

Applications for (i) an order rectifying a trust instrument so as to provide for the complete exclusion from benefit thereunder of the Applicants; (ii) alternatively, an order setting aside the Trust and/or a transfer of shares whereby the Respondent to be held on the trusts of the Trust.

[2023]GRC019

**IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)**

Between:

**DAVID WARREN HANNAH
GEORGIA DEANNE HANNAH
RYAN MATTHEW HANNAH**

Applicants

-and-

**MARLBOROUGH TRUST COMPANY LIMITED
(IN LIQUIDATION)
AS TRUSTEE OF THE CLOUDBURST TRUST**

Respondent

**Case heard on: 8 August 2022
Judgment handed down: 5 May 2023**

**Before: Jessica E Roland, Deputy Bailiff
And Jurats S M Jones OBE, J Hooley and S Morris**

**Counsel for the Applicants: Advocate T W McGuffin
Counsel for the Respondent: The Respondent did not appear.**

Legislation, texts and cases considered:

The Trusts (Guernsey) Law 2007

In the matter of the Colour Trusts (unreported, 24 May 2012)

Derwan et al v Concept Fiduciaries Limited (04/2013)

Gresh v RBC Trust Company (6/2016)

OSM Provident Fund [2018] GRC 33

M v St Anne's Trustee Limited (21/2018)

B Trust [2019] GRC 074

B and C v Virtue Trustees (Switzerland) AG [2018] JCA 219

The Representation of Vistra Fiduciary Limited re The Maria Trust [2022] JRC 164

Great Peace Shipping Ltd v Tsavlis [2003] QB 679

Allnutt v Wilding [2007] EWCA Civ 412

Re B (Care Proceedings: CP: Standard of Proof) [2008] UKHL 35

Pitt v Holt [2013] UKSC 26

Giles v Royal National Institute for the Blind [2014] EWHC 1373 (Ch)

Kennedy v Kennedy [2014] EWHC 4129 (Ch)

Wright v National Westminster Bank PLC [2014] EWHC 3158 (Ch)

Lobler v The Commissioners for HMRC [2015] UKUT 152

Introduction

1. In an application dated 8 October 2020 (the “Application”), David Warren Hannah, Georgia Deanne Hannah and Ryan Matthew Hannah (together the “Applicants”) seek: (i) an order rectifying a trust instrument dated 27 October 2008 (the “Trust Deed”) which created a trust known as the “Cloudburst Trust” (also “the Trust”) so as to provide for the complete exclusion from benefit thereunder of the Applicants; (ii) alternatively, an order setting aside the Cloudburst Trust and/or a transfer dated on or about 27 October 2008 whereby shares in Cornerstone Advisory Services Limited (“CASL”) were transferred to Marlborough Trust Company Limited as the trustee of the Cloudburst Trust (the “Respondent”) the Respondent to be held on the trusts of the Trust.
2. In the normal way for this type of application, the Applicants’ Advocates have written to Her Majesty’s Revenue and Customs (“HMRC”) to notify it of the Application. After consideration of its position over a number of months, HMRC indicated that it did not wish to be joined to the Application, but nevertheless set out its position in comprehensive representations dated 22 October 2021 attaching relevant authorities. It was recorded in the Act of Court dated 11 June 2021 that on provision of written representations, that HMRC would accept to be bound by any decision of the Court with respect to the determination of the Application (or any part thereof).
3. The liquidators of the Respondent have adopted a neutral stance to the Application.
4. The evidence in support of the Application is contained in the first and second affidavits of David Warren Hannah (“David Hannah”) sworn on 10 October 2020 and 13 September 2021 respectively, four affidavits of Ms Kirthi Kalyan sworn on 21 October 2020, 4 November 2020, 9 June 2021 and 14 September 2021 respectively. The second and third applicants, Georgia Deanne Hannah (“Georgia”) and Ryan Matthew Hannah (“Ryan”) each swore an affidavit dated 13 September 2021. Also in support of the Application there were two affidavits of Nicholas Robert Hannah (“Nicholas Hannah”) dated 7 October 2021 and 26 January 2022. Oral evidence was given by David Hannah and Nicholas Hannah at a hearing on 8 August 2022.
5. The Applicants filed a skeleton argument dated 8 October 2021 and also a response to HMRC’s representations on 26 January 2022. The Applicants supplemented their position in oral submissions at the hearing.
6. This judgment has been prepared in accordance with the provisions of Section 16(5) of the Royal Court (Reform) (Guernsey) Law 2008, (“the 2008 Law”), the findings are the unanimous findings of the Jurats. The Deputy Bailiff did not sum up to the Jurats in open Court, but instead retired with them, as she is permitted to do under Section 14(2) of the 2008 Law.
7. The Deputy Bailiff reminded the Jurats of their respective roles. The Deputy Bailiff is the sole judge on questions of law and procedure, and the Jurats are the sole judges on question of facts. The Jurats must accept her directions on the law and follow them. She directed the Jurats to have regard to the whole of the evidence presented to the Court and to form their own judgements about the oral and affidavit evidence and the exhibits thereto, and which evidence

each of them regarded as reliable and accepted and which is not. The Deputy Bailiff directed that the facts of the case are the Jurats' responsibility. If at any time the Deputy Bailiff appeared to express any views concerning the facts, or emphasised any aspect of the evidence, the Jurats were not to adopt these views unless they agreed with them. When it comes to the facts of this case, it is the Jurats' judgement alone that counts.

8. The Deputy Bailiff directed the Jurats that the standard of proof is on the balance of probabilities and that the burden of proof is on the Applicants throughout. To establish something on the balance of probabilities means to prove that something is more likely so than not so.

