

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
PROPERTY TRUST AND PROBATE LIST

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 9th March 2020

Before :

His Honour Judge Halliwell sitting as a Judge of the High Court

Between :

- (1) CHRISTOPHER HENRY MARK JEFFREYS
- (2) SONAMARA MARIE-AMELIE JEFFREYS
- (3) MATTHEW NEIL RICHARD DUNCAN

Claimants

- and -

- (1) SAM SCRUTON
- (2) LUCY SCRUTON
- (3) ALICE JEFFREYS
- (4) ARTHUR JEFFREYS
- (5) INDIANA JEFFREYS
- (6) MADDISON JEFFREYS
- (7) TYLER JEFFREYS
- (8) JACK PRINCE
- (9) LARA PRINCE
- (10) LUKE CLARK
- (11) EVE CLARK (A CHILD)
- (12) IVO CLARK (A CHILD)
- (13) MATILDA CLARK (A CHILD)
- (14) OLIVE CLARK (A CHILD)
- (15) ESME CLARK (A CHILD)
- (16) SOPHIE SCRUTON
- (17) SAMANTHA CLARK

Defendants

Mr Charles Holbech (instructed by **Druces LLP**) for the **Claimants**
Mr Thomas Seymour (instructed by **Fladgate LLP**) for the **First, Second and Tenth to Seventeenth Defendants**

Hearing dates: 27th, 28th and 29th January 2020

APPROVED JUDGMENT

<p>I direct that, pursuant to CPR PD 39A Para 6.1, no official shorthand not shall be taken of this judgment and the copies of this version as handed down may be treated as authentic.</p>

His Honour Judge Halliwell:

(1) Introduction

1. The Claimants are the personal representatives and trustees of the will dated 27th October 2009 (“the Will”) of the late Laura Jeffreys (“Laura”). By these proceedings, they seek an order determining whether their power, in the Will, to appoint additional beneficiaries is exercisable. If not, Laura’s residuary estate is held on trust for a fixed class of beneficiaries only, namely for such of the issue of her brothers and sisters as shall attain 18 years or marry under that age, including issue born after Laura’s death during the lifetime of their respective parents.
2. The First to Fifteenth Defendants are Laura’s nephews and nieces; the issue of her brothers and sisters. Several have not yet reached 18 years of age and are not entitled to a vested interest. Moreover, the class of unborn beneficiaries is not yet closed. At the commencement of the trial, I thus made an order adding the Seventeenth Defendant as a party to represent Laura’s unborn nieces and nephews of the half-blood and appointing the Third Defendant to represent the interests of Laura’s unborn nieces and nephews of the whole-blood. I also made an order discontinuing the claim against the Sixteenth Defendant.
3. Before me, Mr Charles Holbech, of counsel, appeared on behalf of the Claimants and Mr Thomas Seymour, of counsel, appeared on behalf of the First, Second and Tenth to Seventeenth Defendants.
4. Mr Seymour submitted that the power to appoint additional beneficiaries is not exercisable and Laura’s residuary estate is held on trust for the issue of her brothers and sisters only. As counsel for the personal representatives and trustees, Mr Holbech formally adopted a neutral role but, mindful of his duty to assist the Court and, more generally, to ensure that each alternative case was fully presented, he carefully developed the conceptual basis for the proposition that his clients’ power to appoint additional beneficiaries was exercisable.
5. Without any concession as to their admissibility for the purpose of interpreting the Will, the unchallenged statements of five witnesses were adduced together with a substantial amount of documentary evidence. At one stage, the Claimants envisaged calling, as a

witness, the solicitor who prepared the Will on Laura's behalf, namely Ms Arshoo Singh. However, following an email message dated 16th August 2019 in which Ms Singh advised that she had no recollection of the matter and was unable to provide a witness statement, the Claimants elected not to take further steps to obtain evidence from her. Ultimately, she was not called as a witness.

