In the Representation of B (the settlor) and Primafides (Suisse) SA (the trustee)

Jurisdiction:	Jersey
Judge:	MacRae, Bailiff
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Text

In the Matter of the Indigo Trust
In the Representation of B (the settlor) and Primafides (Suisse) SA (the trustee)

[2023]JRC047

(MacRae, Deputy Bailiff and Jurats Dulake and Le Cornu):

ROYAL COURT

Trusts — trust assets — mistake by settlor/donor — transfer of property into trust set aside if court satisfied (i) mistake by representor in relation to transfer; (ii) representor would not have entered transaction but for mistake; and (iii) mistake so serious that unjust for donee to retain property — disposition set aside as representor unaware of significant adverse tax consequences; would have acted differently if aware; and just in circumstances to set aside — adverse tax consequences would have been avoided if trust had been settled several days later, when settlor no longer deemed domiciled in UK for IHT purposes — further declaration that trustee held trust assets on terms of trust settled at later date not granted, as inconsistent with setting aside earlier transfer

Held, ruling as follows:

(1) On an application to set aside a transfer or disposition of property to a trust due to mistake, the questions for the court were (i) was there a mistake on the part of the representors in relation to the transfers to the trust? (ii) would the representors not have made the transfers but for the mistake? (iii) was the mistake of so serious a character as to render it just for the court to make a declaration? In respect of the first question, it was well established that a mistake as to the tax consequences of a transfer to a trust was capable of amounting to a mistake for the purpose of art. 47E. The court was in no doubt that the settlor made two mistakes. He was unaware of the fact that he remained domiciled in the UK for IHT purposes and as a consequence failed to take tax advice and was therefore unaware of the substantial consequences of failing to do so. He was simply not aware of there being any UK tax issues arising from setting up the trust and transferring the BVI company shares to it. In respect of the second question, it was clear that the settlor would have proceeded differently had he been aware of the UK tax position and not made the mistake that he did. The charge to tax would have been avoided entirely if the settlor had established the trust a few days later. There were two components to the third question: first, whether the operative mistake was of a serious character and, secondly, whether it was just for the court to make the declaration sought. In relation to the first component, the quantum of the tax exposure might be a relevant consideration and it was in this case. The exposure to tax was significant, approaching £4m., with periodic future charges. As to whether it was just to grant the declaration sought, the court had a discretion. The court accepted the representors' argument that the creation of the trust was not an aggressive tax mitigation scheme or a complex or artificial exercise in tax avoidance but a simple exercise in estate planning by which the settlor sought to balance his daughters' interests and address his and his wife's long-term wish to retire to Canada. Bearing in mind the financial consequences of the mistake for the settlor and his family and the circumstances in which the mistake arose, the court considered it just to grant the application. The first declaration sought would be made, namely that the transfer of property into the trust was voidable and of no effect from the date on which it was made (paras. 23–24).

(2) The court would not grant the further relief sought by the representors, namely a declaration that the trustee held the trust assets on the terms of the trust for the beneficiaries and had done so since November 30th, 2020. The court was in effect being asked to set aside a trust (which was the effect of setting aside the April 2019 transfer into the trust) for tax reasons and, at the same time, find that the settlor could enjoy the benefit (for tax reasons) of setting up the same trust by virtue of a later change of trusteeship. A consequence of the decision to set aside the transfer into trust at the time it was made was that the trust was not declared/settled in April 2019, as at that time the effect, if any, of the attempt to place assets into trust was only that the settlor and his wife held those assets on bare trust for the settlor and not on the terms of the trust. The assertion that the settlor then effectively settled the assets, which he held as bare trustee, on the terms of the trust when he and his wife retired in favour of the trustee in November 2020 was a matter which, although in some circumstances might be possible, did not represent the reality of the situation, namely that in this case not only the settlor but also the trustee had, owing to the court's decision on the first issue, always held the BVI company shares as bare trustee on

behalf of the settlor and not on the terms of the trust. There was a fundamental inconsistency between setting aside the transfer of the shares into trust in April 2019 and thereafter treating the trust as validly created by the settlor as a Jersey law discretionary trust in November 2020. Whether or not the court's broad powers under art. 47E would permit it to make the declaration sought, which it doubted, the court declined to exercise its discretion to do so. The court had declared that the April 2019 transfer was voidable and of no effect at the time of its exercise. In those circumstances it was difficult to see the scope for granting the second declaration (paras. 43–46).

