D v EFG Trust Company Ltd

Jurisdiction:	Jersey
Judge:	Christensen, J. A. Clyde-Smith OBE., Jurats Ramsden
Judgment Date:	23 June 2020
Neutral Citation:	[2020] JRC 120
Date:	23 June 2020
Court:	Royal Court

Text

[2020] JRC 120

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith OBE., **and** Jurats Ramsden **and** Christensen.

In the Matter of the C Trust

And in the Matter of Articles 11, 47E, 51 and 52 of the Trusts (Jersey) Law 1984 (As Amended)

Between
D
First Representor

and

E

Second Representor
and
EFG Trust Company Limited
First Respondent

and

E (in her capacity as guardian ad litem of F and G)
Second Respondent

Advocate O. J. Passmore **for the Representors**.

Authorities

Trusts (Jersey) Law 1984 (as amended).

Inheritance Tax Act 1984

In the matter of the L Trust [2019] JRC 195

In re R Remuneration Trust [2008] JRC 164A,

Re Lochmore Trust [2010] JRC 068

Re S Settlement [2011] JLR 375

In the matter of the Robinson Annuity Investment Trust [2014] JRC 133

In the matter of the S Trust and in the matter of the T Trust [2015] JRC 259,

Representation of A in the matter of the G Trust [2018] JRC 159

In the matter of the G Trust [2019] JRC 056.

Trusts — application — re grounds of mistake.

THE COMMISSIONER:

1 The Representors apply to have the C Trust dated 18th August 2011 declared invalid on the grounds of mistake.

2 This is another case in which banking clients of the EFG Private Bank Limited ("EFG Bank") in London, who were neither resident nor domiciled in England, have established a Jersey discretionary settlement in part funded, quite unnecessarily, through their London bank account.

3 The brief background is that in April 1990 the First Representor gave instructions to his then bankers for the formation of a Jersey incorporated company to hold leasehold residential property in London, administration of which was moved to EFG Wealth Solutions (Jersey) Limited as it is now named ("EFG Wealth Solutions") in 1997 as a result of the First Representor establishing a new banking relationship with EFG Bank.

4 In 2011, the relationship manager at the EFG Bank, a Mr Ron Teo, whom the Representors had known for many years, suggested the creation of a trust to hold the Jersey company in response to their desire to strengthen their succession planning arrangements. Meetings took place in London with Mr Teo and with representatives of EFG Wealth Solutions, in which the First Representor was told that given the representors' non-domiciled status for UK tax purposes, they would not face any tax repercussions from the structure that was being proposed.

5 The Representors signed a Trust Questionnaire prepared by EFG Wealth Solutions, which stated that the assets to be transferred to the trust were the shares in the Jersey company and that the source of additional cash assets would be the London bank account. The First Representor says in his supporting affidavit that whilst no one advised the Representors to fund the trust by way of transfers from this account, it was assumed by them that they would continue providing funds from that account in the same way that they had in the past, funding we note that would continue to be necessary as the residential properties were not income producing. A question in the questionnaire as to whether they had a professional adviser was left blank. The First Representor acknowledges, however, that the questionnaire stated that EFG Wealth Solutions do not give advice on tax consequences arising outside Jersey and that it strongly recommended such advice be sought prior to the formation of the trust. No such advice was taken as the First Representor thought it was unnecessary, given that he had been told that there would be no tax repercussions from the structure that was being proposed and that he was being guided by EFG Wealth Solutions in relation to the setting up of the structure.

6 The trust was established in August 2011 by declaration made by EFG Trust Company Limited ("EFG Trustee"). It is a discretionary settlement in standard form governed by Jersey law with the beneficiaries being listed as the Representors, their two children and the first Representor's three children by an earlier marriage; the latter were subsequently removed as beneficiaries, so that the current beneficiaries are the Representors and their two children, represented by the Second Representor as guardian ad litem.