(2) Background

6. Laura was born on 13th August 1961. She had six siblings.
 - 6.1. Laura, her brothers, Christopher and Charles, and her sister, Rose Prince, are each children of Mark Jeffreys ("Mark") and his wife, Sarah ("Sarah"). Together, they are Laura's brothers and sister of the full blood. Christopher ("Christopher"), Lord Jeffreys, is the First Claimant.
 - 6.2. Mark and Sarah later re-married. Sophie Scruton (née Jeffreys) was originally joined as Sixteenth Defendant to these proceedings. She is the daughter of Mark and his wife, Annie-Lou. Samantha Clark (née Clarke) and Alexander Clarke are the children of Sarah and her subsequent husband, Teddy Clarke. As already mentioned, I made an order joining Samantha Clark as Seventeenth Defendant, on the first day of the trial.
7. Laura's siblings survive her and they have each had children, several of whom have not yet reached the age of majority.
8. On her death certificate, Laura was described as an "artist/designer". She never married but, for a period of perhaps a year, she lived with a Colombian artist, Freddy Contreras, and, in 2002, they had a son, Tomas ("Tom"). Owing to cerebral palsy, Tom was severely disabled throughout his short life. In his witness statement dated 8th January 2020, Christopher observed that "Tom was completely physically and mentally incapacitated, unable to walk, talk or feed himself"; he was "completely reliant on Laura and his carers day to day" and "he was regularly hospitalised". It appears Laura herself advised Christopher that she believed Tom "was susceptible to potentially life-threatening infections". According to Christopher, "it was obvious to Laura and myself, even without the assistance of expert medical evidence, that Tom would be incapable of marrying or

having children". Christopher's un-challenged evidence on these matters is admissible in relation to Laura's own perceptions at the time she made the Will.

9. It appears Tom's syndrome of disabilities was attributable, at least in part, to oxygen deprivation owing to medical negligence when he was born. He was thus awarded compensation of £750,000. It appears that, as late as 20th July 2009, Laura was aware this amount was being held on his behalf in the Court Funds Office but she was unaware whether a personal injury trust had been settled on his behalf.
10. By this time, Laura had instructed Ms Singh to prepare her will. Following meetings and discussions during the period from July to October 2009, Laura attended Ms Singh's offices to make the Will. On 27th October 2009, she executed the Will.
11. On 21st December 2014, Tom predeceased Laura. Less than 15 months later, on 5th March 2016, Laura herself passed away. On her death certificate, the stated causes of her death were bronchopneumonia and motor neurone disease. However, during the course of the hearing, I was advised that Laura was only diagnosed with motor neurone disease some nine months before her death.
12. By the Will, Laura had appointed Christopher and her half brother, Alexander Clarke, as her executors and trustees. However, on 11th March 2016, Alexander Clarke renounced probate. On 19th September 2016, Christopher took out a grant of probate certifying that the net value of the estate was £2,200,469.
13. By a deed dated 31st July 2017, Christopher appointed the Second and Third Claimants as additional trustees.

(3) The Will

14. The issues in these proceedings relate to the interpretation and effect of Clause 5 of the Will. By these provisions, there was a gift of the Deceased's residuary estate-denoted as "my Trust Fund"-upon the following terms.

"(a) In this clause

- (i) 'the Trust Period' means the period starting with my death and ending 80 years afterwards
- (ii) 'the Beneficiaries' means"

- (1) my son Tomas Frederick Mark Jeffreys (“Tom”)
 - (2) any issue of mine who are alive at the start of or born during the Trust Period
 - (3) any one who is at any time during the Trust Period the spouse of or (whether or not remarried) the widow or widower of any such issue or of any issue of mine who are already dead or die before me and
 - (4) any persons (including charitable and other bodies and persons then unascertained) who my Trustees (being at least two in number or a trust corporation) may by deed appoint as additional beneficiaries under this clause
- (b) During the Trust Period my Trustees (being at least two in number or a trust corporation) may at any time or times
- (i) by deed revocable or irrevocable appoint that all or any part or parts of the income or capital of the Trust Fund shall be held on such trusts (including absolute discretionary and protective ones) in favour or for the benefit of all or any one or more of the Beneficiaries and with and subject to such powers (including dispositive and administrative ones exercisable by my Trustees of any other person) and other provisions as my Trustees think fit and
 - (ii) transfer all or any part or parts of the income or capital of the Trust Fund to the trustees of any Settlement wherever established (whose receipt shall be a good discharge to them) to be held free from the trusts of this Will and on the trusts and with and subject to the powers and provisions of that Settlement but only if those trusts powers and provisions are such that (at the time of the transfer) they could themselves have created them under (i) above
- (c) In default of and subject to any exercise of the powers given them by the preceding provisions my Trustees shall
- (i) during the Trust Period pay or apply the income of the Trust Fund and shall have power to pay or apply the whole or any part or parts of the capital of the Trust Fund to or for the maintenance education support or otherwise for the benefit of such one or more of the Beneficiaries as my Trustees may in their

absolute discretion think fit BUT with the power (during the period of 21 years from my death) to accumulate and add to capital such income or any part or parts of it (with power to apply the accumulations of part years as if they were income of the current year) AND with power (during the Trust Period) to resolve the whole or any part or parts of such income or income on trust for any of the Beneficiaries absolutely and