Cases cited:

(1) *B Trust, In re*, [2019]JRC035; 2019 (1) JLR N [4], considered.

(2) *BNP Paribas Jersey Trust Corp.* Ltd. v. Crociani, 2018 (2) JLR 175, considered.

(3) *G Trust, In re*, 2019 (1) JLR 175, considered.

(4) *Grundy Trust, In re*, 2020 (1) JLR 153, considered.

(5) *Hawksford Trustees Jersey Ltd. v. P*, 2021 (2) JLR 20, considered.

(6) *Shinorvic Trust, In re*, 2012 (1) JLR 324, considered.

(7) *T 1998 Discretionary Settlement, In re*, [2008]JRC062; Royal Ct., April 17th, 2008, unreported, referred to.

The representors sought to set aside the disposition of property to a trust.

The representors were the settlor and trustee of a Jersey trust ("the trust"). The settlor was now in his mid-eighties. He and his wife were Canadian and domiciled in Canada. They had two children: C who lived in the United States; and D who lived in Canada. They moved to the United Kingdom in 1996 and became deemed domiciled in the UK for IHT purposes on April 6th, 2012 (the settlor was not aware that he retained that deemed domicile status until April 5th, 2019). They lost their UK resident non-domicile tax status in 2016. The settlor and his wife moved to Monaco in March 2016 and returned to the UK in May 2022.

The settlor took advice on his tax and other affairs connected to his estate. His assets at that time comprised real estate in Canada (provision for which had been made by the settlor and his wife in their wills); assets then held by a family trust established in 2012 (C had been removed as a beneficiary of the family trust to avoid adverse US tax consequences); and assets owned by a BVI company, which was at that time owned by the settlor directly via a nominee arrangement, with the settlor and his wife (as nominee for the settlor) each holding 1,000 shares in the company. The settlor was advised that the family trust would be deemed to be resident in Canada for tax purposes unless the settlor had resided outside Canada for 60 months prior to the settlement into trust.

Taking into account US and Canadian tax implications, the settlor was recommended to

establish the trust in Jersey which would be a discretionary trust for the benefit of himself, his wife, C and her descendants. The BVI company was part of the recommended structure, for US tax reasons. The trust was to own two holding companies which would each own 50% of the shares in the BVI company. The advice was that, in order to start the clock running *inter alia* on the 60-month period relevant under Canadian law, time was of the essence in establishing the structures, of which the settlor should be the trustee.

On April 1st, 2019, the settlor settled the trust. He and his wife were the original trustees. They transferred 50% of the shares in the BVI company to be held in another company ("J Ltd."), in exchange for J Ltd. issuing shares in J Ltd. to the original trustees. The settlor and his wife transferred the remaining 50% of the shares in the BVI company to another company ("S Ltd.") on the same basis.

On November 30th, 2020, the settlor and his wife resigned as trustees in favour of the trustee and transferred the shares in J Ltd. and S Ltd. to the trustee.

The settlor's intention in settling the trust was to put in place a tax efficient structure which would allow the settlor and his wife to *inter alia* equalize the inheritance between their daughters following C's removal from the family trust, and to make sure that the settlor and his wife could retire to Canada as soon as possible. Tax issues in a number of jurisdictions were central to the establishment of the trust but no UK tax advice was obtained. The settlor was not aware that he was deemed domiciled for UK IHT purposes until April 5th, 2019. The settlor's gift of assets into the trust was subject to a significant IHT charge and ongoing charges. If he had settled the trust on April 6th, 2019 or thereafter, the gift into trust would not have triggered an IHT charge and the shares held by the trustee would have qualified as excluded property for IHT purposes.