Background

9. Contained in the affidavits before the Court was a comprehensive narrative of the background of the matter and the interactions between David Hannah and HMRC all of which were considered by the Court. It was entirely appropriate for this information to be provided to the Court, however, included within the background of this judgment are only those matters that are directly necessary to explain the Court's conclusions.
10. David Hannah is principal consultant and founder of Cornerstone Tax Advisers, ("Cornerstone Tax"), which is a specialist tax practice in England. He is a chartered accountant and chartered tax adviser. He lives in England. Georgia and Ryan are his children. Although they are adults now, they were 11 and 14 in 2008 when the Cloudburst Trust was created.
11. Mr Benjamin Tustin ("Mr Tustin") and Mr Adrian Howe ("Mr Howe") are former directors of Marlborough Trust Company Limited ("MTCL") now in compulsory liquidation and Marlborough Nominees Limited ("MNL") now in voluntary liquidation. Nicholas Hannah is David Hannah's brother. He was also director of MTCL and MNL. In 2008 Mr Tustin and Mr Howe contacted David Hannah offering to purchase Cornerstone Tax. This was due to a prior business relationship which David Hannah describes as "extensive" with the introduction of a number of clients to Cornerstone Tax. Mr Tustin and Mr Howe informed David Hannah that they had plans to build a major tax practice as part of MTCL's wider business offering and therefore wanted to buy his business. After a period of negotiation and subject to a valuation from Kemp Le Tissier dated 10 March 2008, a sale agreement dated 4 August 2008 was executed ("the Sale Agreement") between David Hannah as seller and MNL as the buyer. The assets included the goodwill, custom and connections of David Hannah in relation to Cornerstone Tax together with the exclusive right to carry on Cornerstone Tax's business under its name.
12. Under the terms of the sale agreement, the consideration for the purchase of Cornerstone Tax was the issue of 100 loan notes for £125,000 each (£12.5 million in total) issued by CASL. CASL was a company incorporated in Guernsey set up by Mr Howe and Mr Tustin to run the new Cornerstone Tax business. It is not clear how the tax business moved from the ownership of MNL, the buyer of Cornerstone Tax, to CASL. The instrument issuing the loan notes erroneously refers to the Sale Agreement being between CASL and David Hannah on 30 March 2008.
13. Mr Tustin, Mr Howe and another director of MTCL, David Enevoldsen ("Mr Enevoldsen") were appointed directors on the incorporation of CASL on 2 April 2008. Two ordinary shares were issued to the shareholders who were MNL and MTCL. On 15 September 2008, MTCL and MNL were also appointed as directors.
14. David Hannah said that this was the sale of his entire interest in the business. After the sale he continued as consultant and was a non-executive director of CASL from 1 June 2009 until CASL was dissolved in 2013 (having ceased trading in December 2009). In his first affidavit Nicholas Hannah says that he was aware that Mr Tustin and Mr Howe were involved in dealings with

Cornerstone Tax and his brother, however he was never briefed as a director or in any other capacity about those dealings. He was told by Mr Tustin that he was to be specifically excluded from all related conversations due to the family connection.

15. On 27 October 2008 Mr Tustin settled the Cloudburst Trust with MTCL. The initial settlement sum was £10. On the same day the two shares from MTCL and MNL being the entire share capital of CASL were settled into the Cloudburst Trust. In October 2009 the assets of CASL were transferred to Cornerstone International Advisory Services Limited (CIASL). CIASL was a company registered in the BVI. The entire share capital of CIASL was transferred to the Cloudburst Trust. David Hannah was a non-executive director of CIASL between 28 October 2009 and 18 March 2014. The other directors of CIAS were Mr Enevoldsen, Mr Howe and Mr Tustin, who were all directors of MTCL and MNL. CIASL had been established for the purpose of holding the shares in Vale Property Finance PCC Ltd, a Guernsey company that had MNL and MTCL as its directors, along with Nicholas Hannah, Mr Enevoldsen, Mr Howe and Mr Tustin.
16. An account was opened with Investec Bank on 03 March 2009 by MTCL as trustee of the Trust and the trustee mandate declaration was signed by Nicholas Hannah and Adrian Howe on behalf of the trustee.
17. In the Trust Deed, the beneficiaries are defined in the second schedule as Ryan and Georgia.

“Excluded person” is defined under clause 1 of the Trust Deed as “any person excluded as a beneficiary pursuant to Clause 8 or 10(b).”

Clause 3 of the Trust Deed provides:

No trust or power shall be exercisable in any manner so as to benefit an Excluded Person whilst that person is excluded from benefit.

Clause 7 of the Trust Deed provides:

*Notwithstanding the foregoing the Trustee during the Trust period may...
(c) in the exercise of such powers-
(i) transfer all or part of the Trust Fund to the trustees of another trust howsoever constituted or arising whether governed by the Proper Law of another law under which any of the Beneficiaries are interested and whether or not other persons are actually or potentially interested.*

Clause 8 of the Trust Deed provides:

“any Beneficiary as defined (if an infant, acting by his legal guardian), may at any time by instrument revocable during the Trust Period or irrevocable disclaim his interest as an object of any trust or power (but if the disclaimer be revocable then only for so long as the same remains unrevoked) exercisable by the Trustee or by any other person with respect to the Trust Fund and thereby become an Excluded Person.”

Clause 10 of the Trust Deed provides:

*“Without prejudice to any prior acts or appointments
(a) the Trustee may at any time during the Trust Period by instrument declare that any person or class of persons or any charitable object or purpose shall be added to the Beneficiaries as from the date specified.*

(b) the Trustee may at any time during the Trust Period by instrument declare that any person or class of persons or any charitable object or purpose shall cease to be a Beneficiary as from the date specified.”

The Third Schedule of the Trust Deed provides:

At clause 10 (a)

The Trustee may lend the Trust Fund to any person whether or not a Beneficiary on any terms as to repayment and interest or interest free.

At clause 12

The Trustee may permit any person whether or not a Beneficiary to reside in occupy have custody of use or enjoy any property comprised in the Trust Fund either gratuitously or for any consideration without or on any conditions (including conditions as to payment of expenses outgoings insurance repair and maintenance) and for any period...

18. There is no evidence of any other instruments being executed.
19. David Hannah says he was not aware of the Cloudburst Trust being set up. He only became aware of its existence and other information concerning the Trust during the course of an investigation into his tax affairs by HMRC. The investigation started on the 27 November 2012. However, it was not until a meeting dated 5 December 2014 when the officer of HMRC produced information from the Guernsey Tax Authorities which showed that after the sale of Cornerstone Tax by David Hannah, Mr Tustin had transferred the shares in CASL into the Cloudburst Trust for the future benefit of David Hannah's children. David Hannah did not think Mr Tustin or Mr Howe had met the children. David Hannah said he was, “*utterly and completely dumbfounded by this information.*” Ryan and Georgia also confirmed in their affidavits that they were unaware of being beneficiaries of the Cloudburst Trust. They have not received any benefit from being beneficiaries at any time. David Hannah described himself as “*deeply upset*” by the discovery of the Trust. He said it was not an attempt by him to do anything improper, it was something that he was completely unaware of. He said he was particularly distressed about the possible impact on his children on the basis that if he does become liable for the tax sought, it will bankrupt him and have a catastrophic financial impact upon him. Despite his roles as non-executive director of CASL and of CIASL he said that he was not aware of the beneficial ownership. To the extent that he considered the beneficial ownership at all, he assumed that it was Mr Howe and Mr Tustin as the individuals who had effectively “*purchased*” Cornerstone Tax. As far as he was concerned, he had been engaged in an arm's length sale.
20. In his oral evidence, David Hannah indicated that he thought that Mr Tustin had mentioned putting the shares on trust, but he did not expect that this would be for his children. He had no knowledge or expectation that this was what Mr Tustin was going to do. It was not until the 15 October 2018 that David Hannah's advisers assisting him with the defence of the tax investigation received a copy of the Trust Deed from HMRC. He had not seen the document before then.
21. Nicholas Hannah's evidence was that he had no idea that Mr Tustin was going to set up the Trust in the way that he did. He has no idea why he should have done it. He was never aware of his nephew and niece being the beneficiaries of the Cloudburst Trust although he acknowledged he provided Mr Tustin with Georgia and Ryan's dates of birth but didn't know why he was asked to do this. Mr Tustin has his own children so Nicholas Hannah couldn't understand why he would benefit Ryan and Georgia. He accepted that he had signed documentation referencing the Cloudburst Trust, however, it is not something that he would have paid particular attention to, and it would have been documentation that would have been in the pile of many documents that he would have had to sign. He said he had no meaningful knowledge of the Trust including