- (ii) on the expiry of the Trust Period my Trustees shall hold the Trust Fund as to both capital and income ON TRUST absolutely for such of my issue as are then living and if more than one in equal shares through all degrees according to their stocks and so that no issue shall take whose parent is alive and so capable of taking
- (iii) if at any time the trusts declared by the foregoing provisions of this Will in respect of the Trust Fund fail then from the date of their failure my Trustees shall hold the Trust Fund ON TRUST absolutely for such of the issue of my brothers and sisters living on that date or born afterwards (at any time during the lifetime of my brother or sister whose issue they are) as reach the age of 18 or marry under that age if more than one in equal shares but through all degrees according to their stocks and so that no issue shall take whose parent is alive and so capable of taking PROVIDED that the share in the Trust Fund of any issue who has attained a vested interest shall not be diminished by the birth or marriage of or the attainment of 18 by any further issue
- (d) To avoid doubt I declare that my Trustees may exercise the powers given them by (b) above before the administration of my estate is complete and even before a grant of representation has been obtained”.

(4) *The principles of interpretation*

15. When delivering the main judgment of the Supreme Court in *Marley v Rawlings* [2015] AC 129, Lord Neuberger provided the following guidance.

“[19] When interpreting a contract, the court is concerned to find the intention of the party or parties, and it does this by identifying the meaning of the relevant words, (a) in the light of (i) the natural and ordinary meaning of those words, (ii) the overall purpose of the document (iii) any other provisions

of the document, (iv) the facts known or assumed by the parties at the time that the document was executed, and (v) common sense, but (b) ignoring subjective evidence of any party's intentions....

[20] When it comes to interpreting wills, it seems to me that the approach should be the same. Whether the document in question is a commercial contract or a will, the aim is to identify the intention of the party or parties to the document by interpreting the words used in their documentary, factual and commercial context...."

16. As Lord Neuberger himself observed, at Para [23], this guidance is consistent with the historic principle that a will is to be construed from the testatrix's armchair in the light of her surrounding circumstances at the time. However, in the absence of rectification, the courts cannot re-write a will. It "...is not the function of a court of construction to improve upon or perfect testamentary dispositions. The function of the court is to give effect to the dispositions actually made as appearing expressly or by necessary implication from the language of the will applied to the surrounding circumstances of the case", *Re Bailey [1951] Ch 407* at 421 (Jenkins LJ). This is achieved by interpreting the words used in their proper context so as to give effect to a testatrix's apparent intention rather than by speculating about her intention. The testatrix's intention must be collected from the whole will and effect should generally be given to every word. Consistently with the guidance in *Williams on Wills (10th edn)* at *Para 50.7*, legal words should generally be construed according to their legal or technical meaning, particularly where the will has been prepared by a lawyer.

17. However, these principles are now subject to *Section 21* of the *Administration of Justice Act 1982* which provides as follows.

"21 (1) This section applies to a will-

(a) in so far as any part of it is meaningless;

(b) in so far as the language used in any part of it is ambiguous on the face of it;

(c) in so far as evidence, other than evidence of the testator's intention, show that the language used in any part of it is ambiguous in the light of the surrounding circumstances.

(2) In so far as this section applies to a will extrinsic evidence, including evidence of the testator's intention, may be admitted to assist in its interpretation”.

18. The language is ambiguous if it can reasonably be interpreted in more than one way or the words used can reasonably be given more than one meaning. The ambiguity may be apparent on the face of the will itself or when construed in the light of the surrounding circumstances. Extrinsic evidence can then be admitted under *Section 21(2)* to elucidate the testatrix's intention but it is not open to the Court, even in the light of such evidence, to interpret the will in a way that is inconsistent with the words used. In *re Williams deceased [1985] WLR 905*, Nicholls J (as he was) thus provided the following guidance.

“The evidence may assist by showing which of two or more possible meanings a testator was attaching to a particular word or phrase. “My effects” and “my money” are obvious examples. That meaning may be one which, without recourse to the extrinsic evidence, would not really have been apparent at all. So long as that meaning is one which the word or phrase read in its context is capable of bearing, then the court may conclude that, assisted by the extrinsic evidence, that is its correct construction. But if, however liberal may be the approach of the court, the meaning is one which the word or phrase cannot bear, I do not see how in carrying out a process of construction - or interpretation, to use the word employed in section 21 - the court can declare that meaning to be the meaning of the word or phrase. Such a construction, varying or contradicting the language used, would amount to re-writing part of the will, and that is a result to be achieved, if at all, under the rectification provisions in section 20.”