7 The initial property was £100, sourced from the London bank account in that it was held by EFG London to the order of EFG Trustee; the actual transfer of the £100 took place later. On the same day the trust was established, the First Representor transferred the beneficial ownership of the shares in the Jersey company to EFG Trustee as trustee.

8 From 6th September 2011 until 2nd December 2016, the Representors made 67 transfers

of cash from the London account, totalling £3,818,302.09, to meet the cost of owning and maintaining the residential properties and servicing a bank loan ("the impugned transfers"). A number of letters of addition were executed in relation to each transfer, which confirmed that the Representors had taken appropriate advice as to the effect of settling these assets into the trust, but the first Representor states that he did not take specific tax advice for each transfer, as he considered that he was simply following the recommendations and advice given by EFG Wealth Solutions when the trust was created. The impugned transfers were made to either, the Jersey Company's UK or Guernsey bank account and then book kept as additional assets settled into the trust by way of an inter-trust company loan account.

9 On 2 nd March 2017, the First Representor received an e-mail from Mr Teo, saying that a serious potential UK tax issue had been brought to the attention of EFG Wealth Solutions and that any future funding for the Jersey company must emanate from an offshore source, and not from the London bank account. Between 25th April 2017 and 17th January 2020 14 transfers were made from accounts held by the Representors outside of the UK totalling £750,420.65. Again it is fair to say that these additions were all required to meet the cost of owning and maintaining the residential properties and servicing the bank loan.

10 It was not until July 2018 that the Representors became aware that they were exposed to a UK Inheritance Tax liability as the result of the impugned transfers which were made from the London bank account. Mr Oliver Conolly, English counsel, has confirmed in his opinion of 23rd April 2020 that the impugned transfers, being from the London bank account which was a UK *situs* asset, had given rise to an English Inheritance Tax ("IHT") liability at 20%, which if discharged by the Representors, would be £783,075.72, and if discharged by EFG Trustee, would be £626,460.21. The statutory interest payable on the impugned transfers is approximately £140,953.59 (if discharged by the Representors) and £112,762.87 (if discharged by EFG Trustee) and there is a theoretical risk of penalties. If the impugned transfers are set aside, it would be possible to make a claim under section 150 of the Inheritance Tax Act 1984, which will have the effect that these charges, interest and penalties will cease to be due. The settlement of the shares in the Jersey company comprising non-UK situs assets did not give rise to any IHT issues; nor did the transfers made to the trust from the Representors' non-UK bank accounts referred to above. It is the *situs* of the London bank account, rather than that of the recipients of the transfers that is critical in determining the IHT treatment of those transfers, and they fell within the scope of IHT even though the Representors were not at any time UK domiciled.

11 The impugned transfers were all funded ultimately from the First Representor's income. He has no UK income and the London bank account was simply a conduit. The Representors could, therefore, easily have used a non UK bank account for this purpose.

12 Counsel has not taken into account the initial sum of £100 on which the trust was declared, and has confirmed orally that it too gives rise to an IHT liability in that it constituted a UK *situs* asset.

Legal test

13 The application was brought alternatively under Article 11 and Article 47E of the Trusts (Jersey) Law 1984 as amended ("the Trusts Law"). Article 11 is in the following terms:

> ***"11 Validity of a Jersey trust***
>
> ***(1)***
>
> ***(2) Subject to Article 12 a trust shall be invalid:-***
>
> ***(a)***
>
> ***(b) to the extent that the court declares that —***
>
> ***(i) the trust was established by duress, fraud, mistake, undue influence or misrepresentation or in breach of fiduciary duty*** ,
>
> ***(3)***
>
> ***(4)***
>
> ***(5)***
>
> ***(6) Property as to which a trust is wholly or partially invalid shall, subject to paragraph (5) and subject to any order of the court, be held by the trustee in trust for the settlor absolutely or if the settlor is dead for his or her personal representative*** .
>
> ***(7) In paragraph (6) "settlor" means the particular person who provided the property as to which the trust is wholly or partially invalid*** .
>
> ***(8) An application to the court under this Article may be made by any person referred to in Article 51(3)."***