its beneficiaries. At the time the Trust was set up MTCL and MNL had some 50 staff and new business “*was coming in at a rate of knots*”. He recognised the Trust Deed as a standard MTCL trust deed. He would have expected the excluded persons provision probably to be in the body of the document and there were standard templates dealing with this which could have been used. He cannot say why it was not done. It was not their practice to have sought individual legal advice on this sort of matter. Although minutes of the Directors meeting of MTCL of 27 October 2008 say that “*it was resolved that NR Hannah and DC Enevoldsen were authorised to sign as witnesses to the seal of MTCL*”, during the hearing Nicholas Hannah identified the signatures as belonging to Mr Enevoldsen and Mr Howe. Mr Tustin signed as settlor.

22. On 20 March 2017, Mr Enevoldsen responded to an email from Laine Cornelius, Operations Director at BIS Operations Limited, a Guernsey based company which provides business support services, indicating that the Trust holds shares in a company called Cornerstone Intellectual Developments Limited (“CIDL”), and that once the shares were transferred to David Hannah’s new Qualified Non-UK Pension Scheme (“QNUPS”) “held with Adrian” (who HMRC presume to be Mr Howe), the Trust was to be terminated. David Hannah was not party to this email. When he was asked about it at the hearing he said that this was after he was told that the Trust existed by HMRC (but before he saw the Trust Deed). He thought it was on the basis of a hypothetical conversation with Mr Enevoldsen but that nothing actually happened.
23. The Applicants say that keeping David Hannah in the dark was a deliberate strategy on the part of those involved in establishing the Cloudburst Trust. They rely on various contemporaneous documents which appear to show that he should not be informed of the settlement of the Trust and other correspondence in 2009 which similarly says that David Hannah (and his wife) is unaware of the Trust.
24. David Hannah is motivated to make this Application due to the very significant assessments being made by HMRC on the basis that HMRC assert that the Transfer of Assets Abroad legislation (“the TOAA”) applies to the facts and circumstances of his case. HMRC assert that the TOAA is applicable because the sale income from the sale of Cornerstone Tax became payable to MNL. HMRC says he could potentially enjoy income from this due to the existence and terms of the trust, namely that as David Hannah’s children are named as beneficiaries and he is not expressly excluded from being a beneficiary. HMRC also says that there are clauses within the Trust Deed, which can be exercised for the benefit of David Hannah.
25. HMRC also says that David Hannah entered into the Sale Agreement whereby he sold the business to an offshore entity but it says that he still effectively continued to run the business. Further, that he received a substantial income with the ability to draw upon further funds paying at the capital gains rate. In correspondence HMRC says that “*these amounts would normally have been subject to income tax if you had carried on operating the business as a sole proprietor or corporation tax if you had incorporated... Given your business is tax planning, these benefits cannot have gone unnoticed.*”
26. At the time of the hearing, HMRC’s assessments against David Hannah total £5,576,459, with additional penalties of £2,464,731, not including interest.
27. David Hannah requested that Mr Tustin, Mr Howe, and Mr Enevoldsen give evidence in respect of the Application, however, they have declined. Mr Tustin in response to a comprehensive letter from the Applicant’s Advocates said:

“The establishment of this trust was 13 years ago and as such I have no reliable recollection of why or how it was done. I left the finance industry in 2016 and went through an extremely traumatic period involving a nasty divorce, being fined by the regulator and my father dying all in a very short space of time. I was diagnosed with depression during this period

and medicated accordingly. This period of time and the associated trauma led mental illness will not have helped with my recollection of past events.”

28. David Hannah is also concerned, as are his children, that although as yet HMRC have not sought to assert any liability on them, that at some time in the future due to the Trust, that this is something that may happen. The proceedings in relation to David Hannah’s tax are currently stayed whilst awaiting the outcome of these proceedings.
29. Although the arguments on rescission and rectification were put in the alternative, Advocate McGuffin, was clear that the Applicants’ preference would be for the Court to grant relief on the basis of rescission and only consider rectification if the Court was unable to grant that relief. The position of HMRC is that the Applicants have not satisfied the requisite criteria for either the remedy of rectification or rescission.

The Law

30. The Deputy Bailiff first directed the Jurats that the Cloudburst Trust is a Guernsey law trust by reference to Section 3 of the Trust (Guernsey) Law 2007 (the “Trusts Law”). Further, that the concept of equitable mistake is one that has been recognised in this jurisdiction. There have been a number of cases in recent years where the Royal Court has considered and adopted the same principles of equitable mistake that are found in England and Wales. The key principles were considered and restated in the Supreme Court in *Pitt v Holt* [2013] UKSC 26. The test put at its simplest is there must be a causative mistake of sufficient gravity. If the court finds that the transfer was a mistake the court has an equitable jurisdiction to set aside a transfer of property by a donor.
31. The case of *Kennedy v Kennedy* [2014] EWHC 4129 (Ch) at paragraph 36 has been adopted by this Court as a convenient way for invoking the Court's equitable jurisdiction¹:

- “(1) There must be a distinct mistake as distinguished from mere ignorance or inadvertence or what unjust enrichment scholars call a “misprediction” relating to some possible future event. On the other hand, forgetfulness, inadvertence or ignorance can lead to a false belief or assumption which the court will recognise as a legally relevant mistake. Accordingly, although mere ignorance, even if causative, is insufficient to found the cause of action, the court, in carrying out its task of finding the facts, should not shrink from drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference.*
- (2) A mistake may still be a relevant mistake even if it was due to carelessness on the part of the person making the voluntary disposition, unless the circumstances are such as to show that he or she deliberately ran the risk, or must be taken to have run the risk, of being wrong.*
- (3) The causative mistake must be sufficiently grave as to make it unconscionable on the part of the donee to retain the property. That test will normally be satisfied only when there is a mistake either as to the legal character or nature of a transaction or as to some matter of fact or law which is basic to the transaction. The gravity of the mistake must be assessed by a close examination of the facts, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition.*
- (4) The injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected must be evaluated objectively but with an intense focus on the facts of the particular case. The court must consider in the round the existence of a distinct mistake, its degree of centrality to the transaction in question and the seriousness of its consequences, and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected.”*

¹ See for example *M v St Anne’s Trustee Limited* (21/2018)

32. The legal test for rectification is also well established. In the matter of the *OSM Provident Fund [2018] GRC 33* at paragraph 6, the Deputy Bailiff as he then was, held that:

“Accordingly, in order to succeed in the claim for rectification of a trust instrument arising from mistake, an applicant must demonstrate:

