate income during the lifetimes of Mr. and Mrs. C. a number of different constructions appeared to be possible:-
- (a) that a power to accumulate can be implied;
 - (b) that a de-facto power to accumulate arises under the powers of investment pending distribution;
 - (c) that there is a resulting trust of undistributed income to the Settlor; or
 - (d) that all income not distributed within a reasonable time must be paid to Mr. C. as the sole discretionary object of income during his lifetime (or to Mrs. C., in the case of share A, after Mr. C's death).
12. The Trustee had also concluded that in addition to the accumulation of income issue there were other matters which also ought to be the subject on an application to the Court because the Settlement on close analysis had not been drafted in accordance with the wishes expressed by the Settlor and it also contained typographical errors in that self-evident words had been omitted.
13. The Trustee applied at the start of the hearing for permission to amend its application. After hearing from Counsel the Court granted leave to do so.
14. In the amended form the Trustee applied to the Court:-
- “pursuant to sections 52, 53 and 63 of the Trusts (Guernsey) Law, 1989, as amended by the Trusts (Amendment) (Guernsey) Law, 1990 (the “Trust Law”) and all other power it enabling for:*
- a) a declaration that under the terms of the Pelican Trust Deed, the Trustees are for the purposes of Section 43(1) of the Trust Law empowered to accumulate the income of the Trust; alternatively*
 - b) rectification and/or approval of proposed variations of the term of a settlement deed dated 25th September 1996 in the form of the attached draft; and*
 - c) such consequential relief as this Court deems fit.*
 - d) That all the costs of this Application be paid from the Trust Fund*
15. The existing clauses of the Settlement and the proposed and the rectified clauses appropriately anonymised read as follows:

“Proposed rectification of clause 4.1:

Existing clause:

4.1 *Distributions During the Lifetime of (Mr C).* *During the lifetime of Mr C the Trustee may pay so much of the net income of the Trust Fund and so much of the principal thereof to Mr C or for his benefit as the Trustee in his discretion shall deem advisable.*

Rectified clause:

4.1 *During the lifetime of Mr C:*

- (i) *The Trustee may pay so much of the net income of the Trust Fund and so much of the principal thereof to Mr C or for his benefit as the Trustee in its absolute discretion shall deem advisable.*
- (ii) *The Trustee shall accumulate the residue of any income not so paid by investing the same as in this Trust authorised and shall at any time as in their discretion think fit pay or apply such income thereof or any part thereof to or for the benefit of all or such one or more exclusive of the Beneficiaries or otherwise shall hold the same as an accretion to the principal of the Trust Fund.*

Proposed rectification of clause 4.2(ii):

The two words to be inserted in Clause 4.2 (ii) (a) and the new Clause 4.2 (ii) (c) are emphasised.

4.2 *Distributions Upon The Death of Mr C Where The Wife Is Then Still Living... (rest of clause stands and clause 4.2(i)).*

- (ii) (a) *The Trustee shall divide the rest of the Trust Fund into two equal shares, Share A and Share B. The Trustee shall hold such Share A on trust, to invest and reinvest the same, and shall distribute the sum of UK£50,000 annually (adjusted upwards from 1 January 1997 by the annual rate of inflation as determined by the UK Treasury) in quarterly instalments to the Wife during her lifetime.*
- (b) *In addition the Trustee in its discretion at any time may pay to the Wife so much of the income or principal of the Trust Fund for her benefit as the Trustee determines is reasonable, but only with due regard to the other resources of the Wife and with due regard to the needs of any remainderman of the trust created under this Clause 4.2(ii).*
- (c) *Subject to the exercise of the discretion set out at (b) the Trustee shall accumulate Share A income surplus to the payment of the said annuity by investing the same as in this Trust authorised and shall hold the same as an accretion to the principal of Share A.*

Proposed rectification of clause 4.2(iii) & (iv)

The additional words are emphasised.

