Roger Russell Seggins; Eliana Maria Seggins (nee Ferreira) v Apex Trust Company Ltd

Jurisdiction:	Jersey
Judge:	Bailiff
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Text

[2013] JRC 77

ROYAL COURT

(Samedi)

Before:

W. J. Bailhache, **Q.C., Deputy**Bailiff, **and**Jurats Le Cornu**and**Blampied.

Between
Roger Russell Seggins
Eliana Maria Seggins (nee Ferreira)
Representors
and
Apex Trust Company Limited
Respondent

Advocate P. M. Livingstone **for the Representors.**

Advocate D. J. Petit, **Director representing the Respondent.**

Authorities

Income and Corporation Taxes Act 1988.

Law of Property Act 1925.

Landlord and Tenant Act 1987.

Tait -v- Apex Trustees Limited [2012] JRC 148 .

CC Limited -v- Apex Trust Limited [2012] JRC 071 .

Re the S Trust [2011] JRC 117 .

Re the Lockmore Trust [2010] JRC 068 .

Re the A Trust [2009] JLR 447 .

Insurance Business (Jersey) Law 1996.

Trust — application for orders that certain annuity trusts, contracts and tenancy agreement be declared void ad initio.

Bailiff

THE DEPUTY

1 This is another application arising out of an inheritance tax and estate planning scheme devised by the firm of English solicitors called Baxendale Walker. In this case the representors are a married couple in their 60's who reside in Surrey. The application is for orders that certain annuity investment trusts, estate annuity purchase contracts and a tenancy agreement should be declared *void ad initio*. The precise form of relief sought was varied in oral argument before us.

2 The representation was presented to the Royal Court on 23 rd November, 2012, when the Court ordered that further consideration be adjourned until a date was fixed, but in the interim, the representation and exhibits be served upon the respondent. The Court also directed that notice of the proceedings should be given to Her Majesty's Revenue and Customs, Atlas Trust Company (Jersey) Limited (“Atlas”), Topthorne Limited and Nautilus Trustees Limited. We have seen copies of the letters sent by Advocate Livingstone to those entities, and are satisfied that notice has duly been given so that they could, if they thought

fit, apply to join the proceedings. As it happens no such application has been made, and we are informed by Advocate Livingstone that he has not had a reply to any of those letters.

3 We have had before us an affidavit from Mr Roger Seggins, the first named representor together with exhibits which we have reviewed.

4 In or about August 2003, the representors made some enquiries in relation to possible arrangements to protect their children against any future inheritance tax burden. They were referred by independent financial advisers to Messrs Baxendale Walker, which was an unfortunate referral. That firm, together with an entity called FSL Global Services Limited produced a scheme the benefits of which were said to be the following:–

> *"You:*
>
> *Realise the real value of your estate assets;*
>
> *Receive a structured long term income;*
>
> *Protect the integrity of the investment through a commercial trust.*
>
> *Your family:*
>
> *Upon your death has access to your residual estate funds;*
>
> *Obtains controlled access to succession wealth.*
>
> *The revenue:*
>
> *Is protected against a potential abuse of capital tax advantages by transfer of capital to a restricted commercial trust;*
>
> *Obtains appropriate tax receipts on annuity income."*

5 On 14 th November, 2003, it appears that Messrs Baxendale Walker produced a report for the representors on the estate income plan arrangements. The problems which the representors faced were identified as follows:–

It is not obvious that the representors would have perceived any of these as problems. They were looking only to save tax, as Baxendale Walker must have known.

> (i) Their assets were subject to continuing risk of an unfavourable change in their circumstances such as to produce significant creditor claims against those assets.
>
> (ii) The assets were subject to all the rules of accession and succession consistent with personal ownership and the risks and uncertainties inherent in the possible application of such rules.

(iii) The assets, although under one ownership, produced no synergy investment value.

(iv) Crucially, the assets provided no certainty of an appropriate income in the later lives of the owners.