- (a) There is sufficient evidence that an error has been made so that the document does not carry out the true intention of those involved;*
- (b) to the highest degree of civil probability, a genuine mistake has been made;*
- (c) there has been full and frank disclosure;*
- (d) There is no other practical remedy; and*
- (e) There has been no undue delay in seeking relief.”*

33. In the matter of *B Trust [2019] GRC 074*, the Bailiff, as he was then, Sir Richard Collas, using the same principles as those set out by the Jersey Court of Appeal at paragraph 21 of *B and C v Virtue Trustees (Switzerland) AG [2018] JCA 219*, which he called an elaboration of the test from the *OSM Provident Fund* above:

“The conditions which must be satisfied in order for the Court to order rectification of a voluntary settlement are as follows:

- (i) There must be convincing proof to counteract the evidence of a different intention represented by the document itself;*
- (ii) There must be a flaw (that is an operative mistake) in the written document such that it does not give effect to the Settlor's intention;*
- (iii) The specific intention of the settlor must be known; It is not sufficient to show that the settlor did not intend what was recorded; It must also be shown what he did intend; and*
- (iv) There must be an issue capable of being contested between the parties affected by the mistake, notwithstanding that all relevant parties' consent.”*

34. Thus the legal principles that govern the remedy of rectification under Guernsey law have been settled and derived from principles that have been established as a matter of English law and are similar to the principles that have been applied in Jersey. However, given the conclusions in the recent Jersey case of *The Representation of Vistra Fiduciary Limited re The Maria Trust [2022] JRC 164* the Deputy Bailiff considered it necessary to consider whether this has provided any further clarification which might be of assistance to this Court in its deliberations. This is dealt with further below.

35. In any event, to meet and satisfy these requirements there must be full and frank disclosure; that no other remedy is available to achieve the same end; and that even when the requirements for rectification are satisfied, the Court retains a discretion whether or not to rectify.

Discussion

36. As HMRC did not apply to be joined as a party, they have forgone the opportunity to cross-examine the witnesses, however, in the absence of any opposition to a claim for equitable relief, the Court must nevertheless be satisfied that relief ought to be granted, as sought or otherwise (*Wright v National Westminster Bank plc [2014] EWHC 3158 (Ch)* at [10]). HMRC's position is that even if the Jurats come to the conclusion that the witness evidence is credible that the Applicants have not satisfied the requisite criteria for either remedy.

37. The remedies of rectification and rescission are conceptually distinct. As *Lewin* summarises at paragraph 5-069:

In principle, a court of equity will order the rectification of a document which does not give effect to the true intention of the maker, or to the agreement of the parties to it, whether as a result of ignorance or mistake; who rescind (or set aside), a transaction that has been induced by fraud, duress, mistake, misrepresentation, or undue influence...

38. The Applicants' position is that the Trust and/or the transfer of shares to the Trustees should be set aside on the basis of a mistake. This remedy if granted would allow the parties to be returned to the position as if the Trust had never existed or as if the transfer of the shares in CASL had not been transferred to the Respondent as trustee of the Cloudburst Trust. As HMRC says rescission is a more draconian remedy than rectification.
39. HMRC's representations contend that rescission is unavailable to the Applicants because in most of the reported cases, an application to set aside the settlement has been made by the settlor, and it will usually be the settlor who wishes to bring the application, having become aware of a mistake which led to the creation of the settlement, or in its meaning or effect. *Lewin*, at paragraph 5-086, says:

"It is doubtful apart from special circumstances whether a beneficiary or trustee of a voluntary settlement may apply to rescind the settlement on the ground of the settlor's mistake in making the settlement. In general, the correct course for a beneficiary of a settlement who considers that a settlement adversely affects his interest is for him to disclaim his interest."

40. *Lewin*, however, goes on to say that:

"There may be special circumstances where the settlement is a poisoned gift, and so a burden rather than a benefit to its trustees and beneficiaries, perhaps for tax reasons, as where the settlement is accompanied by taxes at or above the rate of 100%, or for reasons unconnected with tax, for instance, where the settlement is of a burdensome lease. In such cases, however, reliance would be placed in a rescission application on an operative mistake in accepting the settlement rather than the settlor's mistake (if any), in making it."

41. Advocate McGuffin cast doubt on *Lewin* as an authority as to who can apply for rescission although he did not provide an alternative authority for this position. He also argued that in any event this particular set of facts must be a special circumstance, and that David Hannah should not be barred from making a claim, in any event, he says, Georgia and Ryan Hannah are beneficiaries.
42. Although not specifically referenced in the Application, section 69 of the Trusts Law 2007 provides at section 69(2) for an application to be made by a beneficiary. For the reasons set out below it is not necessary for the Court to decide whether David Hannah has locus to make the Application or whether these are "*special circumstances*." Nevertheless it is relevant to note that under section 69 of the Trusts Law, applications may be made by a wide ambit of persons including with the leave of the Royal Court "any other person" (see section 69(2)(g)). Whether David Hannah would have been granted leave for the application for rescission is likewise not necessary to decide for the reasons set out below.
43. In considering the application for rescission by the Applicants, the Deputy Bailiff directed the Jurats that the exercise of the jurisdiction involves the Court making several discrete value judgments as to seriousness, causative effect and unconscionability.
44. To assist the Court in making these judgments, the Applicants provided a list of issues for determination. The first question posed by the Applicants is whether there was an intention by

Mr Tustin for David Hannah to derive some form of benefit from the Trust? There were a number of documents including the New Business Enquiry Sheet when the Trust was set up as well as internal correspondence which satisfied the Jurats that on the evidence there was no intention that Mr Tustin intended David Hannah to derive some form of benefit from the Trust.

45. The second question posed by the Applicants was if the answer to the above question is no, was there a distinct causative mistake as to the consequences of establishing the Trust?
46. In considering what a causative mistake Sir Richard Collas as Bailiff, as he was then, set out at length in Gresh v RBC how the Supreme Court had treated this in Pitt v Holt starting at paragraph 29:

29. In the Supreme Court, Lord Walker largely approved Lloyd LJ's definition of the legal test. In doing so, he reviewed carefully the judgments in Ogilvie v Littleboy, in Gibbon v Mitchell and a number of subsequent cases before holding that the Gibbon v Mitchell test should not be followed. He said (at para 122);

"But I can see no reason why a mistake of law which is basic to the transaction (but is not a mistake as to the transaction's legal character or nature) should not also be included, even though such cases would probably be rare. If the Gibbon v Mitchell test is further widened in that way it is questionable whether it adds anything significant to the Ogilvie v Littleboy test. I would provisionally conclude that the true requirement is simply for there to be a causative mistake of sufficient gravity; and, as additional guidance to judges in finding and evaluating the facts of any particular case, that the test will normally be satisfied only when there is a mistake as to the legal character or nature of a transaction, or as to some matter or fact of law which is basic to the transaction.

123 To confirm the Gibbon v Mitchell test as formulated by Millett J would in my view leave the law in an uncertain state, as the first-instance decisions mentioned in para 119 above tend to demonstrate. It would also be contrary to the general disinclination of equity to insist on rigid classifications expressed in abstract terms."