4.2(iii) *Without prejudice to the above and the provisions in this Trust for the administration of Share B, upon the death of the Wife, the Trustee shall administer the Trust Fund in accordance with Clause 4.3 hereof*

- 4.2(iv) *Without prejudice to the above the Trustee shall administer Share B in accordance with Clause 4.3 of this trust.”*

Preliminary Directions

16. The Deputy Bailiff had given certain directions prior to the hearing on 21st December 2004.
- (1) With regard to part (a) of the application, it was common ground that the interpretation of section 43(1) of the Trust Law was one of law for the Deputy Bailiff alone. The Deputy Bailiff had not expressed a concluded view in advance of the Court hearing but had inclined to the view that a power to accumulate income could not be implied. It would follow that the Trustee would be driven to having to satisfy the Court that it should make an order for rectification of the Settlement in order to reflect the intention of the Settlor.
- (2) The Deputy Bailiff had also noted that it would be necessary for there to be clear convincing evidence in support of an application for rectification and that the Court might require oral evidence. However, he inclined to the view that the Court would probably not require oral evidence.
17. The Court having read the papers and Counsels’ skeleton arguments prior to the hearing indicated that Counsel should proceed on the basis that oral evidence would probably not be required, a matter it would keep under review during the hearing. The application proceeded throughout on the basis of affidavit evidence, consideration of the skeleton arguments supplemented by the submissions of Counsel.
18. The Deputy Bailiff at the outset also indicated that having given the matter further consideration since the directions hearing he was still of the view that taking into account the Settlement Deed, and the provisions of section 43(1) of the Trust Law it was unlikely that the Trustee would be able to satisfy him as a matter of law that the Trustee had the power to accumulate income during the lifetimes of Mr. C. and Mrs. C. The Deputy Bailiff was satisfied that if there exists a power under the Trust Law to imply a power to accumulate then this was not such a case. Whether there can be an implied power to accumulate in light of the provisions of section 43(1) is a matter which can be argued before the Court in a future case.
19. Mr. Robilliard ventilated the possibility that a power to accumulate might be construed out of the Trustee’s investment powers provided in the Settlement but rightly, in the view of the Court, did not seriously contend that this was a sustainable contention.
20. Counsel therefore both submitted that the Court should in the exercise of its discretion order rectification of the Settlement Deed reserving their right if the Court did not so order to make submissions that the Settlement Deed should instead be varied. Counsel limited and focused their submissions at the hearing accordingly.

Evidence by way of Affidavit

21. Mr. Robilliard had filed an affidavit of the Settlor and two affidavits of a director of the Trustee (“the director”). Exhibits appended to the second affidavit of the director included correspondence material to the application.
22. The Court found the correspondence to be both instructive and illuminating in identifying the history of dealings between the Settlor, the Trustee and the professional persons they consulted. It embraced inter alia the wish and belief of the Settlor prior to the execution of the Settlement after consulting with his Chartered Accountant and also the belief of the draftsman. It also highlighted the views expressed when the uncertainty problem became apparent and the

possible solutions which had been explored. The correspondence, coupled with the affidavits also shed light on the reason for the delay in making the application to the Court.

23. Mr. Robilliard, in a helpful skeleton argument which he developed in his oral submissions, pointed out that the first draft of the proposed Settlement Deed produced by a US Attorney would have created an interest in possession settlement. If a settlement had been executed in that form then Mr. C. would during his lifetime have had a right to the entire net income. It would follow that a power to accumulate income during his lifetime would not have been necessary. However, Mr C's Chartered Accountant in an initial letter of 21st June 1996 alerted Mr. C. to the adverse tax consequences which would result if that draft had been used. It had been drafted in a form contrary to the advice he had given Mr. C. There was no general discretionary power to advance capital. In the Accountant's words (emphasis supplied):-

"The terms are contrary to my proposals for a Discretionary Trust.... I believe it would be far better for the Trustees to have a general power to advance capital in their discretion... You will see from my initial comments that I consider that the Deed needs to be changed fundamentally. I would suggest that a copy of my comments together with the draft Deed should be sent to Guinness Flight who will presumably be appointing their own lawyer to review the terms of the Trust."