6 Baxendale Walker suggested a plan which comprised certain transactions. The first was that an independent company would establish the estate income trust, the documentation for which would be produced by Messrs Baxendale Walker. This trust would be established with offshore trustees so as to preserve the funds which secured the estate owners annuity benefits as a gross fund. The plan envisaged that a small amount of contributions would be paid to the trustees to establish an estate income trust, and that contributions would be paid by the company establishing the trust. The trust would then offer to sell an estate annuity to the estate owners. Messrs Baxendale Walker would make such modifications to the model plan transactions as might be necessary to achieve the fiscal and financial objectives of the estate owner in the particular case. Emphasis was given to the suggestion that no party for the transactions intended to undertake any action which would breach the primary rule namely that the estate assets would be used for the purposes of securing the annuity benefits and would not be used for the purposes of tax avoidance. This last statement was directly contrary to the instructions of the representors.

7 There had clearly been some discussions with Messrs Baxendale Walker before this report was executed, because the same date, 14 th November, 2003, a trust instrument proposed by that firm was executed by Enhance Inc, a corporation registered in the British Virgin Islands and Atlas Trust Company (Jersey) Limited in Jersey. Enhance was the Founder of the trust and Atlas the original trustee. The initial trust fund was £100 and the trust contained the following significant provisions:–

> *"(1) The Primary Purpose of the trust was the negotiation, arrangement, execution and performance of Authorised Contracts, and by Clause 3.2 of the trust, the trust fund was to be held for the execution of the Primary Purpose.* The definition of the Primary Purpose described that as a non-charitable purpose. The authorised contracts were defined as "any written agreement between the trustees hereof and any other person (whether in the form of a contract or in English law under a form of instrument which constitutes a speciality);
>
> > *a) by which the trustee agrees to provide a deferred annuity to a person for valuable consideration;*
> >
> > *b) which satisfies each and every of the conditions precedent set forth in Schedule 3 hereto;"*
>
> *(2) By Clause 3.6, the trust instrument made provision that the Primary Purpose "shall not be conferred [sic] so as to provide any legal or factual benefit of any kind to any Excluded Person".*

(3) By Schedule 2, each and every person who was connected with the Founder (as that phrase is defined in the Income and Corporation Taxes Act 1988of the English Parliament) is defined as an Excluded Person.

(4) Schedule 3 of the trust instrument set out the conditions precedent to authorisation of an authorised contract. These were as follows:–

> *1. The purchaser of the annuity (hereafter in this Schedule "the Purchaser") must be an employee or director or former employee or director of the Founder or other person approved by the Founder or any other person.*
>
> *2. Any transfer of any property by the Purchaser or any other person to the Trustees hereof must not constitute a "transfer of value" (whether actual or deemed) for the purposes of the Inheritance Tax Act 1984 (of the English Parliament).*
>
> *3. Any transfer of any property by the Purchaser or any other person to the Trustees hereof must not constitute:–*
>
> > *3.1 a transaction at an undervalue for the purposes of section 339 of the Insolvency Act 1986 (of the English Parliament); nor*
> >
> > *3.2 any other transaction which is liable to be adjusted pursuant to Chapter V of the Insolvency Act 1986 (of the English Parliament); nor*
> >
> > *3.3 a fraudulent disposal of property for the purposes of section 357 of the Insolvency Act 1986 (of the English Parliament); nor*
> >
> > *3.4 a transaction defrauding creditors for the purposes of section 357 of the Insolvency Act 1986 (of the English Parliament).*
>
> *4. Any transfer of any property by the Purchaser or any other person to the Trustees hereof must not constitute a breach of any Order of any court of competent jurisdiction."*

8 The trust instrument contained a number of powers capable of being exercised by the trustee. It also contained some restrictions, of which one important one was at paragraph 5.8:

> *"Notwithstanding anything express or implied elsewhere in this Deed, the Trustees shall have no power to sell any Restricted Asset without the prior consent in writing of the Enforcer."*

9 The founder was the first enforcer. The representors were the purported subsequent enforcers. We use the word "purported" because although clause 10.4 of the trust

instrument provided the enforcer could resign on any date following the date of that instrument. In fact Enhance resigned the same date as the date of that instrument. *"Restricted Asset"* was defined as such property or interest in or right over property as might be notified by the enforcer from time to time to the trustee.