14 Article 47E is in the following terms:

> ***"47E Power to set aside a transfer or disposition of property to a trust due to mistake***
>
> ***(1) In this paragraph, 'person exercising a power' means a person who exercises a power to transfer or make other disposition of property to a trust on behalf of a settlor*** .
>
> ***(2) The court may on the application or any person specified to Article 471(1), and in the circumstances set out in paragraph (3),***

declare that a transfer or other disposition of property to a trust –

(a) by a settlor acting in person (whether alone or with any other settlor), or

(b) through a person exercising a power ,

is voidable and –

(i) has such effect as the court may determine, or

(ii) is of no effect from the time of its exercise .

(3) The circumstances are where the settlor or person exercising a power –

(a) made a mistake in relation to the transfer or other disposition of property to a trust; and

(b) would not have made that transfer or other disposition but for that mistake, and

the mistake is of so serious a character as to render it just for the court to make a declaration under this Article" .

15 Article 47B(2) provides that "mistake" in Article 47E includes:

"(a) a mistake as to –

(i) the effect of ,

(ii) any consequences of, or

(iii) any of the advantages gained by ,

a transfer or other disposition of property to a trust, or the exercise of a power over or in relation to a trust or trust property;

(a) a mistake as to a fact existing either before or at the time of, a transfer or other disposition of property to a trust, or the exercise of a power over or in relation to a trust or trust property; or

(b) a mistake of law including a law of a foreign jurisdiction."

16 The law in relation to such applications is now well settled and was summarised in the case of *In the matter of the L Trust* [2019] JRC 195 at paragraphs 10–23, with that summary being drawn from *In re R Remuneration Trust* [2008] JRC 164A, *Re Lochmore Trust* [2010] JRC 068, *Re S Settlement* [2011] JLR 375, *In the matter of the Robinson Annuity Investment Trust* [2014] JRC 133, *In the matter of the S Trust and in the matter of the T Trust*

[2015] JRC 259, *Representation of A in the matter of the G Trust* [2018] JRC 159 and *In the matter of the G Trust* [2019] JRC 056.

17 For all practical purposes, the test under each Article will be the same, namely:

(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 to render it unjust on the part of the donee to retain the property?

18 As beneficiaries of the trust, the Representors have locus to bring the application under Article 11 (pursuant to Article 51(3)) and as settlors under Article 47E (pursuant to Article 47I(1)).

Evidence

19 The Court has an affidavit from the First Representor and from Ms Constance Clark, a director of EFG Trustee, which supported the application. The Second Representor has written to the Court in her capacity as guardian ad litem of the two children, supporting the application. Notice had been given to HMRC, who confirmed that it did not intend to intervene in the application. The Attorney General had also been notified, and he confirmed that he did not intend to intervene.

Decision

20 The facts in this case are very similar to those in the *L Trust* (which also involved EFG), the *Re S and T Trusts*, the *Re G Trust* [2018] (which also involved EFG) and the *Re G Trust* [2019].

21 The Court had no difficulty in finding the test met, the essential facts being indistinguishable from these earlier cases. There was simply no need for the Representors to create this substantial tax liability to a jurisdiction in which they are neither resident nor domiciled, when they could have easily funded the trust from outside of the UK. There clearly was a mistake on their part and the Representors would not have made the impugned transfers from their London account but for that mistake. The mistake is serious in the light of the substantial tax liability that they have incurred and was so serious as to render it unjust for EFG Trustee to retain the property transferred as trustee.

Article 11 or Article 47E

22 The Representors ask the Court to proceed under Article 11 and to declare the trust invalid, with the consequence that the trust fund is held by EFG Trustee on bare trust for the Representors absolutely. The First Representor explains their position at paragraph 9.4 of his affidavit in this way:-

> *"9.4 I understand that there is the possibility that the Court will consider it more appropriate to set aside the transfers to the Trust that have triggered the IHT liability, rather than the whole Trust.* I have been advised that this would mean that the Trust would continue to exist, holding the shares that I transferred at the outset … and the non-UK situs cash that E and I have added recently. It would not be our preference for the Trust to exist in this way, holding such a limited amount of assets, not least because of the expense incurred in administering such a small trust. We would therefore prefer, given that the vast majority of transfers into the Trust were problematic from a tax perspective, for the Court to set aside the whole Trust, and declare it void with no effect from the time of the settlement of the initial settled sum."

