A and B and C and D v Nautilus Trustees Ltd and Advocate Robert Gardner Guardian ad litem for the minor beneficiaries of the T Trust

Jurisdiction:	Jersey
Judge:	The Bailiff
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Text

[2015] JRC 259

ROYAL COURT

(Samedi)

Before:

W. J. Bailhache, Bailiff, **and** Jurats Kerley **and** Liston

IN THE MATTER OF THE S TRUST AND IN THE MATTER OF THE T TRUST

AND IN THE MATTER OF ARTICLES 11, 47E AND 51 OF THE TRUSTS (JERSEY) LAW 1894

Between
A and B

First Representors

and

C and D
Second Representors
and
Nautilus Trustees Limited
First Respondent

and

Advocate Robert Gardner Guardian ad litem for the minor beneficiaries of the T Trust
Second Respondent

Advocate J. P. Speck **for the Representors**.

Advocate J. Harvey-Hills **for the Trustees**.

Advocate R. Gardner **appeared in person**.

Authorities

Finance Act 1986.

Trusts (Jersey) Law 1984.

In The matter of the Lochmore Trust [2010] JRC 068.

The Representation of the Robinson Annuity Investment Trust [2014] JRC 133.

Trusts (Amendment No.6) (Jersey) Law 2013.

Re S Trust [2011] JLR 375.

Pitt v Holt and *Futter v Futter* [2013] UKSC 26.

Trusts (Amendment No.6) (Jersey) Law 2013.

Trust — representation seeking an order that transfer of money to the two trusts be set aside on grounds of mistake and declared void.

The Bailiff
The S Trust

1 The First Representors brought their representation on 8 th January, 2015, seeking, *inter*

alia, an order that the transfers of money by them into a trust known as the S Trust be set aside on the grounds of mistake and declared void or voidable and of no effect. The First Respondent is the trustee of that Trust which was established by a trust instrument dated 22 nd May, 2008, between the First Representors and the First Respondent ("the S Trust"). The beneficial class includes the First Representors, the four children of the First Representors, all of age and none of whom appeared, any trust association body or other organisation in any part of the world the objects of which are charitable, and any person added to the class of beneficiaries by the trustee (none). The Trust was constituted by an initial settled figure of £20, and subsequently each of the First Representors added the sum of £984,750 to the trust fund by transfers made in July 2008. The first named of the First Representors, A, has a lifetime interest in possession in the trust fund, and his wife (B) has a lifetime interest in possession if her husband should predecease her. Subject thereto, the First Respondent was given a discretionary power of appointment to hold the trust fund of the S Trust and its income for the benefit of the beneficiaries. The mistake which it is said gives rise to the application to have the transfers referred to set aside is a mistake as to the tax consequences of the actions of the First Representors in making the transfers into trust. Accordingly, Her Majesty's Revenue and Customs were notified of these proceedings and provided with a copy of the Representation and the Act of Court from the convening hearing. On 29 th January HMRC acknowledged receipt of the copy documents and requested copies of the affidavits and evidence submitted in support of the application. We understand that such documents were so provided, and representations were made by HMRC in this connection, by letter dated 27 th March, 2015, to the Judicial Greffier. We deal with these in more detail below.

2 The circumstances surrounding the establishment of the S Trust were these. The First Representors were informed of a scheme by the Second Representors which the latter had entered into, the purpose of which was to minimise inheritance tax. They were introduced to a Nautilus Trustees Limited, an independent financial adviser, of Kevin Neal Associates Limited ("KNAL"). In or about February 2008, KNAL outlined to the First Representors the details of an inheritance tax mitigation scheme, the intention of which was to enable the First Representors to pass on their main capital asset, their house in Surrey, to their children on their deaths, free of inheritance tax. The basic structure of the scheme was that the First Representors would borrow approximately £4.2 million from a bank, EFG, whose lending would be secured by a mortgage over their property. The mortgage would be on interest only roll-up terms. With the borrowed sum, the current mortgages on their property would be redeemed and thereafter the remaining amount would be transferred by the First Representors into an offshore trust. They understood this would have the effect of reducing the value of their estates for the purposes of inheritance tax by creating a liability which would be taken into account when valuing their estates for inheritance tax purposes. KNAL advised the First Representors that the trustee of the Trust would invest the trust fund in structured notes and in a fund which invested in life insurance policies which between them would generate a sufficient return to cover both the interest on the loan from the bank and create a source of independent wealth for the family of the First Representors. Thus it was said there would be no risk to capital as a result of entry into the scheme and inheritance tax would be saved.