24. Mr Robilliard emphasised that Mr. C's Accountant in an expanded letter dated 25th June 1996 reiterated his advice. In that letter he stated as follows:-

"However, my own preference would have been for the Deed to have been drafted by Guernsey lawyers who would be familiar with the usual format used by them. However, specific comments are as follows:-"

Clause 4.1-4.3 gives life interest to yourself, then(Mrs. C.) and then the children with some powers to accumulate. I would suggest that these clauses should be replaced by a fully discretionary power to distribute to any of the beneficiaries..."

25. No doubt the Settlor and Mr. C wished matters to progress swiftly. If Mr. C. accepted the advice of his Chartered Accountant it would be essential that Clause 4.1 – 4.3 should be substantially re-drafted. It seems clear that Mr C wished the Settlement to be re-drafted in order to reflect his Accountant's unequivocal advice.
26. Mr Robilliard pointed out that thereafter the draft deed was amended by the US Attorney. The draftsman, when amending the draft, did not deal with the treatment of the undistributed income by including an express power to accumulate nor did he provide for the full discretionary power which had been advocated. If a Guernsey Advocate had been instructed by the Settlor or by Mr. C. he would have had in mind the provisions of section 43(1) of the Trust Law. It is unthinkable that a Guernsey Advocate would have failed to deal expressly with the treatment of undistributed income during the lifetime of Mr. C. and the lifetime of Mrs. C. should she survive him. In doing so he would hopefully have also picked up a number of other drafting points which ought to have been dealt with.
27. The Court noted that the Trustee referred the draft Deed to its Guernsey Advocate. That Advocate was instructed to advise the Trustee on the adequacy and validity of the Deed. The Trustee's Advocate was not shown the background correspondence containing in particular the clear cautionary professional advice given to Mr. C. by his Accountant. The advice the Advocate gave to the Trustee confirmed that the draft deed conformed with and was enforceable under Guernsey law. He proceeded in his letter to raise a number of other points to which the Trustee may wish to have regard. He was not instructed to advise the Settlor or Mr. C nor did he see the advice letters sent to Mr C by his Accountant.

28. Mr Robilliard also drew the Court’s attention to the Trust Accounts for the years 1997 – 2004. It is clear that the Trustee annually had accumulated the Trust Fund income. The Trustee, it would appear, had proceeded on the basis that a power to accumulate income might be implied notwithstanding the concerns which it harboured as to whether this was possible.

The Settlor’s intention

29. Of considerable importance in this application was the Settlor’s affidavit. In Lewin on Trusts 17th ed at p.93 the position under English Law is stated in the following terms:

“Voluntary settlements

It is well established that voluntary settlements can be rectified or set aside as a result of ignorance or mistake. For equity to intervene, it must be proved that the settlement fails to express the real intention of the settlor. In Re Butlin’s Settlement Trust, [1976] Ch 251 Brightman J set out the law as follows:

“In the absence of an actual bargain between a settlor and trustees: (i) a settlor may seek rectification by proving that the settlement does not express his true intention”

At p.260 Brightman J accepted that rectification could be ordered not only where particular words had been added or omitted, but also where the words were purposely used but were mistakenly thought to carry a different meaning from their meaning properly construed”

30. The material part of the affidavit reads as follows (emphasis supplied):-

“I swear this affidavit in order to confirm, that at the time of execution of the Deed, it was my intention as Settlor to empower the Trustees to accumulate income during the life of (Mr. C.) (or in the case of share A, after (Mr. C’s) death and during the lifetime of (Mrs. C.). I therefore consent to the application as it is designed to give effect to my original intentions.”

