

Andrew Wilkes and Sylvia Gay Wilkes, (nee Pugh) v Valla Ltd (formerly Apex trust Company Ltd) and Cheveral Investments Ltd

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Nicolle, Marett-Crosby
Judgment Date:	02 October 2015
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Text

[2015] JRC 200

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner and** Jurats Nicolle **and** Marett-Crosby

IN THE MATTER OF THE REPRESENTATION OF ANDREW WILKES AND SYLVIA
GAY WILKES NEE PUGH IN RELATION TO THE WILKES ANNUITY INVESTMENT
TRUST

Between
Andrew Wilkes and Sylvia Gay Wilkes, (nee Pugh)
Representors

and
Valla Limited (formerly Apex trust Company Limited)
First Respondent

and
Cheveral Investments Limited
Second Respondent

Advocate M. E. Whittaker for the Representors.

Advocate D. J. Petit appeared as a Director of Valla Limited.

Authorities

Moffat v Apex Trust Company Limited [\[2014\] JRC 252](#).

Robinson v Apex Trust Company Limited [\[2014\] JRC 133](#).

Seggins v Apex Trust Company Limited [\[2013\] JRC 077](#).

Tait v Apex Trustees Limited [\[2012\] JRC 148](#).

CCC Limited v Apex Trust Limited [\[2012\] \(1\) JLR 314](#).

Trusts (Jersey) Law 1984.

Re Lochmore Trust [\[2010\] JRC 068](#).

Insurance Business (Jersey) Law 1996.

Trust — application to set aside a trust on the ground of mistake.

THE COMMISSIONER:

- 1 This is another application arising out of an inheritance and tax planning scheme devised by the now defunct firm of English solicitors Baxendale Walker. The Court has intervened to set aside a number of these schemes on the ground of mistake, namely *Moffat v Apex Trust Company Limited* [\[2014\] JRC 252](#), *Robinson v Apex Trust Company Limited* [\[2014\] JRC 133](#), *Seggins v Apex Trust Company Limited* [\[2013\] JRC 077](#), *Tait v Apex Trustees Limited* [\[2012\] JRC 148](#) and *CCC Limited v Apex Trust Limited* [\[2012\] \(1\) JLR 314](#). The facts of this case are very similar and for that reason this judgment will be short.
- 2 In about May 2005, the representors owned their home, 5 Britannia Square, Worcester

WR1 3DG ("Britannia") then valued at about £900,000 but against which they planned to raise a loan of £765,000, partly to pay off a business loan and partly to provide cash.

- 3 The representors were advised by Baxendale Walker that they could enter into arrangements whereby they would be able to receive an annuity income from the date that each of them respectively reached the age of 75 and this could be achieved through a trust. Through such a trust United Kingdom real estate could be purchased and improved, using loans arranged within the trust, thus creating a progressive increase in capital which would eventually fund the annuity payments. The representors were advised their estate would be protected from Inheritance Tax, although this was not their primary concern.
- 4 Baxendale Walker advised that an estate income trust be set up with offshore trustees and that assets be transferred by the representors to the offshore trustees, which assets (as they progressively increased) would be used for the primary purpose of securing annuity benefits for the representors. A report dated 17th May, 2005, was prepared setting out what could be done to give effect to the arrangements.
- 5 Pursuant to this advice, on 30th June, 2005, a purpose trust known as the Wilkes Annuity Investment Trust ("the Wilkes AIT") was established. Enhance Inc. ("Enhance"), a BVI company, connected to Baxendale Walker, was the founder and enforcer and Atlas Trust Company (Jersey) Limited ("Atlas") the trustee.
- 6 On 30th June 2005, Enhance purported to appoint the representors as enforcers in its place. Whether this was effective is unclear, as Clause 10.4 of the Wilkes AIT provides that the enforcer may resign on any date following the date of the trust deed.
- 7 Again on 30th June, 2005, the representors each entered into Estate Annuity Purchase Deeds ("the EAPDs") whereby Atlas, as grantor, would pay the representors (as purchasers) an annuity in consideration for the transfer to Atlas of, on each EAPD, a 50% beneficial interest and equity of redemption in Britannia. In the case of Mr Wilkes, the EAPD also referred to a cash consideration of £266,236.40. The annuities were to commence on the respective 75th birthdays of the representors — at the time the representors were aged 56 years-and continue until the death of the survivor of them.
- 8 Prior to these transactions, the representors had been informed that Britannia could not become an asset of the Wilkes AIT because of the existing borrowing secured against it and that they would have to place cash into the Wilkes AIT instead. The cash came from both representors, not just Mr Wilkes, and the amount transferred was in fact £370,494.
- 9 On 27th June, 2005, (before the Wilkes AIT was established), a company known as Cheveral Investments Limited had been formed and on 26th July, 2005, it entered into a tenancy agreement with the representors in respect of Britannia, which it did not own. That

agreement was for one year and was not subsequently renewed.