3 In June 2008, the First Representors agreed the terms of a loan from EFG for the equivalent of £ 3.5625 million in Swiss Francs. The First Respondent gave a guarantee of the First Representors' debt due to EFG, and by way of security assigned the bond in which the First Respondents had invested as trustee of the S Trust. The loan from EFG to the First Representors was drawn down in two *tranches*. By the first draw down in June 2008, the original mortgages on the property of the First Representors were discharged and the second draw down in July 2008 was substantially transferred to the First Respondent as trustee, and then invested in a bond duly assigned by way of security to EFG as lender.

4 Far from being an effective scheme for avoiding inheritance tax liabilities, the scheme proposed by KNAL was a fiscal disaster. The Court is informed that the effect of the transfers made in July 2008 were as follows:–

(i) The transfer gave rise to an immediate 20% inheritance tax charge over and above the nil rate band, creating a tax liability on each of the First Representors of £183,787.50.

(ii) The sum transferred was subject to the *“relevant property”* regime for inheritance tax purposes, and the consequence was that if the trust fund remained as relevant property, it would be subject to 10 yearly charges following the settlement. The rate of such charge has not been fixed, but may be up to 6% of the value of the Trust. The first charge would arise in the First Representors' case in July 2018.

(iii) If the trustee were to transfer assets away from the settlement so that the property ceased to be relevant property for these purposes, the transfers would give rise to charges which are sometimes called exit charges. The rate of charge, we are told, was a proportion of the 10 yearly rate depending on the duration of the settlement.

(iv) To add insult to injury, the effect of the Finance Act 1986 was that the trust property was not enjoyed to the exclusion or virtually to the exclusion of the First Representors as donors, and it followed that the trust property was treated as remaining within their estates for inheritance tax purposes. The consequence was that not only were there the 20% entry charge and 10 yearly charges, but also the First Representors would be deemed to be beneficially entitled to the Trust assets for inheritance tax purposes at the date of their death if the Trust property remained in trust, and thus the ostensible objective of the scheme would not have been achieved.

5 The First Representors brought proceedings on 12 th October, 2012, against EFG, KNAL and Mr Kevin Neal personally in the High Court. These proceedings were vigorously defended but ultimately compromised by means of a settlement agreement as a consequence of which EFG agreed to indemnify the First Representors in respect of any UK inheritance tax and income tax charges relating to the transfers to the S Trust and in relation to the investment in the relevant bond. The indemnity is expressly conditional upon the First Representors taking steps reasonably required by EFG to reduce their tax liabilities by lawful means. The First Representors had become aware of the possibility of

applying to set aside the transfers into trust for mistake when EFG explicitly stated this to them in October of 2013.

6 The Court is informed that the outcome of the present application, for UK tax purposes, is that none of the relevant tax charges would be payable if the Court were to grant the relief sought.

7 In the context of delay, the First Representors became aware of the inheritance tax problems in September 2009, and, as set out above, later commenced the litigation in England. They did not become aware of the possibility of an application to this Court until October 2013 and accordingly they contend that they have proceeded timeously since then and that the delay has been neither protracted nor deliberate.

The T Trust

8 The underlying facts surrounding the T Trust are very similar to those set out above. In or about July 2007, Mr Neal of KNAL had outlined to the Second Representors the details of an inheritance tax mitigation scheme, the purpose of which was to minimise the amount of inheritance tax which the Second Representors' children would have to pay on the death of the survivor of the Second Representors. The structure of the scheme was that the Second Representors would borrow approximately 95% of the value of their property from a private wealth bank, the lending of which would be secured by a charge over their property. The mortgage would be rolled over so that borrowings would not be repaid until the death of the survivor of the Second Representors unless the property was sold in the meantime, and interest on the mortgage would be rolled up. The borrowed sum would be transferred by the Second Representors into an offshore trust, where it would be invested in a series of low risk investments such as government gilts or bonds and capital guaranteed structured notes which would generate sufficient return to cover both the interest on the loan from the bank and any charges and fees associated with the scheme. It was said that the scheme would make a return of approximately 10% every year, 5% of which the Second Representors would be able to withdraw from the scheme tax free. It was said that they could exit the scheme without penalty at any stage if they wished to do so.