The representors sought an order from the court that (i) pursuant to art. 47E of the Trusts (Jersey) Law 1984, the disposition of property by the settlor pursuant to which the trust was established on April 1st, 2019 was voidable and of no effect as at that date; and (ii) a trust on the same terms (albeit with a different commencement date) had been in existence since November 30th, 2020.

In respect of the second order sought, the representors submitted that (i) on April 1st, 2019, pursuant to the trust, the settlor and his wife were appointed original trustees and the settlor settled the shares in the BVI company on the terms of the trust. The representors called this "Transaction 1"; (ii) on April 2nd, 2019, the original trustees transferred and divided the ownership of the shares in the BVI company to and between J Ltd. and S Ltd. in return for shares in those companies being issued to the original trustees; (iii) on November 30th, 2020, in his capacity as one of the original trustees, the settlor transferred legal ownership of the shares in the BVI company to the trustee. It was said that notwithstanding the avoiding of the 2019 transfer, the November 2020 transfer had the effect of transferring legal ownership of the shares such that they were not legally owned by the trustee, and the trustee received the shares from the settlor on the basis that they were to be held on trust and on the terms of the trust. It was argued that owing to the effect of the mistake made in 2019, when the settlor retired as trustee in favour of the trustee in November 2020, ownership of the shares passed directly from him (or from him and his wife) to the trustee rather than from himself and his wife in their capacity as original trustees. The representors

called this “Transaction 2”; and (iv) in those circumstances the settlor effectively resettled the trust on the terms of the trust in November 2020 and the court was invited to declare that the trustee held the trust assets on the terms of the trust for its beneficiaries and had done since November 2020.

Legislation construed:

Trusts (Jersey) Law 1984 (Official Consolidated Version, ch.13.875), art. 47B: The relevant terms of this article are set out at para. 22.

art. 47E: The relevant terms of this article are set out at para. 21.

J. Harvey-Hills for the representor.

Bailiff

1 MacRae, **DEPUTY**

Background

On February 6th, 2023, we heard a representation issued by the settlor and the trustee of a trust known as the Indigo Trust (“the trust”).

2 The representors sought an order from the court that:

> (i) Pursuant to art. 47E of the Trusts (Jersey) Law 1984, as amended (“the Law”), the disposition of property by the settlor pursuant to which the trust was established on April 1st, 2019 is voidable and of no effect as at that date; and
>
> (ii) A trust on the same terms as the trust (albeit with a different date of commencement) has been in existence since November 30th, 2020.

3 The settlor is now in his mid-eighties. His wife is a little younger. They have two children: C, who lives in the United States, and D, who lives in Canada.

4 The settlor and his wife are Canadian and domiciled in Canada. They moved to the United Kingdom in 1996 and became deemed domiciled in the United Kingdom for inheritance tax purposes on April 6th, 2012 and lost their UK resident non-domicile tax status in 2016.

5 In order to avoid the adverse UK tax consequences of these events, on April 3rd, 2012, three days before the key date referred to above, the settlor settled a family trust which is not relevant to our considerations, but we refer to it by way of background, and in March 2016 prior to the commencement of the UK tax year commencing on April 6th, 2016, the

settlor and his wife moved to Monaco.

6 C was revocably removed and excluded as a beneficiary of the family trust in March 2017 as she had become engaged to, and later married, a US citizen and planned a permanent move to the United States. Her removal was in order to avoid certain adverse US tax consequences. This occurrence led, *inter alia*, to a restructuring of the family's wealth which included the creation of the trust and another trust which is not relevant to our considerations. The source of the settlor's wealth was the sale of a chain of retail stores located in Canada which he sold on his retirement in approximately 1997. It was in the context of his retirement that the settlor moved to the United Kingdom with his wife. However, they always intended to return to Canada.