- 10 The representors wished to invest in a property on a “buy to let” basis known as 38 Conduit Street, Tredworth, Gloucester (“38 Conduit Street”). That was purchased by Cheveral on 15th August, 2005, for a consideration of £110,000 together with fees and legal charges provided by Atlas. For reasons unknown to the representors finance agreements were prepared between a company called Jitlis Finance Company Limited (which had the same registered office as Atlas) and Mr Wilkes which referred to the purchase and subsequent renovation of 38 Conduit Street but there was never any suggestion that he would have to repay the sums involved. The representors proceeded by treating Conduit Street as their own, renovating and letting it annually to students.
- 11 In February 2009, Valla Limited (then called Apex Trust Company Limited) took over the responsibility for this and the other Baxendale Walker trusts with the consent of the Jersey Financial Services Commission. Advocate Petit informed the Court that there may be one more Baxendale Walker trust which might require the intervention of the Court.
- 12 In a further unfortunate development, in or about the same time as this scheme was set up, the representors were persuaded by Baxendale Walker to invest £100,000 in a Brazilian Carbon Offsetting Scheme. This investment was made in Mr Wilkes' sole name. Subsequently, they learned that the administrators of this scheme had diverted its assets (and intellectual property rights) into a series of different offshore companies — some in Belize — with unknown ownership but all of the original investors have lost their money. The matter is under investigation but a number of the investors, including Mr Wilkes, were declared bankrupt as a direct consequence of this fraud. Mr Wilkes' bankruptcy was declared on 6th April, 2011, and discharged a year later.
- 13 There are no longer any assets within the Wilkes AIT, the balance following the purchase of 38 Conduit Street apparently being absorbed through fees. Britannia is in negative equity, leaving only 38 Conduit Street, which is still held in the name of Cheveral.
- 14 Her Majesty's Revenue and Customs in the United Kingdom have been given notice of this application but have not sought to intervene.

Applicable law

- 15 We adopt the same approach as the Court in *Moffat v Apex* at paragraphs 21–24. The Wilkes AIT is governed by Jersey law and although the two EAPDs are expressed to be governed by English law, Article 9(1) of the Trusts (Jersey) Law 1984 provides that the validity of a Jersey trust and validity and effect of any transfer of property into a Jersey trust shall be determined in accordance with the law of Jersey and no rule of foreign law shall affect such question. As held in *Moffat v Apex* (and *CCC Limited v Apex*) this means the

domestic law of Jersey (i.e. without reference to its conflict of law principles). Thus, we must apply the Jersey law of mistake to the issue before us.

- 16 We agree with the decision in *Moffat v Apex* and both *Tait* and *Seggins* that the creation of the Wilkes AIT and the EAPDs are so closely linked that they must all be considered together. The EAPDs were an essential part of the scheme which led to the establishment of the Wilkes AIT and they were entered into as part of the scheme to establish the Wilkes AIT.
- 17 Whether the matter is approached under Article 11 or Article 47(e) of the Law, the test is, for all practical purposes as summarised in *Re Lochmore Trust* [\[2010\] JRC 068](#) at paragraph 11 in the following terms:—

“11. It follows that the Court has to ask itself the following questions:—

(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?”

The mistakes

- 18 As can be seen from the above, there are a number of difficulties with the Wilkes AIT, but for the purposes of this application, the representors rely on the impossibility of performance for two reasons:—

Put simply, the scheme was incapable of performance.

(i) Under Schedule 1 of the Insurance Business (Jersey) Law 1996 (“the Insurance Law”) contracts to pay annuities are classified as long term insurance business. By virtue of Article 5 of the Insurance Law, it is an offence for any person to carry out long term insurance business unless he holds a permit for that purpose issued by the Jersey Financial Services Commission. Neither Atlas nor any of the successor trustees has at any stage held such a permit and the EAPDs were accordingly illegal contracts to the extent that they imposed an obligation on Atlas to pay a deferred annuity. They could not lawfully be performed by Atlas.

(ii) On the evidence, it would never have been possible to pay the deferred annuities in accordance with the scheme as there were always going to be insufficient assets in the Wilkes AIT to pay them at that rate. That was amply illustrated by the helpful attempt by Advocate Petit to calculate the amount payable annually, irrespective of the real difficulties in carrying out the calculation at all.

Conclusion

- 19 Taking the first question, there was a mistake on the part of the representors in entering into a scheme that was incapable of performance in that it would have been unlawful for any annuity to be paid and in any event, it was impossible for the annuity to be paid at the level set out in the EAPDs.
- 20 We are satisfied that the representors would not have entered into the scheme ***“but for”*** this mistake and that the mistake was of so serious a character as to render it unjust on the part of the donee to retain the property. There are no beneficiaries of the Wilkes AIT who will suffer from it being set aside.
- 21 For these reasons, we declare that the Wilkes AIT and the two EAPDs are invalid. It follows that the assets of the Wilkes AIT, including Cheveral and any loans due by it, are held on bare trust for the representors and have been so held at all times.