31. In 1998 the Trustee was querying whether it had power to accumulate undistributed income during Mr. C’s lifetime. The US Attorney in a letter dated 14th May 1998 stated (emphasis supplied):-

“The Pelican Trust is a purely discretionary Trust during (Mr. C’s) lifetime. See Clause 4.1. As such the Trustee has the power to accumulate income. Any income which is not distributed, or is “surplus” to use your term, remains in the Trust.”

32. At that time it would appear that an application to the Court was not in prospect.

33. In a further letter to the Trustee dated 27th September 2004, when an application to this Court was imminent the US Attorney stated as follows (emphasis supplied):-

“On the instructions of my client, (the Settlor) I drafted the Pelican Trust in 1996. My draft was reviewed by (Mr. C’s) Accountant and tax advisors and by counsel for the trustee. Their recommended changes were incorporated in the final draft...”

34. Mr Robilliard drew attention to the fact that some of the recommended changes were incorporated in the draft. Others were not.

The letter continued (emphasis supplied):-

“Several years later, in 1998, the trustee was concerned that it might not have the power to accumulate income during (Mr. C’s) lifetime. I wrote to assure the trustee that it was (the Settlor’s) intention (as Settlor) that the trustee had such power, that it was my intention (as the draftsman) that the trustee have such power, and further that it was my opinion that the trust did grant such power to the trustee (see the enclosed)...”

35. A copy of the 1998 letter was appended. The letter continued (emphasis supplied):-

“I wish to reiterate that it was my intention to draft the trust, in conformity with the instructions of the Settlor..... so as to permit the trustee to accumulate income for the benefit of (Mr. C.)and/or the other beneficiaries of the trust... I do not know how either I or (the Settlor) can make this clearer;..”

36. Mr. Robilliard and Mr. Clark in their skeleton arguments, amplified by their oral submissions, reminded the Court that rectification is a discretionary remedy. This Court in a number of cases since 1989 has granted applications to rectify settlement deeds. They cited four cases:-

Kleinwort (Guernsey) Trustees Limited in re. Darby’s Settlement Trust, Royal Court 2.3.1989;

In the matter of Ferguson and Centurion Trust Company Limited, Royal Court 10.12.1992;

In Kleinwort Benson (Guernsey) Trustees Limited and Others re. the Wilson Settlement, Royal Court 12.3.1998;

Praxis Fiduciaries Limited in the matter of the Estate of Mr. A.Q.G. Gamble, deceased, Royal Court 6.3.2003.

37. The Court recalled that in Praxis Fiduciaries Carey, Bailiff, on the subject of rectification directed the Jurats in the following terms:-

“8. My view is that, as a matter of law, this Court should be applying English principles in deciding whether or not to order rectification.”

38. It is well established that trusts made inter vivos can be rectified as a result of a mistake. In order to invoke the Court’s assistance it must be found that the Settlement fails to express the real intention of the Settlor - Lewin on Trusts 17th Edition p. 93 and Snells Equity 30th Edition chapter 43.

39. Applying the principles of rectification established by the Courts of England the Royal Court must be satisfied on a number of points. The Court when considering the application took each principle into account in turn. The Court’s reasoning on each ground was as follows:

1. There must be sufficient evidence of the error

Rectification of Clause 4.1

The Court having noted the circumstances and advice which led up to the execution of the Deed was satisfied that there was a mistake on the part of the US Attorney who drafted the Deed. Unhelpfully a Guernsey Advocate was not instructed by the Settlor nor by Mr. C to independently review the draft deed to ensure that it accorded with the Settlor’s view.

The relevant clauses in Clause 4.1 which are the subject of the application failed adequately to deal with the treatment of undistributed income. The Settlor dealt

with the matter in unequivocal terms in his affidavit. His intention is corroborated in two letters signed by the US Attorney who drafted the Settlement, one in 1998 sent to the Trustee before the Court application was in contemplation and one in 2004 when the application was in contemplation.