10 The trust instrument made provision at Clause 4 for a power conferred on the trustee to appoint any of the trust fund upon trust for any persons or classes of persons as beneficiaries or prospective beneficiaries as the trustee might in its absolute discretion determine, provided that it had written consent of the enforcer to do so, and provided that no excluded person would be capable of receiving any benefit of any kind under such other trust.

11 Consequent upon the execution of this trust instrument, which is governed by Jersey law, an estate annuity purchase deed was executed by Atlas as grantor and Mr Roger Seggins, the first named representor on 20 th November, 2003. Under this deed, which is purportedly governed by English law and disputes subject to the non-exclusive jurisdiction of the English courts, Atlas as grantor undertook to Mr Seggins to pay him payments calculated in accordance with the deed on the first representor' s 75 th birthday and on each anniversary thereafter. Each Flat Payment was:–

> *"… calculated as the product of:*
>
> *5.1.1 The Flat Life Office Annuity Rate plus two per cent; and*
>
> *5.1.2 The Flat Indexed Capital Value;*
>
> *5.2 The "Flat Indexed Capital Value" means:*
>
> *5.2.1 the value of the Property at the date hereof ("the Present Value"); plus*
>
> *5.2.2 the sum to the Payment Date of each Deemed Flat Annual Accretion thereto;*
>
> *5.3 "Deemed Flat Annual Accretion" means in each year the product of:*
>
> *5.3.1 the Present Value plus the aggregate of any and all earlier Deemed Flat Annual Accretions; and*
>
> *5.3.2 the annual increase in the retail price index from the previous year (as published by Her Majesty's Treasury from year to year)."*

12 The obligation on the part of the first representor as the purchaser of this annuity as expressed in paragraph 3.1 of the deed was to pay to Atlas, as grantor, the property (the home of the representors), and the first representor undertook to convey to Atlas all title to the property and to hold legal title to the property on bare trust absolutely for Atlas as grantor as from the date of the deed. The property was defined as the beneficial interest in Marronwood, 4 Kelvedon Avenue, Walton-on-Thames, Surrey jointly owned with the

second representor, subject to an existing mortgage.

13 A mirror image estate annuity purchase deed was executed by the second named representor, who was the joint owner of the property Marronwood.

14 Both estate annuity purchase deeds are expressed to be governed by English law and the parties submitted to the non-exclusive jurisdiction of the English courts. There is no reference to Atlas having made either deed as trustee of the Seggins Annuity Investment Trust.

15 The same day, a tenancy agreement was executed between Atlas as trustees of the Seggins Annuity Investment Trust and the representors. The tenancy agreement related to the property Marronwood and was to last for a period of seven years. Rent of £3,900 per calendar month was due to the trustee. There were sundry other provisions which are not relevant for the purposes of this case. There is no express choice of law in relation to the transaction and we have not been addressed on what the appropriate choice of law might be, but we have approached the matter upon the basis that the tenants were English residents and the property situated in England, and accordingly the tenancy would seem to be subject to English law. That is also consistent with references in the tenancy agreement to the Law of Property Act 1925 and the Landlord and Tenant Act 1987. No rent was ever demanded or paid, nor it seems did either party anticipate it would be.

16 Atlas appeared to have resigned as trustees on 29 th February, 2008, and with the consent of the representors as purported enforcers, Nautilus Trustees Limited were appointed as the new trustees. By an instrument dated 12 th January, 2009, Nautilus retired as trustee, and the respondent was appointed as new trustee.

17 In 2005 the representors decided to purchase some “buy to let” properties and three such properties were purchased between September 2005 and June 2007. Between them, they made a further six estate annuity purchase deeds with Atlas, and transferred the properties, notionally, to a sub-trust of the Seggins Annuity Investment Trust, again against a notional offer to pay an annuity on their respective 75 th birthdays. The “buy to let” properties were purchased with a mortgage representing the majority of the purchase price. It is currently considered that, by reason of a downturn in the property market, the “buy to let” properties have little or no equity. All the “buy to let” properties are held in the joint names of the representors, and all the rental income has been paid to the representors and not to the trustees.