The creation of the trust

7 When the settlor and his wife left the United Kingdom for Monaco in March 2016, they received UK tax advice to the effect that if they were outside the UK for six full tax years they could then consider returning to the UK with their “domicile clock” reset. Accordingly, they would not be able to return to the UK prior to April 5th, 2022. The settlor did not take any further UK tax advice on any issues arising from their move to Monaco and, as he explains:

> “As far as I understood it, our UK tax liabilities and exposure ended when we were no longer resident in London (*i.e*. March 2016), but we had to be non-UK resident for a further six tax years … before we could return if we were once again to be resident non-dom.”

8 They also received letters via their advisers from HMRC in August 2017 to the effect that their adviser had informed HMRC that for the tax year 2016/2017 the settlor and his wife no longer met the criteria for filing a self-assessment tax return with HMRC. Although not relevant to our decision, we note the settlor and his wife returned to the United Kingdom in May 2022.

9 In August 2017, the settlor took advice on his tax and other affairs connected to his estate. His assets at that time fell broadly into three portions—real estate in Canada (provision of which had already been made by the preparation of wills by the settlor and his wife), assets then held by the family trust, and the assets owned by a BVI company, A Ltd. (“the BVI company”). The BVI company was at that time owned by the settlor directly via a nominee arrangement, with the settlor and his wife (as nominee for the settlor) each holding a thousand shares in the company.

10 On August 9th, 2017, the settlor, his wife and their two daughters met in the presence of Canadian advisers and considered the various options open to the family, and noted the need for Monegasque tax advice, owing to the fact that the settlor and his wife were then

resident in Monaco. On December 6th, 2017, advice was taken in relation to the family trust, in particular whether or not the trust might be deemed to be a Canadian resident trust by virtue of the provisions of certain Canadian legislation. The beneficiaries of the family trust are the settlor, his wife and their daughters—subject to C's later exclusion. The upshot of the advice was (and this applies also to the trust) that the family trust would be deemed to be resident in Canada for tax purposes unless the settlor (or "contributor") had resided outside of Canada throughout the period of sixty months (*i.e.* five years) prior to the settlement into trust.

11 On August 14th, 2018, Stonehage Fleming Law US, Philadelphia office, sent extensive advice on the international tax estate planning considerations relevant to the settlor and his wife, taking into account US and Canadian tax implications. The "recommended structure" was that the settlor establish a new trust in Jersey which would be a discretionary trust for the benefit of himself, his wife, C and her descendants, with the settlor having the power to revoke the trust.

12 During the settlor's lifetime, neither C nor the settlor would suffer any US federal tax consequences if they were to receive distributions from this trust. The BVI company was a necessary part of the structure, again for US tax reasons. However, in order to address US tax problems which may arise after the settlor's death, it was necessary, according to the advice, for a slightly more complicated holding structure entailing the new trust owning two holding companies which would each own 50% of the shares in the BVI company. The advice was that in order to start "running the clock" on, *inter alia*, the sixty-month period relevant under Canadian law that "time is of the essence in establishing the structures," of which the settlor should be the trustee. A Jersey law trust was recommended.

13 The proposed trust would also avoid the risk of Monegasque forced heirship rules and probate fees. The settlor says, in summary, that:

> "While my US and Canadian tax and legal advisers were, quite properly, considering US, Canadian, Monegasque and BVI issues arising from my proposed return to Canada and … there was no suggestion that any UK tax issues might have a bearing on the estate planning, or when the steps to be taken should be taken. For the reasons I have explained above, my clear understanding at the time was that no UK issues arose, and I saw no reason to retain UK advisers, and those were my instructions to my US and Canadian advisers."