9 The Second Representors decided to enter into the scheme and in November 2007 made a trust with the First Respondent (the “T Trust”), with an initial payment of £20 to constitute the trust fund. The first named Second Representor had a lifetime interest in possession in the trust fund but if he predeceased his wife, she would then have a life interest and possession thereafter. As a result, the first named Second Representor had the right to enjoy the income but not the capital of the trust fund during his lifetime and his widow would enjoy the income after his death should he predecease her. The First Respondent as trustee had a discretionary power of appointment over the trust fund and the income for the benefit of any of the beneficiaries which included the four children of the Second Representors, any trust association body or other organisation in any part of the world, the objects of which are charitable, and any person added to the class of beneficiaries by the

trustee.

10 In November 2007, the Second Representors agreed a loan from EFG for the equivalent of £4.75 million in Swiss Francs. The monies were paid into the T Trust. EFG required a guarantee from the trustee and an assignment over the bond in which the trustee was to invest, all by way of security for the loan which it had made to the Second Respondents. This all duly took place and was completed by January 2008.

11 The tax consequences of the transfers to the T Trust were these:–

(i) The transfer gave rise to an immediate 20% inheritance tax charge over and above the nil rate band, which in effected created a tax liability of £526,100.20 on each of the Second Representors.

(ii) The sum transferred was subject to the *"relevant property"* regime for inheritance tax purposes, and thus subject to 10 yearly charges following the settlement.

(iii) Should the trustee transfer assets from the settlement so that the property ceased to be relevant property, the transfers would give rise to exit charges.

(iv) The effect of the Finance Act 1986 was that the trust property was not enjoyed to the exclusion or virtually to the entire exclusion of the Second Representors as donors, and as a consequence, if the T Trust remained in place with those assets within it, not only would the 20% inheritance tax entry charge and 10 yearly charges apply, but the Second Representors would also be deemed to be beneficially entitled to the Trust assets for inheritance tax purposes and the whole purpose of the scheme therefore would be defeated.

12 The Second Representors brought proceedings against EFG, Mr Neal personally and KNAL in the High Court in London. Trial commenced on 2 nd December, 2013, but were compromised by a settlement agreement dated 17 th December, 2013, between the Second Representors, EFG, KNAL and Mr Neal by which EFG agreed to indemnify the Second Representors in respect of any UK inheritance tax and income tax charges relating to the transfers into the T Trust and in relation to the investments in the relevant bond. The indemnity was expressly conditional upon the Second Representors taking steps reasonably required by EFG to reduce their tax liabilities by lawful means.

13 The Second Representors' representation was presented to the Royal Court on 9 th January, 2015. The Court ordered that the First Respondent and the two adult children of the Second Respondents should be convened, and also ordered that Advocate Robert Gardner be appointed as guardian ad litem to represent the minor beneficiaries of the T Trust and served with the documents accordingly. HMRC and HM Attorney General were to be notified of the existence of the proceedings. In February, HM Attorney General confirmed he had no observations to make on the relief sought. The Second Representors received

confirmation from HMRC that consideration was being given as to whether any representations should be made to the Jersey Court, and representations were in fact made by letter dated 27 th March to the Judicial Greffier. We will deal with the detail of those later in this judgment.

14 The representation was heard on 31 st March when Advocates Speck, Harvey-Hills and Gardner were heard, and judgment was reserved.

The Law

15 Prior to 25 th October, 2013, there was an established line of authority in relation to the setting aside of a trust established by mistake. Article 11 of the Trusts (Jersey) Law 1984 ("the 1984 Law") provides that a trust is invalid to the extent that the Court declares that it was established, inter alia, by mistake. The test in relation to applications under Article 11 is well settled. *In The matter of the Lochmore Trust* [2010] JRC 068, the Court confirmed that there were three questions to be addressed:–

(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?

16 This test has been applied on so many occasions that no further discussion of it is necessary in this Court.

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 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."

18 In the present case, there was some distance in time between the establishment of the two Trusts and the disposition of assets into trust, but looking at the circumstances surrounding the arrangements as a whole, we have no doubt that the two were inextricably linked. However, this Court does recognise that there may be factual circumstances where that is not the case. In such an instance, the provisions of Article 47A *et seq*, introduced by the Trusts (Amendment No.6) (Jersey) Law 2013 carry particular relevance.