(5) *The issue and the putative ambiguity*

19. The issue in the present case is as to the interpretation of Clause 5(c)(iii) of the Will and, more specifically, whether it was intended to take effect as a separate trust or as part only of one composite trust encompassing the whole of Laura's residuary estate. This involves

asking what is meant by the introductory words of Clause 5 (c)(iii): “if at any time the *trusts* declared by the *foregoing provisions* of this Will in respect of the Trust fund *fail...*” (My italics).

20. Mr Seymour submits that the Will made provision for two trusts, namely (1) a discretionary trust for the Beneficiaries, as defined, during the eighty year Trust Period with a default trust for such of Laura’s issue as survive the end of the Trust Period; and (2) in the event of the failure of the preceding trusts, a fixed trust for the benefit of Laura’s nephews and nieces under Clause 5(c)(iii). Mr Holbech submitted that there is no more than one composite trust in the Will and Clause 5 (c)(iii) simply applies subject to the operation of the preceding clauses.
21. For reasons I shall explain now, this issue dictates whether the Claimants are entitled to exercise the power to appoint additional beneficiaries in Clause 5(a)(ii)(4) of the Will.
22. As it happens, Laura died without issue. Her only issue was Tom who predeceased her un-married without issue. Whilst her trustees were accorded a power to appoint additional beneficiaries, this was a mere power only, not a fiduciary power, and it was and is not exercisable in the absence of beneficiaries to enforce the trusts under Clause 5(b) and (c)(i) or (ii) of the Will.
23. If Mr Seymour is correct, the preceding trusts have thus failed for lack of a beneficiary, *Morice v Bishop of Durham (1804) 9 Ves 399 at 405*. On the hypothesis that the preceding trusts have failed, Laura’s trustees now hold Laura’s residuary estate on trust absolutely for the issue of her brothers and sisters under the trusts of Clause 5(c)(iii) of the Will.
24. Mr Holbech accepts the beneficiary principle. However, consistently with *Schmidt v Rosewood Trust Limited [2003] 2 AC 709*, he submitted that the potential object of a mere power is entitled to the protection of a court of equity and a trust will not fail for lack of a beneficiary if it can be shown that there is an ultimate default beneficiary. If the discretionary trusts of Clause 5(b) and (c)(i) and the fixed trusts in Clause 5(c)(ii) and (iii) can, together, be regarded as a single composite trust under which the beneficiaries of Clause 5(c)(iii) are the ultimate default beneficiary, the composite trust has not failed and the trustees’ power to appoint additional beneficiaries in Clause 5(a)(ii)(4) remains exercisable.

25. Moreover, Mr Holbech submitted that, when the provisions of Clause 5 are construed together, they are at least *capable* of being construed so as to create a single composite trust in this way. This could be achieved by construing the opening words of the formula in Clause 5(c)(iii) so as to mean “if at any time the trusts declared by the foregoing provisions in respect of the Trust Fund *shall otherwise* fail...” or, indeed, substituting “subject as stated above...” for “if at any time the trusts declared by the foregoing provisions of this Will in respect of the Trust Fund fail then from the date of their failure...” On the basis that the language used is at best ambiguous, Mr Holbech submitted that evidence of Laura’ intention, may be admitted under *Section 21(2)* of the *Administration of Justice Act 1982*.

(6) Analysis

26. By analogy, Mr Holbech relied on the judgment of the Royal Court of Jersey in *Re Exeter Settlement* [2010] JLR 169. In that case, a trust deed was executed in which the schedule of beneficiaries was left blank but power was expressly conferred on the trustees to add to the class of beneficiaries. The settlor and the trustees had intended to provide, in the deed, for the RNLI to be identified as the ultimate default beneficiary, but in error, they failed to do so. The Royal Court of Jersey concluded that, in the absence of a beneficiary, the trust was void and the power to add beneficiaries could not be deployed to fill the lacuna. They observed that “a person who is a possible object of a power to add beneficiaries is not in fact a beneficiary unless or until the power is exercised in his favour and he is added as a beneficiary. Until that moment, the trustees may not apply income or capital for his benefit and he does not have any of the rights attached to being a beneficiary of the trust”. However, the Court made an order rectifying the deed by identifying the RNLI as the ultimate default beneficiary. In this way, the deed was retrospectively validated.