Rectification of Clause 4.2

With regard to the application to rectify the Clause 4.2 it is evident that two words “on” and “to” have been omitted. It would appear that the document has not been collated or otherwise carefully scrutinised because the omission of those two words would have been evident. The mistake is patently clear and consequently the sentence cries out for simple rectification.

Clauses 4.2 (iii) and (iv) also indicate a lack of attention to detail. When Clause 4 is read in context in its entirety the need for rectification is apparent. Again the Court is satisfied that there were genuine drafting mistakes. Although the affidavits and correspondence do not deal expressly with those particular points, nevertheless the Court was satisfied that the need for rectification was sufficiently clear in each case.

The Court was also mindful that if a mistake is made in a document legitimately designed to avoid the payment of tax, there is no reason why it should not be corrected. (*Whiteside v. Whiteside and others* [1949] 2 All ER 913)

2. It must be established to the highest degree of civil probability that a genuine mistake has been made

The Court was mindful of the statement of Buckley LJ. In *Thomas Bates & Son Ltd. v Wyndham’s (Lingerie) Limited* [1981] 1 WLR 505 (at p. 514):

“The requisite degree of cogency of proof will vary with the nature of the facts to be established and the circumstances of the case. I would say that in civil proceedings a fact must be proved with that degree of certainty which justice requires in the circumstances of the particular case. In every case the balance of probability must be discharged, but in some cases that balance may be more easily tipped than in others.”.

and the statement of Brightman LJ (at p. 521) which was endorsed by Gibson LJ in *Racal Group Services v Ashmore and Others* (1995) STC 1151 CA –

“The standard of proof required in an action of rectification to establish the common intention of the parties is... the civil standard of balance of probability. But as the alleged common intention ex hypothesi contradicts the written instrument, convincing proof is required in order to counteract the cogent evidence of the parties’ intention displayed by the instrument itself. It is not, I think, the standard of proof which is high, so differing from the normal civil standard, but the evidential requirement needed to counteract the inherent probability that the written instrument truly represents the parties’ intention because it is a document signed by the parties.”.

The Court was satisfied to the highest degree of civil probability that a genuine mistake had been made. The genuine mistake had been made probably as a result of the failure to instruct a Guernsey Advocate to advise the Settlor and Mr. C as to whether their wishes had been reflected in the Settlement deed.

The Settlor's intention was in the view of the Court explicit and was not contradicted.

3. There must be full and frank disclosure

The Court was assured by Counsel that copies of all relevant correspondence which could shed light on the drafting and execution of the Settlement had been produced. The Court considered that the exchange of correspondence in 1998 in particular, when the Trustee queried the construction of the Deed, was of considerable importance.

4. There must be no other practical remedy

Both Counsel submitted that there was no other satisfactory remedy which would put the matter beyond doubt. The Court had brief argument on the application of this principle and agreed that there was no other practical remedy.

5. There should be no undue delay

The Settlement was executed on 25th September 1996. As already noted the issue of whether or not there was a power to accumulate appears to have been raised first in correspondence in 1998. The Settlement draftsman robustly asserted that there was a power to accumulate. The Trustee continued to accumulate income as is reflected in the Settlement accounts. The matter was subsequently raised with Mr. C's English Solicitors in 2000. Possible ways of dealing with the problem were explored. However, it would appear that there was no unanimity of view as to how the problem should be dealt with.

Further delay ensued following the retirement of the partner of the English Solicitors who had been advising Mr. C. It was some time before a successor in that firm gave advice to Mr. C. Further delay resulted from the need to seek clear legal advice in Guernsey, thereafter for the case to be prepared and the necessary affidavits assembled.

The Court concluded that although there has been some considerable delay in this case it cannot be categorised as undue delay.

40. In the circumstances the Court agreed that there should be rectification in the terms sought by the Trustee.

Costs of the Application

41. The Court's order has retrospective force. The costs of both Counsel are to be paid out of the Settlement funds.