14 The settlor accepts that tax issues in a number of jurisdictions were "central to the planning and establishment of the trust" and those identified at the time were US, Canadian or Monegasque as referred to above in summary form. The settlor says:

> "Although I did not know it at the time, and no advice was obtained in relation to them in settling the [trust], I now understand that there were, in fact also UK tax issues in play."

15 The key thing of which the settlor was unaware is that he was not only deemed domicile for UK inheritance tax ("IHT") purposes shortly after he left the UK in 2016 but retained that deemed domicile status for the following three UK tax years, *i.e.* until, but not after, April 5th, 2019. The effect of this was that his worldwide estate was in scope for UK IHT until April 5th, 2019 and any gift into trust during that period might trigger an immediate IHT charge of up to 20% of the value transferred, in addition to filing and disclosure obligations in the UK and ongoing taxation of the funds in the trust.

16 Unaware of these considerations, the settlor wanted to proceed with settling the trust as soon as he could, and did so at 11 a.m. on April 1st, 2019. Had he settled the trust a few days later then the UK tax consequences which have arisen would not have arisen. The trust identifies the settlor as such and he and his wife were appointed as original trustees of the trust. The trust property was the 2,000 shares in the BVI company, *i.e.* the entire shareholding in the company. The beneficiaries were, and remain, the settlor, his wife, C and her descendants. There is a power of addition which has not been exercised; the proper law of the trust is Jersey and the trust is revocable by the settlor during his lifetime.

17 On April 2nd, 2019, the settlor and his wife as the original trustees transferred 50% of the shares in the BVI company to be held in another BVI company, which we will call "J Ltd.," in exchange for J Ltd. issuing shares in J Ltd. to the original trustees. The remaining 50% of the shares in the BVI company were transferred to a BVI company which we will call "S Ltd." In return, S Ltd. issued shares to the settlor and his wife as original trustees. This was all apparently done in compliance with the US tax advice that had been given. The shares settled into trust were worth approximately $20m.

18 On November 30th, 2020, the settlor and his wife resigned as trustees of the trust in favour of the trustee. At the time of so doing, they transferred the shares in J Ltd. and S Ltd. to the trustee. Accordingly, as things stand, the trustee in its capacity as trustee of the trust wholly owns J Ltd. and S Ltd., which in turn own the BVI company in equal shares.

19 The settlor's intention in settling the trust was simple—to put in place a tax efficient structure that would allow the settlor and his wife to, *inter alia*, equalize the inheritance between their daughters following C's removal from the family trust and to make sure that the settlor and his wife's plans for returning to Canada for the last chapter of their lives could proceed as soon as possible.

The unforeseen consequences

20 The trustee carried out a tax review of the trust in early 2022 which revealed that the trust was created when the settlor was deemed UK domiciled for IHT purposes. The UK tax consequences are explained in a letter from Stonehage Fleming Law Ltd. ("Stonehage Fleming"), London office, dated October 26th, 2022. Stonehage Fleming advised:

(i) That the settlor retained his deemed domicile status for UK IHT purposes for three UK tax years following his departure *i.e.* up to and including April 5th, 2019.

(ii) On the basis that the settlor remained deemed domiciled in the UK for IHT purposes up to and including April 5th, 2019, his non-UK assets would have been in scope of IHT during that period but would have ceased to be in scope of IHT from April 6th, 2019 (provided none of their value was connected to UK residential property—which has no application on these facts).

(iii) As the settlor settled the trust with assets that had a significant value whilst he was deemed domiciled for UK IHT purposes, that gift was subject to an inheritance tax charge and ongoing charges on each tenth anniversary of the original settlement and on capital distributions unless the assets qualify for some sort of relief which, in this case, they do not.