27. Mr Holbech observed it is not uncommon in offshore jurisdictions to create discretionary trusts with no discretionary beneficiaries but a power to add such beneficiaries, validated by provision for a default beneficiary, often a charity. These trusts are sometimes styled “black hole” or “Red Cross” trusts. Mr Holbech submitted there is no good reason why the class beneficiaries in Clause 5(c)(iii) of the Will should not be treated as ultimate

default beneficiaries so as to validate Laura's discretionary will trusts and the power of her trustees to appoint additional beneficiaries.

28. Mr Holbech also submitted that, in substance, there is no material distinction between "default" and "failure", particularly where the failure results from the lack of a beneficiary. The difference is essentially one of semantics and it should not operate to deprive the trustees of their power to add beneficiaries. He drew my attention to *Forms 103* and *104* of *Volume 40(1)* of the *Encyclopaedia of Forms and Precedents* in which there is alternative provision for a "long-stop default trust" and a "default trust" with an "ultimate trust on failure of previous trusts", submitting there is no good reason why they should not operate in the same way to validate the powers of the trustees. There was nothing in the editors' foot-notes to suggest that there is perceived to be any material distinction between the two forms bearing on the trustees' powers.
29. Mr Holbech also sought to identify ambiguities in the words used in clause 5(c)(iii). He submitted that "subject to the foregoing provisions" could be substituted for "if at any time..." or "otherwise" could be inserted before the word "fail". He submitted that there is an ambiguity as to how the trust fund is to then to be held on fixed trust "absolutely" for the issue of Laura's brothers and sisters under Clause 5(iii)(c). Consistently with the analysis of Sir John Lindsay in *Howell v Lees-Millais [2009] EWHC 1754 (Ch)*, he submitted that an interest could be absolute in the sense that it is indefeasible or, alternatively, in the sense that it comprises the entire ownership of a particular asset at a particular point in time. More generally, he submitted that there is uncertainty as to whether clause 5(c)(iii) was intended to make automatic provision for what would happen in default of application of the preceding provisions or to "plug gaps" to ensure the trustees' powers were preserved during the Trust Period.
30. Despite the ingenuity and skill with which Mr Holbech advanced his submissions, I am satisfied that, on the true construction of the Will and in the events that have happened, the trust in Clause 5(c)(iii) was apt to take effect and did so separately from the trusts in the preceding provisions. On this basis, the beneficiaries in Clause 5(c)(iii) are not to be treated as ultimate default beneficiaries so as to validate the trustees' power, in Clause 5(a)(ii)(4), to appoint additional "Beneficiaries", as defined.

31. No doubt, the judgment of the Royal Court of Jersey in *Re Exeter Settlement* [2010] JLR 169 was founded on well-established principles. However, the issue in the present case is not whether it was correctly decided rather it is whether, on the true construction of the Will, the beneficiaries in Clause 5(c)(iii) are to be regarded as ultimate default beneficiaries. In my judgment, the answer is that they are not to be so regarded.
32. The Will is to be construed in the context of Laura's surrounding circumstances at the time. However, in the surrounding circumstances, there is nothing to throw light on this issue. By the time of the Will, Laura was 48 years of age. She was unmarried. She had one child, Tom, who was severely disabled and was likely to have a limited life expectancy. At that stage, it is unlikely she envisaged she would have additional children in the future but it appears from the Will itself she may not have entirely eliminated the possibility. Having provided for her residuary estate to be held on discretionary trusts for Tom and any future issue or the spouses of such issue with a power to appoint additional beneficiaries, it is unsurprising she wanted to make fixed provision for a class of beneficiaries encompassing the children of her siblings in the event the discretionary trusts failed. However, there is nothing in Laura's surrounding circumstances to suggest she would also have wanted her trustees' power to appoint additional beneficiaries to be exercisable alongside the fixed trust for the children of her siblings.
33. However, the Will itself is in clear terms. In it a clear distinction is drawn between the fixed trust in Clause 5(c)(iii) itself and the preceding trusts, described as "the trusts declared by the foregoing provisions of this Will..." and it is expressly provided that the fixed trust in Clause 5(c)(iii) only applies in the event that the preceding trusts fail. In my judgment, there is no room for the proposition that the beneficiaries in Clause 5(c)(iii) are to be treated as ultimate default beneficiaries so as to resurrect the trustees' power to add beneficiaries in Clause 5(a)(ii)(4) alongside the fixed trust.
34. Firstly, the Will was professionally prepared; the formula chosen in Clause 5(c)(iii) is of a legal or technical nature and the words used are to be interpreted according to their established legal meaning. The power to add beneficiaries, in Clause 5(a)(ii)(4) is contained only in the definition of "Beneficiaries". Clause 5(c)(iii) contains a gift for a specified class of beneficiaries; not to the "Beneficiaries" defined in Clause 5(a)(ii). Moreover, the failure of a trust is a well-established legal concept which classically occurs