23 In terms of the size of the trust, it owns the shares in the Jersey company and a loan due by that company of £4.5 million. That company in turn owns three leasehold properties valued at £7.2 million and has cash of some £223,000. It has a bank borrowing of £3.4 million and a debt due to the First Representor of £1.9 million. It follows that if the EFG Trustee were to call in its loan, some £2 million only would be realised out of the assets of the Jersey company.

24 Setting aside the impugned transfers under Article 47E would create a debt due by EFG Trustee to the Representors of £3.8 million, but it would be a matter for the Representors whether or not that debt would be called in.

25 On looking at the accounts provided by Ms Clark, it is fair to say that the cost of running the trust is modest, namely £6,000 per annum. The more substantial costs (some £200,000 per annum) lie in the administration of the company, which would continue whether the whole trust is set aside or not. The Representors give no indication that it is their intention to have the company wound up.

26 In asking the Court to proceed under Article 11, Advocate Passmore for the Representors relied on this passage from the judgment in *Re S and T*:

> ***"17. It is to be noted however that this is an Article of the 1984 Law which deals with the invalidity of the trust as a whole. Sometimes it might be said that a trust is valid and that the settlor or donor made a mistake not in relation to the trust but in relation to a disposition into it. The Court has approached such an issue in the past with realism. The arrangements in relation to the trust are generally looked at in the round, and taking the S Trust and the T Trust as examples, it would seem to be inconceivable that the Trusts themselves, constituted by the payment of £20 into the relevant***

trust on the date it was established, would have been made had there been any contemplation that the further dispositions later made into the trust were not to be made. Of course on some occasions the matter is academic – where the trust is constituted by the mistaken disposition into trust, the effect of finding that the disposition would not have been made is that the trust would not have been constituted and one can therefore say the trust fails on account of the mistake. As this Court said in *The Representation of the Robinson Annuity Investment Trust* [2014] JRC 133, ***when considering the impact of the new Articles commencing with Article 47A introduced to the 1984 Law in 2013:-***

> ***'The introduction of these provisions immediately raises the question of the relationship between Article 11 and Article 47E.*** We have to say that, like the court presided over by Bailhache, Deputy Bailiff, in *Boyd v Rozel Trustees (Channel Islands) Limited* [2014] JRC 056 ***we have not found this to be very easy.*** Article 47E appears to be dealing only with dispositions to a trust whereas Article 11 is dealing with the trust itself, but in many cases the two are inextricably linked, because without any trust property there can be no trust. Furthermore, in many if not most cases, the transfer of property will occur at much the same time as the creation of the trust and the same mistake will be operating on the mind of the settlor both in relation to the creation of the trust and the transfer of the property to it. It is therefore somewhat surprising to find the legislature dealing with the creation of a trust and the transfer of property to a trust in completely separate parts of the law.'"

27 The *S and T Trusts* had been established with an initial £20 which gave rise to no tax issues and which the Court took in the round together with the subsequent substantial transfers which did give rise to such issues.

28 The same approach was taken by the Court in the *Re G* [2018] case, where the bulk of the transfers took place within a few months of its creation, the Court finding (at paragraph 22) that the same mistake operated on the mind of the settlor in relation to the creation of the trust and subsequent transfers to it.