Lord Walker went on to consider what he referred to as "The conscience test"

124 Lindley LJ's test in Ogilvie v Littleboy, quoted at para 101 above, requires the gravity of the causative mistake to be assessed in terms of injustice-or, to use equity's cumbersome but familiar term, unconscionableness. Similarly Millett J said in Gibbon v Mitchell [1990] 1 WLR 1304, 1310:

"Equity acts on the conscience. The parties [in] whose interest it would be to oppose the setting aside of the deed are the unborn future children of Mr Gibbon and the objects of discretionary trusts to arise on forfeiture, that is to say his grandchildren, nephews and nieces. They are all volunteers. In my judgment they could not conscionably insist upon their legal rights under the deed once they had become aware of the circumstances in which they had acquired them."

125 The evaluation of what is or would be unconscionable must be objective.....

126 The gravity of the mistake must be assessed by a close examination of the facts, whether or not they are tested by cross-examination, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition. Other findings of fact may also have to be made in relation to change of position or other matters relevant to the exercise of the court's discretion. Justice Paul Finn wrote in a paper, "Equitable Doctrines and Discretions in Remedies" published in

Restitution: Past, Present and Future (eds W R Cornish, Richard Nolan, Janet O'Sullivan and Graham Virgo) (1998), at p 260:

“the courts quite consciously now are propounding what are acceptable standards of conduct to be exhibited in our relationships and dealings with others..... A clear consequence of this emphasis on standards (and not on the rules) is a far more instance-specific evaluation of conduct.”

*The injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected must be evaluated objectively, but with an intense focus (in Lord Steyn’s well-known phrase in *In re S (A Child)* [2005] 1 AC 593, para 17) on the facts of the particular case.”*

Lord Walker concluded his passage on “the conscience test” in para 128:

“The court cannot decide the issue of what is unconscionable by an elaborate set of rules. It must consider in the round the existence of a distinct mistake (as compared with total ignorance or disappointed expectations), its degree of centrality to the transaction in question and the seriousness of its consequences and make an evaluative judgment whether it would be unconscionable, or unjust, to leave the mistake uncorrected. The court may and must form a judgment about the justice of the case.”

47. What this extended passage highlights is that the mistake can be either as to the legal character or nature of the transaction, or as to some matter of fact or law which is basic to the transaction. The Deputy Bailiff directed the Jurats that mistake was not limited to the effect of the transaction but included its consequences. The test is simply whether there was a causative mistake of sufficient gravity.
48. However, Lord Walker at paragraph 108 of *Pitt v Holt* distinguishes between whether there has been a positive mistake (in which case relief can be granted) or forgetfulness, inadvertence or ignorance even if it is a difficult line to draw. He says:

“It may indeed be difficult to draw the line between mere causative ignorance and a mistaken conscious belief or a mistaken tacit assumption. I would hold that mere ignorance, even if causative, is insufficient, but that the court, in carrying out its task of finding the facts, should not shrink from drawing the inference of conscious belief or tacit assumption when there is evidence to support such an inference.”

49. The Applicants submit that the inference should be drawn that there was a tacit assumption that there would be no adverse tax consequences on David Hannah or on Georgia and Ryan which was the causative mistake of Mr Tustin.
50. Serious tax consequences are no bar to a remedy for rescission. It is clear from *Pitt v Holt* itself that a mistake as to the tax consequences of a transaction may in an appropriate case be sufficiently serious to warrant rescission². Further as *Gresh* makes clear this jurisdiction has adopted those same principles where the tax consequences of a mistake have been sufficiently serious. Incorrect tax advice is a common feature of a number of the decisions on mistake in this jurisdiction (which is to be distinguished from artificial tax avoidance³). However, as Mrs Justice Proudman set out in *Lobler v The Commissioners for HMRC* [2015] UKUT 152, the question is whether the fundamental or root element of the transaction was affected by the error i.e. was the Trust so affected by the tax consequences that the effect of settling the Trust was entirely different from that which Mr Tustin believed it to be.

² Pitt v Holt (ibid) paragraphs 129-132

³ Pitt v Holt (ibid) paragraph 135

51. In considering the drawing of an inference that there was a tacit assumption that there would be no adverse tax consequences, the words of Lord Walker are instructive at page 127:

The fact that a unilateral mistake is sufficient means that the court may have to make findings as to the state of mind, at some time in the past, of a claimant with a lively personal interest in establishing that there was a serious causative mistake.

52. This mistake could be where, owing to his ignorance of some fact or facts, an applicant held an incorrect conscious belief which caused him to act, or where he acted on the basis of a tacit assumption about some fact which was falsified by some other fact of which he was ignorant; or simply on the basis of an incorrect tacit assumption about a fact. However, they should not conclude that there was a relevant causative mistake where an applicant made neither an active nor a tacit mistake and simply acted in a state of mere causative ignorance. An applicant would not have acted as they did had they known of some fact of which they were ignorant; but when they acted, they held no belief or assumption about that fact, conscious or tacit; and no conscious belief or tacit assumption on which they acted was falsified by their ignorance of the relevant fact.
53. Therefore the Deputy Bailiff directed the Jurats to consider whether on the balance of probabilities, Mr Tustin had made a causative mistake in setting up the Trust.
54. She further directed that in making such a finding they should consider whether on the balance of probabilities they could draw an inference of the conscious belief or tacit assumption by Mr Tustin that there would not be adverse tax consequences.
55. The Jurats found that there was no evidence of a mistake on Mr Tustin's part in setting up the Trust. The evidence before the Jurats was that he made the disposition to the Trust for the benefit of Ryan and Georgia. The Trust Deed sets this out in its terms. The Jurats found that the contemporaneous documentation including correspondence with the Guernsey Income tax office and the New Business Enquiry Sheet evidences that this was his intention. Whilst there was no evidence that David Hannah knew of the Trust, there is no evidence upon which the Jurats could conclude that Mr Tustin had made a causative mistake in its creation including a finding based on an inference or tacit assumption. Nicholas Hannah in his first affidavit surmised that he did not believe Mr Tustin would have deliberately wished to create a tax problem for David Hannah least of all one with enormous consequences and that he believed that had Mr Tustin appreciated the terms of the trust he would not have established the Trust or included Ryan and Georgia as beneficiaries. In oral evidence he surmised if this was "virtue washing" by Mr Tustin, however he also accepted he did not have any actual evidence of Mr Tustin's intentions. The Jurats came to the unanimous conclusion that there was no or insufficient evidence before the Court as to Mr Tustin's state of mind at the time to draw any inference that he was mistaken as to the consequences of the creation of the Trust. Further, there was no evidence before the Court of what Mr Tustin believed he was achieving by creating this Trust for the benefit of the Ryan and Georgia.
56. Although the focus in submissions was on setting aside the Trust, the Application was also on the alternative basis of the transfer of the shares being set aside. Although HMRC refers in its representations to the background of David Hannah's sale of the shares, it is the purchase of the shares by the Trust that the Application is concerned with. In relation to this HMRC says "*The transfer on or about 27 October 2008 of shares in CAS to MTCL to be held by the Trust was also presumably subject to a contract.*". HMRC says that if there is a contract, the rules are not the same as for a voluntary disposition but rather the court should apply the legal principles set out in *Great Peace Shipping Ltd v Tsavliris* [2003] QB 679. This case established that there is no equitable jurisdiction which allows a court to order rescission of a contract for common mistake in circumstances that fall short of the circumstances in which the common law would

hold the contract to be void. The grounds on which a contract could be declared void for mistake at common law are very narrow.