19 In the *Robinson Annuity* case, the Court considered whether there was in fact any difference between the test enunciated by the Courts and the statutory test set out in Article 47E(3). The full text of Article 47E is in these terms:–

> ***"47E Power to set aside a transfer or disposition of property to a trust due to mistake***
>
> ***(1) …***
>
> ***(2) The court may on the application of any person specified in Article 47I(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."***

20 As the Court indicated in the *Robinson Annuity* case, the only difference between the test adumbrated in the cases and the statutory test is that the wording concerning the seriousness of the mistake is inverted. In the statute, the Court decides whether a mistake is so serious as to render it just for the Court to make a declaration under the Article, whereas in the judicially adumbrated test in relation to mistake, the question is whether the mistake is so serious as to render it unjust on the part of the donee to retain the property. Sir Michael Birt, Bailiff, considered that this was a distinction without a difference but of course he cannot have had in mind circumstances such as exist in the present case. It appears to us that there is potentially this difference between the statutory and the judicial tests — the judicial test, in requiring the Court to consider whether it is unjust on the part of the donee to retain the property, seems to us to contemplate that the Court is measuring justice by reference to the position of the donee — is it just for the donee to retain the property in the circumstances of the mistake? The focus of the statutory test, by contrast, is whether it is just for the Court to make a declaration that a disposition of property to a trust is voidable with some or no effect as the Court determines because of a mistake made by the donor. These are very fine margins, and whilst we agree that in most cases the result of the statutory and the judicial tests will be the same, we are not sure that there will not be some factual circumstances which might make the distinction between the two tests relevant.

21 In the *Robinson Annuity* case, the application was to have the trust itself declared invalid and the Court approached the matter under Article 11. In the present case, the application is to have the transfers of money made by the First Representors into the S Trust and by the Second Representors into the T Trust set aside on the grounds of mistake and declared void or voidable and of no effect. In so far as the transfers included the transfer which immediately constituted the Trusts, Article 11 would seem to apply. In so far as the transfers were made to an existing trust, Article 47E would apply.

22 What is clear is that whether one is looking at the matter under Article 11 or under Article 47E, it does not matter whether the mistake was of fact, law, as to the effect or as to the consequences. Accordingly a mistake as to the tax consequences of a trust or a transfer to a trust is a mistake for these purposes (see *Re S Trust* [2011] JLR 375). We agree with Sir Michael Birt, Bailiff, that the definition of ***"mistake"*** in Article 47B(2) is to like effect (see paragraph 29 of the *Robinson Annuity* case).

HMRC representations

23 Although the initial dealings with the two trusts were with different branches of HMRC, letters dated 27 th March, 2015, in relation to each trust were sent to the Court by the solicitor's office, in each case emanating from the team leader of the property taxes team. The two letters are very similar. The essential point made were these. Firstly the mistake in question was not a mistake for which the Royal Court should give relief because the mistake, such as it was, lay in the tax consequences of the transfers into trust and did not lie in the nature of the transfers themselves. Reliance was placed upon paragraphs 99–108 in *Pitt v Holt* and *Futter v Futter* [2013] UKSC 26. It was pointed out that Lord Walker distinguished a mistake from mere ignorance or inadvertence and in particular reliance was placed on his statement, at paragraph 108 of his judgment, that mere ignorance, even if causative is insufficient. This expanded the earlier distinction between causative ignorance which was not a mistake and an incorrect conscious belief or an incorrect tacit assumption, which could be regarded as mistake. It was therefore submitted that the Representors respectively had not made an actual mistake which could be rescinded. After all, they knew that they were transferring money into trust, they knew the value of the money they were transferring and they knew that the money would sit within the trust which it did. What they did not know was that a United Kingdom inheritance tax liability would arise, and that the tax planning which they had put in place would not in fact be successful in avoiding that liability. This was mere ignorance.

24 Secondly, HMRC relied upon paragraphs 114–123 of Lord Walker's judgment and in particular emphasised at paragraph 122 his statement that there would have to be some mistake either as to the legal character or nature of the transaction or as to some matter of fact or law which was basic to the transaction. Accordingly, it was submitted that their mistake was a mistake as to the tax consequences rather than to the effect of the transaction.

25 Finally it was submitted that it would not be unconscionable to leave the transaction uncorrected because the motivation for setting up the trust and transferring money into the trust was to mitigate a tax liability and there were no special circumstances regarding consideration such as is the case with *Pitt* or *Futter*.