29 The Court had considerable difficulty on the facts of the case before it, because the stated intention in establishing the trust, as per the First Representor's affidavit at paragraph 3.12, was for the trust to hold the shares in the Jersey company. These shares were added on the same day as the trust was established, and no adverse tax issues arose upon that transfer because the shares constituted non-UK situs assets. Furthermore, after March 2017, further transfers of cash have been made, totalling £750,420.65, from an account held by the Representors outside of the UK, again on which no adverse tax issues arose. It would seem, therefore, that there was no mistake operating on the mind of the First Representor when he transferred the shares to EFG Trustee and that the only mistake

operating on the minds of the Representors was in relation to the account from which the additional funds were to be transferred. There is no difficulty in declaring the impugned transfers void under Article 47E, but could the Court go further and declare the entire trust invalid from the outset on the grounds of mistake, pursuant to Article 11?

30 The Court has some sympathy with the predicament the Representors find themselves in. The trust was established on the suggestion of their London bankers and they were guided in the process by EFG Wealth Solutions, experts in the establishment of such structures. It was known that the costs of the Jersey company had been funded in the past through the London bank account and the questionnaire actually states that further funds would be introduced into the trust from that bank account, a UK situs asset.

31 It is not a question, however, of deciding what would be the best outcome for the Representors in the circumstances prevailing today, as the Court's decision has to be based upon the evidence before it as to their state of mind at the material time. With each transfer out of the London bank account, there was clear evidence of a serious mistake operating on their minds, as they would not have made those transfers from that account if they knew it would create such an adverse English tax liability. But did that mistake, taken in the round, extend to the trust as a whole?

32 The arguments in favour of proceeding under Article 11 might be put as follows:

(i) The shares in the Jersey company transferred to the trust brought with them substantial administration costs with no income to discharge those costs. Those shares could only be placed in trust if the Representors were to cover the annual costs of the administration of the Jersey company and its underlying properties by regular additions of capital. The number and timing of the transfers from the London bank account shows that they were indeed to meet those costs. As of today, there is only a limited cash surplus in the Jersey company.

(ii) It was the intention of the Representors to fund those costs through their London bank account, as they had done before the trust was settled.

(iii) The Representors assumed that the transfer of the shares in the company was made into a trust that had been validly declared over the sum of £100 held to EFG Trustee's order. If the Court proceeds under Article 47E and declares the subsequent transfer of £100 void, then it might be argued that the trust had not been validly established at the point at which the shares in the Jersey Company were added. It would be a difficult argument in that as at the date of the trust's creation, EFG London was holding £100 to the order of EFG Trustee and that constituted an asset upon which the trust could be declared even if the actual sum £100 was transferred by the Representors later. There is no evidence that a mistake was operating on the mind of EFG London in agreeing to hold those funds to the order of EFG Trustee.

(iv) The Representors continued funding the trust after March 2017, because the

ongoing annual costs had to be met.

33 However we are not persuaded by these arguments such as they are. We find on the evidence before us that there was no mistake operating on the mind of the First Representor when he settled the shares in the Jersey company into the trust. The whole purpose of establishing the trust was to hold those shares and their transfer did not give rise to any IHT tax liabilities. That purpose was validly achieved. Again there was no mistake operating on the minds of the Representors when they made the additions after March 2017. In the light of these findings it is not appropriate, in our view, to take all of these substantial and intended transfers in the round with the impugned transfers and declare the whole trust invalid.

34 We therefore declare that each of the impugned transfers is void from the time each was made pursuant to Article 47E of the Trusts Law and has been held on bare trust by the EFG Trustee for the Representors. We give the following further directions:

(i) the EFG Trustee to the extent necessary may retain the remuneration it has already charged and the reimbursement it has already received for expenses and liabilities reasonably incurred out of the impugned transfers and may continue to charge its reasonable remuneration and reimburse itself for all expenses and liabilities reasonably incurred up to the date hereof; and

(ii) the EFG Trustee is relieved from personal liability for any breach of the bare trust upon which it has held the impugned transfers, save to the extent that any breach of the bare trust would have also constituted a breach of the trust.

35 The Representors did not ask for any order as to costs, but we were informed by Advocate Passmore that they will not be paying any of the costs they have incurred in bringing this application. We agree that in these circumstances it would be unfortunate if the Representors had to incur any costs.