18 The trust instrument which set up the Seggins Annuity Investment Trust sub-trust was intended to own a British Virgin Islands company which would hold the “buy to let” properties, named Topthorne Limited. Various fee accounts in relation to this company were submitted to the representors and paid. The Estate Annuity Purchase Deeds relating to the “buy to let” properties provided for the transfer of the beneficial interests or equity

security interests to Atlas, but there were no subsequent transfers of such interests to Topthorne.

19 As indicated above, the representors have at no stage themselves paid rent for Marronwood, notwithstanding the terms of the tenancy agreement. At one stage they did let out Marronwood briefly, and the rental in respect of that letting was received by the representors and not accounted for to Atlas. The Court has been shown copies of the income tax returns of the representors showing that the rental income for Marronwood and the "buy to let" properties has been fully disclosed to Her Majesty's Revenue and Customs as income of the representors.

20 In terms of fees, the representors have paid Baxendale Walker, Atlas, Nautilus, the respondent and the other various entities involved since 2003 a total sum of over £100,000.

21 The first main representor completes his affidavit as follows:–

> *"We have no intention of pursuing anybody for damages following any Court order.* We do not believe Nautilus or Apex are responsible for our predicament. Atlas, so we are advised, no longer trades. The principals of [Baxendale Walker] have been struck off the role of solicitors in England and [Baxendale Walker] no longer exists as a firm. We have no appetite for litigation which we believe would result only in a pyrrhic victory.
>
> *We relied upon the advice we received from [Baxendale Walker] informing the mistaken impression that we would obtain protection from inheritance and Capital Gains Tax.* The mistakes we made as to the effect of the Seggins AIT and the purported transfers of interests and property be made were serious. They have caused us to spend over £100,000 in fees for no purpose. We would never have contemplated entering into the scheme had we known that it could not have worked as we intended."

22 The representation seeks orders that the Seggins AIT and the Seggins Sub AIT, the Estate Annuity Purchase Deeds and any purported transfers thereunder and the tenancy agreement should all be declared *void ab initio*. As indicated above, the Annuity Investment Trust and the Sub Annuity Investment Trust are both governed by Jersey law. The Estate Annuity Purchase Deed is ostensibly governed by English law, and we have found that the tenancy agreement is impliedly governed by English law. The first question is whether or not we should take all these documents together as being in effect one transaction.

23 As we said in *Tait -v- Apex Trustees Limited* [2012] JRC 148, a similar matter to the present one:–

> ***"14. On the other hand, Article 9(1) of the Trusts (Jersey) Law 1984 ("the Trust Law") makes it plain that where one is dealing with non-Jersey domiciled settlors — and in this case the founder, otherwise to be known***

as the settlor, was a BVI incorporated company — any question concerning the validity or interpretation of a trust or the validity or effect of any transfer or other disposition of property to a trust is to be determined in accordance with the law of Jersey, and no rule of foreign law shall affect such question. Furthermore the Jersey law of conflicts will not be applied in these cases. It seems to us as a matter of Jersey law therefore that if the estate annuity purchase deeds are sufficiently linked to the trust deed, it follows that they fall to be construed according to Jersey law in so far as one is looking at their validity or effect, notwithstanding the express choice of English law and the election of non-exclusive jurisdiction of the English courts."

24 We have applied these principles here. It seems to us that the clearest link lies in the fact that, although there is nearly a week between the date of execution of the Seggins Annuity Investment Trust and the execution of the Estate Annuity Purchase Deeds, the trust instrument itself has as its primary purpose the making of authorised contracts which are generally of the kind which were in fact made by the Estate Annuity Purchase Deeds. No other authorised contracts have been put before us. The affidavit of the first representor makes it plain that the context of the investment trust and the Estate Annuity Purchase Deeds was the same. The report of Messrs Baxendale Walker is consistent with treating the documents as one related group. The product briefing of FSL Value Solutions equally points in the same direction. We have no doubt that it is right to take them together as the Court did in *Tait Investments Limited -v- Apex*.