26 The first point we would like to make about these representations is this. *Pitt v Holt* is a decision of the Supreme Court which although not strictly binding naturally receives in the Royal Court of Jersey the utmost respect. Nonetheless, the Supreme Court is concerned with the law in Great Britain and Northern Ireland, and not with the law of Jersey. Any appeal from a decision of the Royal Court of Jersey goes to the Privy Council and not to the Supreme Court. This is not a distinction without a difference. The Privy Council can be expected to have regard both to the law and to the policy interests to the Island of Jersey in deciding an appeal from the Jersey Court of Appeal and the Royal Court, considerations which obviously played no part in *Pitt v Holt*. In one sense that is obvious. The Island's legislature has adopted statutory provisions by the Trusts (Amendment No.6) (Jersey) Law 2013 which have no application in Great Britain and Northern Ireland, but which do form part of the law of Jersey which the Privy Council would naturally apply. No doubt in addition, the Privy Council would wish to pay careful regard to the numerous judgments of

the Royal Court over a prolonged period, and the views expressed by at least four different judges on this subject. Indeed, although at paragraph 121, Lord Walker appears to distance himself from the conclusions of Lloyd LJ in *Pitt v Holt* when he expressed the view that some recent cases about offshore trusts did not accord with English law, the fact that the analysis of these differences happens at all demonstrates that the Royal Court operates from a different juridical root.

27 The second point to make is that in different parts of Lord Walker's judgment, it may be thought that he placed emphasis on other factors than those on which HMRC rely. When considering the issue of whether the mistake on the part of a donor had to be either as to the legal effect of the disposition or as to any existing fact basic to the transaction, Lord Walker said this at paragraph 122:–

> ***"But I can see no reason why a mistake of law which is basic to the transaction (but is not a mistake as to the transaction's legal character or nature) should not also be included, even though such cases would probably be rare … I would provisionally conclude that the true requirement is simply for there to be a causative mistake of sufficient gravity; and as additional guidance to judges in finding and evaluating the facts of any particular case, that the test will normally be satisfied only where there is a mistake either as to the legal character or nature of a transaction or as to some matter of fact or law which is basic to the transaction."***

28 We think the summary of the ***"true requirement"*** is in effect the ***"but for"*** test which is the second part of the Lochmore Trust and is reflected in Article 47E(3)(b) of the 1984 Law, as amended. All parties before us accept that the whole purpose of these gifts into trust was to mitigate tax liabilities in the United Kingdom. Rather than mitigate them, the transfers in fact exacerbated them. They did not do so for any reason other than that there was at least one fundamental mistake made as to the taxation law of the United Kingdom. Representations which invite this Court to go back into distinctions between consequences and effect, or into whether mistakes were mistakes of law or mistakes of fact in our view invite the Court to head off in the wrong direction. There is no doubt that the two pairs of Representors understood the legal nature of a trust and understood that they were making transfers of money into a trust. However, as we now go on to discuss, and quite contrary to the representations of HMRC, it is not the case that their mistake was not basic to the transaction — it was fundamental to the transactions, because, but for their mistakes, the transactions would never have occurred.

Discussion

29 We start with the first two questions — which are the same whether the *Lochmore* questions or the circumstances set out in Article 47E(3)(a) and (b) are applied.

30 We have no doubt that in both the case of the S Trust and in the case of the T Trust, the First Representors and the Second Representors respectively made a mistake. They were advised and believed that entering into these arrangements and establishing the Trusts would avoid inheritance tax on the assets which were put into the Trusts. Very possibly they should not have believed that. As it is so often said, when a scheme appears too good to be true, it probably is not true. However, we accept that the mistake was made in each case, and that but for it, neither pair of representors would have made the transfers into trust which they did. They thought, apparently, that whilst continuing to live in their homes, they could place the property into trust, receive an income from it and at the same time ensure that the full value of it would pass to their children on their death free of inheritance tax. Had they realised the tax consequences were quite what they were, we have no doubt that the transfers would not have been made.

31 Accordingly, we now come to the third question — under the judicial test in relation to setting aside a trust under Article 11, was the mistake of so serious a character as to render it unjust on the part of the trustee to retain the property? Under the statutory test, was the mistake of so serious a character as to render it just for the Court to make a declaration that the various transfers of property into trust should be set aside and have no effect? In each case the consequence of making such a declaration would be to return the funds in question to the transferors. In our view, the answer to the two tests is the same and so the question of which test to apply does not arise.