where the trust is void for lack of a beneficiary. As Mr Holbech himself observed, a range of different formulae and legal expressions would have been available to Laura and her solicitors. She could, for example, have eschewed referring to the *failure* of “the trusts declared by the foregoing provisions of this Will...” so as to draw on the precedent in *Form 103* of *Volume 40(1)* of the *Encyclopaedia* (see above) prefacing Clause 5(c)(iii) with a formula such as “subject as stated above...” or, as Mr Holbech submitted, “subject to the foregoing provisions”. According to another such formulation, Mr Holbech submitted the word “otherwise” could have been inserted before the word “fail”. However, in the absence of any indication to the contrary – whether in the Will itself or the surrounding circumstances – Laura can be taken to have intentionally adopted the formula chosen.

35. If “the trusts declared by the foregoing provisions” have failed, this encompasses the foregoing trust provisions as a whole, including the power to add Beneficiaries. It follows that, if Clause 5(c)(iii) is construed so as to create a class of ultimate default beneficiaries, it will operate to resurrect a power that is limited, by definition, to the trusts that have failed as a precondition to the operation of Clause 5(c)(iii) itself. There is a certain lack of logic in this. If Laura had intended such an outcome, she could have been expected to provide for it expressly in clear and unambiguous terms. There is, in fact, no such provision.
36. In the hypothetical event that there was such provision, this would raise unanswered questions in relation to issues such as the application of income and the extent, if any, to which the powers could be deployed to divest beneficiaries of a vested interest.
37. Secondly, if expressions with a legal connotation are construed according to their established meaning, as legal concepts, this will eliminate much of the uncertainty and ambiguity to which Mr Holbech referred in his submissions. For example, if Clause 5 (c)(iii) was apt to create a separate trust in the event that the preceding trusts failed, the gift to her siblings’ issue *absolutely* can be taken to be absolute in the sense that it is indefeasible. Moreover, the issue would not arise as to whether the gift was intended for no purpose other than “to plug the gaps”.
38. Thirdly, once Clause 5(c)(iii) is construed by giving the words used their strict legal meaning, a clear and logical scheme can be discerned in the provisions of Clause 5 as a

whole. On this basis, Clause 5(c)(ii), not Clause 5(c)(iii), provides a class of ultimate default beneficiaries analogous to the RNLI in *re Exeter Settlement (supra)*. The trusts of Clause 5(c)(iii) are – as Mr Seymour submitted – separate and distinct from the preceding trusts. They arise on failure of those trusts and they are not discretionary trusts subject to an eighty-year Trust Period. Moreover, they incorporate a separate class of beneficiaries who are not beneficiaries under the antecedent discretionary trust. Once operative, the intermediate income from the date of death is available for application under Clause 5(c)(iii) and *Section 31* of the *Trustee Act 1925*. Conversely, if Clause 5(c)(iii) has somehow operated to resurrect the discretionary trusts, the intermediate income will not be available for the beneficiaries in Clause 5(c)(iii).

39. The language in the Will has a clear and coherent meaning. It is unambiguous on its face and no latent ambiguity can be discerned from the surrounding circumstances. Consistently with the words used in the Will itself, it is not possible to construe the Will so as to resurrect or otherwise validate and apply the trustees' power to appoint additional trustees alongside the fixed trust in Clause 5(c)(iii). I am thus satisfied that there is no room for the admission of extrinsic evidence in relation to Laura's intentions under *Section 21* of the *Administration of Justice Act 1982*.
40. *Section 21* is no more than an aid to construction. It enlarges the range of admissible evidence for the purpose of ascertaining the meaning of the words used. However, it cannot be used to contradict the meaning of the words or assign a meaning to them which they are incapable of bearing. Unlike *Section 20*, it does not provide for the Will to be rectified in consequence of a clerical error or other failure so as to reflect a testatrix's real intentions.
41. Nevertheless, in the hypothetical event that, contrary to my conclusions, extrinsic evidence of Laura's intention is admissible, documentation from Ms Singh's file at Kingsley Napley was presented before me and I shall consider what it reveals about Laura's intentions. The documentation includes Laura's answer to standard inquiries on a questionnaire together with attendance notes, correspondence in the period July–October 2009 and Laura's signed letter of wishes dated 27th October 2009.