57. In *Van der Merwe v Goldman and another* [2016] EWHC 790 (Ch) at [31] Morgan J considered the question of whether the equitable or common law rules should be applied to a particular transaction and found that it turned on whether consideration had been given: *“In my judgment, the difference between the cases where the equitable rules apply and those where they do not turns on whether consideration has been given for the benefit conferred by the transaction. If the effect of rescission (or a declaration that a transaction is void) would deprive a party of a benefit for which he gave consideration, then the common law rules apply and there is no separate equitable jurisdiction to order rescission.”*⁴
58. The Applicants have not sought to persuade the court that the test would be different under Guernsey law because their position is firmly that this was a voluntary disposition and that there is no evidence of a contract.
59. The Deputy Bailiff directed the Jurats that if they found there was a contract, one set of rules applies but if the Jurats found it was a voluntary transaction, the tests set out above in *Kennedy v Kennedy* (*ibid*) would apply. The Deputy Bailiff further directed the Jurats that for these purposes they should treat Guernsey law the same as English law and thus the presence or absence consideration or “*cause*” was a critical distinction in making this assessment.
60. The Jurats found that on the basis of the limited documentation before them that on the balance of probabilities, this was a voluntary disposition. David Hannah refers in his affidavit to the original shares being “*purchased*” however there is no evidence of his having knowledge of the nature of the transaction at the time. The Cloudburst Trust internal General Ledger shows the shares but there is no evidence that consideration was paid for these. The Directors’ minute of 28 October 2008 refers to the shares being accepted by the Trust but makes no reference to Trustees having paid for the shares. The Jurats also take note of the New Business Enquiry Sheet says:
- “BJT is settling this trust in order for BJT and ABH to transfer the shares to it for the future benefit of David Hannah’s children.*
61. Taking the documentary evidence into account and the nature of the transaction surrounding the setting up of this Trust, the Jurats came to the conclusion that this was not a transfer where consideration was paid for the benefit conferred by the transaction.
62. It was therefore not necessary for the Jurats to consider mistake on this basis of a transfer for value any further, thereafter the Deputy Bailiff directed the Jurats that they were to apply the same test for rescission that they applied to the Trust to the transfer of the shares. The Deputy Bailiff directed the Jurats to consider whether on the balance of probabilities, there had been a causative mistake transferring the shares. The Jurats were satisfied that the shares were intended to be the trust property. The Jurats concluded that there was no evidence of a mistake nor was there evidence to support a finding based on an inference of a conscious belief or tacit assumption that would support a finding that a causative mistake of the transfer of the shares to the Trust.
63. As the Jurats had come to the conclusion that there was not a mistake in relation to the creation of the Trust nor the transfer of the shares, it was not necessary for the Jurats to consider any other element of the tests for rescission nor to consider the remainder of the issues for determination on rescission set out by the Applicants.

⁴ See also paragraph 115 of *Pitt v Holt* (*ibid*)

64. The Jurats were not satisfied on the evidence before them that there was a mistake on the part of Mr Tustin as to the legal effect of the disposition or as to an existing fact which was basic to the transaction. The mistake was not the establishment of the Trust or the transfer of the shares, rather the error was in the drafting, which, it would appear, failed to explicitly exclude David Hannah from the Trust, or exclude Mr Tustin and Mr Howe. It is this failure that attracts the unintended consequences not the creation of the Cloudburst Trust itself if it had been properly drafted. Putting it another way, the error does not appear to have been Mr Tustin's, but rather whomever drafted the documentation forming the Trust on his behalf. Therefore, as the Applicants cannot show on the balance of probabilities that there is a relevant mistake, the Jurats have found as a matter of fact, having been directed by me on the law, that the claim for rescission fails.

Rectification

65. Two days after the hearing of this matter, the Jersey Royal Court case of *The Representation of Vistra Fiduciary Limited re The Maria Trust* [2022 JRC164] was handed down. For the reasons which will become clear below, it was not necessary to ask for further submissions from the Applicants on this. Interestingly this was a case where those who drafted the document failed to appreciate even if the intention was that a relevant individual was not going to benefit from a trust, it was not enough not to include that individual as a beneficiary (in that case the settlor) if there is a power in the Trust Deed for the Trustees to add beneficiaries, rather specific exclusion was required. In that case the Royal Court of Jersey considered the balance of probabilities in rectification cases and in particular “*strong irrefragable evidence*” which is a phrase which is referred to in *In B and C v Virtue Trustees Limited AG* [2018] JCA 219 and which although it is a Jersey Court of Appeal case has been relied on in this jurisdiction. In his judgment the learned Deputy Bailiff said: “*In our view it is unhelpful to speak, as the old authorities do, of the need for ‘strong irrefragable evidence’, which according to Snell means ‘something more than the highest degree of probability’ in circumstances where the standard of proof is the normal civil burden, namely balance of probabilities.*”. Similarly by reference to the test proposed in Lewin, he says “*the reference to ‘convincing proof’ does, as set out above, appear to be inconsistent with the usual civil burden of proof – what is required is simply proof sufficient to discharge the burden which the parties seeking rectification must discharge.*”. In doing so the learned Deputy Bailiff referred to the words of Baroness Hale in *Re B (Care Proceedings: CP: Standard of Proof)* [2008] UKHL 35 at paragraph 70

“I...would announce loud and clear that the standard of proof in finding the facts necessary to establish that the threshold....is the simple balance of probabilities, neither more nor less. Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies.”

66. The learned Deputy Bailiff is right to highlight the importance of the standard of proof being no more than the normal civil burden. Nevertheless, in cases where there is no opposition to the rectification, the Court is often looking back some or even many years to the time of the original intentions, and the evidence is provided by those who can equally be described as having “*a lively personal interest in establishing that there was a serious causative mistake*”, thus the Court needs to be alert to ensure that there is cogent evidence of the facts needed to be found to establish the case for rectification on the balance of probabilities. The Deputy Bailiff directed the Jurats that as with rescission the standard of proof was and remains the balance of probabilities.
67. HMRC set out in their representations that recourse to rectification under the equitable doctrine of mistake in the courts of England and Wales has generally only been available to the settlor as the person who made the disposition after having discovered a mistake. However, they do accept

that a beneficiary may seek rectification as long as he or she has a present interest in the Trust. As current beneficiaries, Georgia and Ryan Hannah have that interest. However, David Hannah is only a potential beneficiary (i.e. because he is not excluded from becoming one) and may only become an actual beneficiary of the Trust if the Trustee were to exercise the power at Clause 10 of the Trust Deed to add him as a beneficiary. Given the state of the Trust it is extremely unlikely that these powers will be exercised. David Hannah has no present interest in the Trust and therefore they say does not have standing to make this Application for rectification. HMRC says that if the Court were to find that David Hannah has standing to bring an Application for rectification in relation to the Trust Deed, it would be a radical departure from the case law of England and Wales on rectification, where generally only parties to the document in question can be afforded this remedy as outlined above. HMRC also say there is no or not sufficient evidence to support the application for evidence. They point to the New Business Enquiry sheet referring only to ABH (Mr Howe) and BJT (Mr Tustin) but not to David Hannah.