32 If the transfers into trust were not set aside, there would be the following consequences:–

(i) The beneficiaries of the two Trusts, including the respective Representors, would continue to enjoy the benefits of the property in trust.

(ii) The beneficiaries other than the Representors would have a vested interest as putative beneficiaries in the Trust property.

(iii) As far as the First Respondent is concerned, it will have the ability to charge fees for its services.

(iv) It is unlikely that there will be any tax liability for either the Trusts or the Representors because of the EFG indemnity. In most cases of this kind, the exposure to tax represents a real consideration, indeed usually the overriding consideration, in measuring where equity lies, because the donor is generally subject to a significant liability which only arises as a result of the mistake and which the Court considers it would be unfair to require him to pay. Here that is not the case. If EFG ends up being responsible for the tax which is due, that can hardly be said to be inequitable, because the company has agreed its liability in that respect.

(v) On the other hand there will be the possibility, and at least in so far as the Morgan Settlement agreement is concerned the probability, of ongoing litigation with all the stress for the families which that entails.

33 The absence of any financial consequences adverse to the beneficiaries has made this an extremely difficult analysis. We do not consider that the fact that the children of the two pairs of representors will no longer have a vested claim to be considered recipients of the underlying trust property is significant — in all probability, they will ultimately receive an inheritance from their parents in any event, and the Court is prepared to proceed on that assumption.

34 At the end of the day, therefore, it comes down to the question of whether the equity lies in setting aside some transfers into trust which would not have been made if the Representors respectively had realised the true fiscal consequences of making them only on the basis of the stress which will be experienced by them if the orders are not made. In so far as the Second Representors are concerned, their children, for whom Advocate Gardner has been appointed Guardian ad Litem, are aged 9 and 12 respectively, and any emotional stress on the parents will almost certainly have an effect on their upbringing.

35 The evidence before us is to the effect that there has been very hard fought litigation in the High Court to achieve the result that ultimately the Representors achieved. By the time of trial, only EFG was in the frame as a defendant with assets, KNAL having been placed in liquidation and Mr Neal himself being a man of straw. EFG itself vigorously denied liability at the time the trial started and it was only after it had commenced that a settlement agreement was reached — one of the key factors in reaching such a settlement for the Representors was that they were running out of money in order to fund that litigation, and both pairs of Representors had difficulties with their family businesses as a result.

36 There is something unattractive about the proposition that the Court should come to the rescue of foreign tax payers who, anxious to avoid paying the contribution towards the outgoings of their own jurisdiction's government, and thus meet their own obligations as citizens of that jurisdiction, make schemes of this nature. No doubt they congratulated themselves for some years on the smart move which they had made to avoid the relevant taxes and get benefits for themselves in the meantime. The Court can have only limited sympathy for those people who later find that actually things have not worked out quite as they planned, and here of course the sympathy is even less because there is no financial downside if the Court were not to come to their rescue, because they have an EFG indemnity. Nonetheless, by a small margin, the Court has determined to exercise its discretion to set the transfers aside and grant the relief in the prayers to the representations. It does so without any sympathy at all for EFG as the indemnifier, and with only some sympathy for the Representors — and that sympathy arises from a recognition that all litigation is stressful, and that risky litigation against professional advisers between 2009 and 2013 would obviously have generated a great deal of anxiety for them; and indeed that anxiety would have been increased by the knowledge that if the litigation were to be unsuccessful, there were really serious tax consequences flowing from the misguided attempts to avoid their obligations as citizens of the United Kingdom in the first place. The Court thinks this was a pretty naked attempt to avoid those obligations. In the event, we are granting the relief because we recognise the stress of the last three years for the Representors, and the stress of this litigation as well. We recognise the possibility, perhaps

even probability, that a refusal of relief is likely to lead to further litigation on appeal, and given their tax position will be the same if we make the order as it would have been if the transfers into trust had not been made in the first place. On balance we think that these Representors and their families have suffered enough.

37 For these reasons, the prayers to the two representations are granted and we order that the transfers of money be the Representors respectively into the S Trust and the T Trust are set aside on the grounds of mistake and declared to be of no effect. The First Respondent is thus declared to hold, and to have at all times held, the money transferred by the First Representors on bare trust for those Representors in equal shares, and likewise the money transferred by the Second Representors on bare trust for those Representors in equal shares.