42. In the light of such documentation, I am satisfied that, when she made the Will, Laura understood her trustees would have the power to appoint additional beneficiaries under Clause 5 and, indeed, that she intended them to do so. She thus sought to provide guidance, in a letter of wishes, on how they should exercise the power. Based on such evidence, it is conceivable she considered the power would be exercisable in the event that the fixed trust in Clause 5(c)(iii) came into effect but this requires a measure of speculation about the hypotheses on which she might have done so. The extrinsic evidence on which Mr Holbech relies does not establish that Laura specifically addressed the issue and concluded that the power would in those circumstances be exercisable. In the hypothetical event that extrinsic evidence of Laura's intention is admissible under *Section 21*, I am not satisfied it establishes she specifically contemplated or intended that the power would be exercisable in the event her discretionary trusts failed and her residuary estate was held on trust for the fixed class of beneficiaries in Clause 5(c)(iii).
43. The first significant document on Ms Singh's file is in Laura's reply to the questionnaire. In this document, she identified Tom as the only residuary beneficiary. However, she also indicated she would like "Lambeth Crossroads" and "Small Steps" to benefit, as charities, with provision of £1000 for each. At a consultation on 20th July 2009, Laura stated she wanted to "leave everything absolutely to Tom". However, Ms Singh advised her to set up a discretionary trust in which Tom would be named in the class of beneficiaries. Laura agreed to proceed on this basis and instructed Ms Singh to prepare a draft will.
44. Following the consultation, Ms Singh prepared at least one draft will. On file, there are two drafts dated 25th July 2008, each with a discretionary trust upon terms that were ultimately replicated by the Will itself, namely a discretionary trust for Tom and Laura's other issue, if any, together with the spouse or spouses of such issue and such additional beneficiaries as her trustees might appoint. The drafts each contained default provision on expiry of the Eighty Year Trust Period. However, there were significant differences between them. One draft provided, in Clause 3, for Laura to make pecuniary legacies, albeit the recipients were in blank. Unlike the other, this draft did not contain provision analogous to Clause 5(c)(iii) of the Will itself setting out what would happen in the event the preceding trusts failed.

45. By letter dated 18th August 2009, Ms Singh asked Laura to confirm whether she wished to include the pecuniary gifts, stating that “when we met you were thinking about providing for these to be paid out of the discretionary trusts”. Later in the letter, she specifically referred to the discretionary trusts but not the default provision and confirmed that Clause 5(a)(iv) provided for the trustees to have the power to add beneficiaries.
46. There followed a consultation on 20th August 2009 at which Ms Singh took Laura through the terms of the draft Will. There is a comment in Ms Singh’s Attendance Note recording that “with regard to the default provisions Laura has not had any thoughts on this. On the one hand she was thinking of leaving it to her favourite charity. On the other hand she was thinking of leaving it to her current favourite niece who is her namesake, Laura. She appreciates that her instructions will change from time to time depending on who takes a special interest in Tom.” Consideration was then given to whether it would be appropriate to leave these matters to a letter of wishes but Ms Singh explained that a letter of wishes would not be legally binding on the trustees.
47. By letter dated 6th October 2009, Ms Singh sent Laura a further draft will. It can be inferred that, for material purposes, this was on essentially the same terms as the Will itself. She also sent a draft letter of wishes. Again, she referred to the discretionary trusts in Clause 5. Having done so, she stated as follows.
- “You also need to consider the ‘default provisions’ as referred to in clause 5(c) of the Will. As drafted I have provided that in the event that no appointments are made out of the discretionary trust as referred to in clause 5(b) then the Trust Fund is to be held on trust for any of your issue as are living at that time and if more than one in equal shares. Failing which, the Trust Fund will pass to the issue of your brothers and sisters who reach 18 years and if more than one in equal shares. I have incorporated these provisions as default provisions as you were going to consider this further (we had talked about your niece Laura and the charity Shooting Stars). Again this is something we can incorporate in the Letter of Wishes if you are still undecided”.
48. On 27th October 2009, Laura attended Ms Singh’s offices for their final meeting. During the meeting, Laura mentioned that provision should be made for charity if there were sufficient funds. Ms Singh confirmed that this could be incorporated in the letter of

wishes. However, Laura stated that, for the time being, the draft letter of wishes was fine. Having done so, she signed, in sequence, the Will itself and her letter of wishes (“the Letter of Wishes”).