68. For the reasons set out above in relation to rescission, the Applicants say that this is a case where David Hannah does have standing to make the Application but in any event as Georgia and Ryan are beneficiaries and thus have standing, this is not an issue.
69. The position with regard to standing to apply for rectification is not the same as rescission. As Lewin sets out at paragraph 5-088

A beneficiary or intended beneficiary is in any event unlikely in practice, in the absence of special circumstances, to seek the rescission of a settlement but such a person may seek rectification, especially when the trust instrument in its rectified state, will give him an interest that does not presently exist. It is the beneficiaries to whom the trustees are liable to account, and such persons must have standing to apply to court to correct a mistake in the terms of the trust instrument. The question may arise whether a beneficiary with a remote interest, or whose interest will be unaffected by the relief sought, or the object of a mere discretionary power, should have the right to bring a claim. We consider that, as with the right to bring a claim for breach of trust, a beneficiary or object with a present interest may apply, however remote that interest is. The question whether the court will grant equitable relief in its discretion is another matter, and will no doubt be determined by the evidence and by the position adopted by the settlor and by those interested in the settlement, whether or not a remedy is granted. We consider that a party with no interest in the outcome has no standing to pursue a claim.

70. As set out above, whilst this Application is not sought specifically under Section 69 of the Trust Law, section 69(2)(g) of the Trust Law allows an application under this section to be made by any person with the leave of the Court. Ryan and Georgia as beneficiaries of the Trust are entitled to make the Application as of right under section 69(2)(d). The Application is made not only on the basis of the impact on David Hannah himself but also the impact on Ryan and Georgia in terms of the consequences for the family if David Hannah is subject to the tax consequences which are said to be payable by virtue of his non-exclusion from the Trust and also because of the potential for themselves also to be taxed in the future. In circumstances where the Jurats have found that Mr Tustin created the Trust but that David Hannah did not know about it and nor was he intended to benefit from it, given the tax consequences of creation of the Trust, David Hannah has a clear interest in the outcome of the application for rectification. Crucially the Beneficiaries support the Application not only for their own benefit but for the benefit of their father. As already discussed the settlor Mr Tustin has declined to take part in the proceedings (and nor have the others involved in the establishment of the Trust) and the Trustee is neutral. In the very particular and highly unusual circumstances of this case I consider it would be appropriate for me to grant leave for David Hannah to have standing to bring the Application with Ryan and Georgia.

71. The Applicants have submitted that there are 5 issues for determination which will assist the Jurats in considering the claim in rectification:

1. Was there an intention by the settlor of the Trust for David to derive some form of benefit from the Trust?
2. If the answer to the above question is no, is there sufficient evidence to show that a genuine error has been made so that the Trust instrument does not reflect the intention of those involved in establishing the Trust?
3. Are there any other practical remedies available to the Applicants?
4. Have the Applicants unduly delayed the bringing the Application?
5. Whether, in all the circumstances, the Court ought to exercise its discretion to grant the relief sought?

72. The Deputy Bailiff directed the Jurats that they should consider each of these questions in turn, and that each finding of fact must be on the balance of probabilities.

73. In considering the remedy of rectification so that the terms of a document are amended to reflect the true intention of the settlor at the time of the execution of the document, this jurisdiction has adopted the guidance of Mummery LJ in *Allnutt v Wilding* [2007] EWCA Civ 412 at paragraph:

“...putting the record straight. ... 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.”⁵

74. The Deputy Bailiff directed the Jurats that it is a subjective intention of Mr Tustin which is relevant. As set out above, on the basis of the evidence before them that although they did not have direct evidence from Mr Tustin, the Jurats were able to conclude that on the balance of probabilities it was the intention of the Settlor that David Hannah should not benefit from the Trust. There were a number of documents which demonstrated this. A letter dated 25 March 2008, heading Re Cornerstone Advisory Services Limited to Mr Ken Forman, who was the former director of Income Tax, which is set out in full below:

“Dear Mr Forman

Re: Cornerstone Advisory Services Limited (“NewCo”)

The above company is soon to be formed as a Guernsey company. The subscriber shareholders will be myself and Adrian Howe and we are both Guernsey residents. It is intended that NewCo will purchase an unincorporated UK business that specialises in providing indirect tax advice to a wide range of clients. We are purchasing the business from a UK resident individual. The business will continue contracting with clients to provide advice and using UK consultants to provide the service. Marlborough Trust Company Limited will administer the activities of NewCo. Once the purchase has been completed both Adrian and I intend to transfer our shares in NewCo to a discretionary trust that we will establish. The trust will be for the benefit of the children of the UK resident individual. The UK resident, Adrian and I will be specifically and irrevocably excluded from benefit from the trust.

⁵ See paragraph 41 of *In the matter of the Colour Trusts* (unreported, 24 May 2012)

I would be grateful if you could advise whether Adrian or I will have any Guernsey tax liability arising, either now or in the future, from entering into this transaction. As mentioned we do not intend to benefit in any way from NewCo although profit will be made by that company.

I look forward to hearing from you.

*Yours sincerely,
Benjamin Tustin”*

75. In addition, on the New Business Enquiries sheet dated 27 October 2008:

*“Entity Type: Trust
Jurisdiction: Guernsey
Client Name: Ben Tustin*

Notes:

BJT is settling this trust in order for BJT and ABH to transfer the shares to it for the future benefit of David Hannah’s children. David Hannah is NOT aware of this and should not be informed.

The reason is that we have purchased the business of Cornerstone from DH in exchange for loan notes. Once those loan notes have been extinguished then the company may make a profit and we wish for this residual profit to accrue to the trust and for the benefit of DH’s children. Over the period when the loan notes are extinguished Marlborough Trust (and indirectly ABH and BJT) will be making a healthy profit from running Cornerstone and therefore we wish to make a gift of residual profit.

Once the trust is established ABH and BJT MUST be irrevocably excluded from benefit. No fees are to be charged.”