25 The application is to have the various deeds set aside for mistake. First of all, even on the application of English law, it is plain that a tenancy purportedly granted by someone who does not own the property to someone who already does cannot be a valid document. Accordingly we do not have to consider the tenancy agreement separately even though that is a document which we would normally expect to be construed in accordance with English law.

26 Although the Estate Annuity Purchase Deeds are expressed to be governed in accordance with English law, we still consider, as indicated above, that Jersey law applies to the purported transfer of assets by virtue of Article 9(1) of the Trusts Law. In following this course, we also follow the course adopted by the Royal Court in *CC Limited -v- Apex Trust Limited* [2012] JRC 071.

27 It is well settled that as a matter of Jersey law, when considering whether to set aside a disposition into trust on the grounds of mistake, the Court should ask itself the following three questions:–

(See *Re the S Trust* [2011] JRC 117, *Re the Lockmore Trust* [2010] JRC 068 and *Re the A Trust* [2009] JLR 447).

(i) Was there a mistake on the part of the settlor?

(ii) Would the settlor not have entered into the transaction “but for” the mistake?

(iii) Was the mistake of so serious a character as to render it unjust on the part of the donee to retain the property?

28 We are quite satisfied that on the facts of this case there are several mistakes that can be identified which lead independently to the conclusion that the Seggins Annuity Investment Trust and Sub-Trust and the Estate Annuity Purchase Deeds cannot stand. This is for the following reasons:–

(i) The trust instruments themselves envisage that the trustees would grant deferred annuities. The provision of such annuities would fall within the long term insurance business for the purposes of Schedule 1 of Part 1 of the Insurance Business (Jersey) Law 1996, and by virtue of Article 5 of that Law, no person is permitted to carry on such business without a permit issued by the Jersey Financial Services Commission. Neither Atlas nor the successor trustees are or have been registered for the purposes of carrying out long term insurance business. Accordingly the Estate Annuity Purchase Deed, to the extent that it imposed upon Atlas the obligation of paying deferred annuities, was illegally entered into. That being so the transfer to the trustee cannot stand. It is no answer to this, in our judgment, to say that different trustees could have been appointed under the Annuity Investment Trust or Annuity Investment Sub-Trust. The purported transfers of assets were made pursuant to the Estate Annuity Purchase Contracts, which were between Atlas and the representors. One cannot determine a question of the essential validity of the transfers purportedly made pursuant to those deeds by pretending someone other than the transferee of the property was or could be the transferee for the purposes of those deeds.

(ii) The annual payment which Atlas agreed to make to the representors commencing on the first representor's 75 th birthday was defined as the product of an Annuity rate and the Flat Indexed Capital Value. The Annuity Rate was defined as the Flat Life Office annuity rate plus two per cent. The Flat Indexed Capital Value was defined as the full capital value of the property transferred plus an annual accretion, compounded, adjusting the capital value by reference to percentage changes in the Retail Prices Index. That is the most favourable construction of the relevant provisions if one seeks to make sense of them. Even so, there was no evidence before us to suggest there would be sufficient income to meet this liability. The compounding effect of the changes to the Flat Indexed Capital Value would soon mean that the flat payment was well beyond the means of any grantor of the insurance policy. The Deed simply could not have meant what it says.

(iii) Furthermore there is no possibility of any rental stream making such payments feasible. Performance of the Estate Annuity Purchase Deed Obligations by Atlas was impossible. Leaving aside the difficulty that it does not appear that either Atlas or the representors ever intended rental to be paid, there is no evidence that the rent could

reasonably cover this liability. Nor can it be said that the property Marronwood could have been sold by the trustee to assist in making even one of the payments. It was a property in which the representors lived. Assuming that they were validly appointed as enforcers, they would have been able to describe the property Marronwood as a Restricted Asset thus preventing it being sold. (Whether they were in fact ever properly appointed as enforcers is as we indicated above open to question, but we do not have to resolve that issue for the purposes of this judgment).