49. In the Letter of Wishes, Laura stated as follows.

“To the Trustees of my Will dated 27th October 2009 (“my Will”)

In my Will I have left the share of my estate that I might otherwise have left to my son Tomas Frederick Mark Jeffreys (“Tom”) upon discretionary trusts.

This is because my son may never be able to look after money and property himself and because of the implications for means-testing of any financial entitlement he has, I am conscious that by reason of his limited mental abilities and physical disabilities he will throughout his life be dependent upon state benefits and local authority provision, and may also be supported or assisted by some charitable organisations. I do not have the means to enable him to be independent for the rest of his life but am anxious to make the best long-term provision that I can for him.

It is my wish (but without imposing any binding obligation upon you) that you use your discretionary powers in regard to clause 5 of my will to promote the support that Tom needs from time to time and to supplement the provision that is otherwise available to him. It is my wish that Tom is to be regarded as the primary beneficiary of the trusts set up under clause 5. I hope you will be able to use the income and capital if need be for any help or support for Tom which you consider necessary.

In so far as other persons provide personal care for Tom I would wish them to receive practical support from the trust so far as possible and I hope that you will also be able to give financial assistance to any charitable organisations that provide services for him. You may also be able to improve his environment and the standards of amenity that he enjoys.

For those reasons I have made the trust as flexible as I can and in seeking to fulfil my objectives I encourage you to be imaginative in the use of your powers. Subject to these primary objectives you may benefit my wider family.

If Tom pre-deceases me then I envisage you holding the remaining capital and income of the trust on the basis set out in the default provisions.

After Tom's death I request that you pay for such funeral expenses (including the cost of a memorial) as you consider appropriate for Tom from the trust. Any monies remaining are to pass to my wider family as stipulated or if appropriate I shall be content for any remaining money to be paid to charities concerned with the needs of persons such as my son, and especially those which have helped him.

This letter is not to be produced to any person unless you in your absolute discretion believe it appropriate to do so.

This letter is intended for your guidance only and is not legally binding upon you

Signed Laura Jeffreys

Dated 27th October 2009"

50. There is no evidence to suggest, at any point from the time Laura first instructed Ms Singh, that they discussed what would happen to Laura's trustees' power to appoint additional beneficiaries in the event the discretionary trusts failed and the trusts in Clause 5(c)(iii) came into operation. Whilst it can be seen from the Letter of Wishes that Laura envisaged her trustees might exercise their powers to appoint beneficiaries by transferring monies to charities, this was apparently in the event she predeceased Tom and the discretionary trusts took effect. In the event Tom predeceased her, it was provided simply that her trustees would hold the remaining capital and income on the basis set out in the default provisions. It is at least conceivable Laura and Ms Singh overlooked the question of what would happen to Laura's trustees' power of appointment in the event Tom predeceased Laura and she died without other issue. In view of the fact that Laura's main concern was to provide for Tom, this would not have been entirely surprising. However, if this is the case, it does not follow that Laura intended that the power to appoint beneficiaries would be exercisable in the event that the discretionary trust failed and clause 5(c)(iii) was brought into operation. On the hypothesis she did not address the question, it is only possible to speculate what her instructions might have been had she been made aware of the wider implications for her will trusts.

51. If, contrary to my conclusions, extrinsic evidence of Laura's intention is admissible, I am satisfied such evidence does not show Laura intended that the power of her trustees to appoint additional beneficiaries would survive in the event that the trusts in Clause 5(c)(iii) took effect.

(7) Disposal

52. I am satisfied that the Trust Fund, as defined, is held upon trust for the class of beneficiaries in Clause 5(c)(iii) of the Will and the power of Laura's trustees to appoint additional beneficiaries under Clause 5(a)(ii)(4) of the Will is not exercisable.

53. It is declared that upon the true construction of the Will and in the events that have happened:

53.1. upon Laura's death, the trusts declared by Clause 5(a), (b) and (c)(i) and (ii) of the Will failed;

53.2. the Trust Fund (as defined in the Will) was and is held upon trust for the class of beneficiaries entitled under Clause 5(c)(iii) of the Will; and

53.3. the power to appoint any persons as additional beneficiaries under Clause 5(a)(ii) is not exercisable.