76. They also take into account the terms of the Trust Deed itself which does not provide for the benefit of David Hannah only for Georgia and Ryan. Although HMRC refer to the fact that on the New Business Enquiry Sheet it is only Mr Howe and Mr Tustin who are referred to as being irrevocably excluded, nevertheless, the Jurats were satisfied that on the balance of probabilities taking into account all the relevant evidence before them that the clear intention was not for David Hannah to benefit from the Trust. There was no evidence that this was limited in time or subject to change in the future. Therefore the answer to the first issue posed by the Applicants is no.
77. As the terms of part 1 of the Application is to rectify to the Trust Deed so as to provide for the complete exclusion from benefit of the Applicants, the Deputy Bailiff directed the Jurats that they should also consider what was the intention with regard to Ryan and Georgia. The Jurats concluded that it was the clear intention of Mr Tustin to include Ryan and Georgia as the beneficiaries of the Cloudburst Trust.
78. The second issue was whether there is sufficient evidence to show that a genuine error has been made so that the Trust Deed does not reflect the intention of those involved in establishing the Trust? The Deputy Bailiff directed the Jurats that in considering the Trust Deed they must do so objectively.
79. In considering this question, the Jurats took into account that the terms of the Trust Deed specifically names Georgia and Ryan as the Beneficiaries as had been intended, however, the Trust Deed fails to exclude David Hannah, Mr Tustin or Mr Howe. With regard to David Hannah, the Jurats were clear that it was never the intention for him to benefit, further the Jurats

considered that there was either a failure to understand the need for David Hannah to be formally excluded as a beneficiary and/or a failure to execute such a document in order to properly implement Mr Tustin's instructions and give effect to his intention. The Jurats noted that it appeared that no legal advice appears to have been taken to give proper effect to Mr Tustin's intention in the Trust Deed. The Jurats concluded that there is no evidence that this was anything other than a genuine mistake. Nevertheless, they were able to conclude on the balance of probabilities that a mistake had been made. The true intention and the standard of proof are satisfied by this matter in relation to the failure to formally exclude David Hannah as a beneficiary. There was, however, no mistake in the Trust Deed with regard to Ryan and Georgia.

80. The third issue raised by the Applicants is whether or not there was any other practical remedy as CASL and CIASL have been dissolved and MTNL and MNL are both in liquidation. This is not a case where, for example, a legal adviser can be sued. Having rejected the application for rescission, the Jurats concluded that no other practical remedy appears to be available.
81. The fourth issue raised by the Applicants is where there had been delay in bringing the Application. The representations from HMRC urged the Court to consider that there has been undue delay which should be fatal to the Application. The Deputy Bailiff directed the Jurats to consider the evidence in relation to whether there had been undue delay in the Applicants making the application. However, the Jurats considered that in all the circumstances that there was no undue delay. HMRC argues that David Hannah only appears to have sought rectification/rescission after becoming aware of his tax liability, rather than when he became aware of the Trust. However, the Jurats were satisfied that prior to the notification by HMRC of the existence of the Cloudburst Trust, that David Hannah, Ryan and Georgia were unaware of the existence of the Trust. Further, it was not until October 2018 despite requests, that David Hannah was provided with a copy of the Trust document through his advisers. The Jurats considered that it was appropriate and necessary for David Hannah to wait for sight of the actual trust deed before making an application for rectification. Thereafter, as set out in the chronology provided by the Applicants, between October 2018 and the filing of the Application, the Applicants were diligent in pursuing other relevant material from HMRC and the Respondent as well as taking other appropriate pre-litigation steps.
82. The final issue for the Court to resolve is whether, in all the circumstances, the Court ought to exercise its discretion to grant the relief sought. The Deputy Bailiff directed the Jurats that in considering the exercise of the discretion, they should also consider whether or not the Court has been provided with full and frank disclosure.
83. As can be seen from the *B Trust (ibid)* test, it has been previously held that one of the criterion for rectification includes a test that there must be an issue capable of being contested between the parties affected by the mistake, notwithstanding that all relevant parties' consent. In *The Representation of Vistra Fiduciary Limited re The Maria Trust (ibid)*, the Jersey Royal Court discusses what this means and the criticism that this criterion has received as being unclear⁶. The conclusion of the Jersey Court was that it was not "*appropriate for this Court to adopt a criterion that is unnecessary and has been criticised*" and therefore the test for rectification was a three stage test as previously established in *Walbrook Trustees v Amethyst Trust [2002] JRC 186* and *R.E. Sesemann Will Trust [2005] JLR 421*.
84. In this case HMRC declined to be asked to be joined but provided a set of robust representations and authorities opposing the Application, all of which were considered by the Court. The Respondent Trustee was neutral. Therefore, there was no formal opposition. In these circumstances despite the conclusions of the Royal Court of Jersey the Deputy Bailiff directed

⁶ See for example *Giles v Royal National Institute for the Blind [2014] EWHC 1373 (Ch)*

the Jurats in this case it was appropriate for them to adopt a careful approach and consider in the exercise of their discretion in accordance with *Wright v National Westminster Bank PLC [2014] EWHC 3158 (Ch)* at paragraph 10: “*In the absence of any opposition to a claim for equitable relief, the Court must nevertheless be satisfied that relief ought to be granted, as sought or otherwise.*”

85. In addition to David Hannah’s own affidavit evidence which sets out in detail the background and the interactions with HMRC, the Jurats considered that the Applicants have conducted a comprehensive exercise in attempting to obtain all the relevant contemporaneous evidence held by the Respondent (attached to the affidavits of Ms Kalyan). The Applicants have attempted although unsuccessfully to obtain evidence from those who were actively involved at the time including the settlor but they have declined to engage save for Nicholas Hannah. The Jurats were satisfied the Applicants have done what they can to fulfil their obligation to give full and frank disclosure. The current state of the Trust is that CASL has been dissolved. MTNL and MNL are both in liquidation. Therefore, no third parties will be disadvantaged by the matter being set aside. The only other persons affected by a rectification of the Trust Deed to exclude David Hannah are Georgia and Ryan who support the Application. Therefore the Jurats concluded that in all the circumstances they were satisfied relief should be granted to the extent that the Trust Deed is rectified such that David Hannah is excluded from the Trust.

Conclusion

86. In all the circumstances, the Applicants have satisfied the Court that the current drafting of the Cloudburst Trust does not meet the purpose for which it was created and does not give effect to Mr Tustin’s intentions. All the legal elements required for rectification are satisfied. There is no reason to refuse the application with respect to the rectification in relation to David Hannah and the Jurats consider they ought to exercise the Court’s discretion to grant the relief sought, that is, to insert the wording that the Applicants put forward at the hearing, that is to say:

“Notwithstanding any other provision of this Deed, nothing in this Deed shall enable any benefit whatsoever to be conferred (whether directly or indirectly) on David Warren Hannah and in particular no power shall be exercised in such a way as confers any such direct or indirect benefit, notwithstanding that doing so would otherwise be within the scope of such power.”

87. As rectification is retrospective in its effect, the above wording to the Trust Deed takes effect from the date of the settlement of the Trust on 27 October 2008.
88. However, for the reasons set out above, the Jurats did not consider that they should exercise their discretion to rectify the Trust Deed in relation to Georgia and Ryan.