29 For these reasons we think that the Annuity Investment Trust and Sub-Trust, and the Estate Annuity Purchase Deeds were incapable of performance as drafted.

30 The second reason that the documents fail for mistake is that it was clear that neither Atlas nor the representors ever considered that rental income either for Marronwood or for the "buy to let" properties should be paid to the trustees. The representors declared the income to Her Majesty's Revenue and Customs as their income. The possession and enjoyment of the underlying property was never transferred to Atlas. If one of the main purposes of the arrangement was to pass property tax free to the representors' children, that simply did not happen, nor on any proper analysis was it in fact intended to happen during the lifetime of the representors. The documents were a sham.

31 Furthermore there are other difficulties with the trust instrument apart from the inability of the trustee to perform any annuity contracts as set out above. Clause 3 of the instrument provides that the primary purpose of the trust is the negotiation arrangement execution and performance of authorised contracts. There are the same difficulties with the construction of Schedule 2 of the trust instrument (see paragraph 7 above) as described in paragraphs 19 and 20 of the Court's judgment in *Tait -v- Apex Trustees Limited*. It is hard to see how the trustee could sensibly make an authorised contract for the provision of a deferred annuity to a person who was excluded, as Clause 3.6 of the instrument makes expressly clear. In our view the provisions by which one could identify a person for whom an investment annuity contract could be made are uncertain.

32 Furthermore, the Estate Annuity Purchase Deeds do not refer to the Seggins Annuity Investment Trust or Sub-Trust as the case maybe. They are not expressed to be binding on the successors of the original trustee, and in fact Atlas did not assign the benefit of these deeds to its successor trustee. We are satisfied that the parties ignored the relevant documents because there was not in fact any intention of seeing the substantive provisions performed. It is clear from the affidavit of the first representor that substantial refurbishments at Marronwood were carried out in 2005, which were funded by increases in the mortgage secured against the property. Neither Atlas as the entity for which the representors ostensibly held Marronwood on their trusts nor the representors, nor it seems the lender paid any attention to the content of the Estate Annuity Purchase Deeds. The representors confirmed that they had never any intention of paying the monthly rental nor of selling the assets.

33 Accordingly we are entirely satisfied the representors made the mistake of thinking that they were putting up their home under the Estate Annuity Purchase Deed, and the "buy to let" properties under the subsequent deeds in circumstances where the beneficial ownership of these properties would be retained for their benefit and for the benefit of their estates, and yet nonetheless annuities would be paid to them. In other words, although there could be no substantial disposition of the relevant properties, the trust nonetheless would provide a steady and not insubstantial income stream should that be required after they obtained their 75 th birthdays.

34 Addressing the second of the questions we have to consider, we have no doubt whatever that the representors would not have entered into this transaction but for the mistake. We are entirely satisfied they did not contemplate for one moment that their home might be sold from underneath them, nor do we think that they would have entered into an arrangement by which they would receive a deferred annuity payment from an organisation which by Jersey law was incapable of making such payments to them.

35 Addressing the third question, the justice of the matter is that these arrangements should be set aside. The respondent does not object. There are no other proposals under the Seggins Annuity Investment Trust to benefit others, and it would be unjust to allow a situation to arise where the representors might be the subject of an application for specific performance of their obligations under the respective deeds.

36 For all these reasons we set aside the Seggins Annuity Investment Trust and the Estate Annuity Purchase Deeds related thereto, and the Seggins Annuity Investment Sub-Trusts and Estate Annuity Purchase Deeds relevant thereto. The purported tenancy agreement clearly fails as a result because Atlas had no title to grant that tenancy.

37 The prayer in the representation sought a declaration that these deeds were *void ab initio*. The question of whether the various deeds and instruments were void or voidable was canvassed briefly in argument before us, but Advocate Livingstone contended that it would be adequate in this case merely to set aside the relevant documents, as nothing turned on the void/voidable issue. Accordingly, we have adopted that approach, and there is liberty to apply if difficulties arise in that respect.