(iv) The headline rate of tax for transfer of property into trust in these circumstances is 20%. Tax is charged on the total loss to the transferor's estate so that where the transferor pays the tax, the tax is treated as part of the gift and the amount is then “grossed up” so that the effective tax rate of the grossed up amount is 25% of the sum paid. Accordingly, a gift of non-UK shares worth US$20m. (£15.3m.) would give rise to an inheritance tax liability for the settlor in the sum of £3.75m. or, in the case of the trustee, liability in the sum of £3m. On top of these substantial amounts are potential interest penalties and charges made on any distribution of capital of the trust and on each tenth anniversary of the trust. The tenth anniversary charge will be in the region of 6%.

(v) Had the settlor settled the trust on April 6th, 2019 or thereafter, the gift into trust would not have triggered an IHT charge and the shares held by the trustee would have qualified as “excluded property” under the IHT legislation and potentially would have fallen outside the scope of IHT.

The trust law principles

21 Article 47E of the Law provides:

“ **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 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."

22 "Mistake," for the purpose of art. 47E, is defined in art. 47B as follows:

"(2) In Articles 47E and 47G, 'mistake' includes (but is not limited to)—

(a) a mistake as to—

(i) the effect of,

(ii) any consequences of, or

(iii) any of the advantages to be 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;

(b) 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

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

23 As the Royal Court said in *In re G Trust* (3) (2019 (1) JLR 175, at para. 10):

"10 This is well-trodden territory for this court. The three questions for the court are:

(i) Was there a mistake on the part of the representors in relation to the transfers

to the trust?

(ii) Would the representors not have made the transfers but for 'the mistake'?

(iii) Was the mistake of so serious a character as to render it just for the court to make a declaration?"

Our decision on the first issue

24 Dealing with these questions in turn:

(1) *Was there a mistake on the part of the settlor in relation to the transfer to the trust?*

It is well established that a mistake as to the tax consequences of a transfer to a trust is capable of amounting to a mistake for the purpose of art. 47E. We were in no doubt that the settlor made two mistakes. He was unaware of the fact that he remained domiciled in the UK for IHT purposes and as a consequence failed to take tax advice and was therefore unaware of the substantial consequences of failing to so do. He was simply not aware of there being any UK tax issues arising from setting up the trust and transferring the BVI company shares into it.

(2) *Would the settlor not have made the transfer but for the mistake?*

The evidence here speaks for itself. The charge to tax would have been avoided entirely if the settlor had waited just a few days before establishing the trust and providing it with assets. It is plain that the settlor would have proceeded differently had he been aware of the UK tax position and not made the mistake that he did.

(3) *Was the mistake of so serious a character as to render it just for the court to make a declaration?*

As the court noted in *G Trust* (3), there are two components to this question. The first is whether the operative mistake was of a serious character, and the second is whether it is just for the court to make the declaration sought. In relation to the first component, the quantum of the tax exposure may be a relevant consideration and it is in this case. The exposure to tax is significant indeed—amounting to approaching £4m. with periodic future charges. As to whether or not it is just to grant the leave sought, the court noted in *G Trust* that (2019 (1) JLR 175, at para. 22): "there is a real discretion to be exercised" by the court. It is said on behalf of the representors that the creation of the trust was not an aggressive tax mitigation scheme or a complex or artificial exercise in tax avoidance. It is said it was a simple exercise in estate planning by which the settlor sought to balance the interests of his daughters and address his and his wife's long-term wish to retire to Canada. On balance we accept that argument and bearing in mind the financial consequences of the mistake for the settlor

> and his family and the circumstances in which the mistake arose, we do regard it as just to grant the application and we make the first declaration sought, namely the transfer of property into the trust (and there was no other property placed in the trust so the trust accordingly terminates by virtue of this declaration —subject to what we say below) was voidable and of no effect as from the date that it was made, *i.e.* April 1st, 2019.

The second prayer for relief

25 However, as set out in para. 2 above, the representors seek further relief from the court.

26 Counsel for the representors reminded the court of the breadth of the court's powers under art. 47E by reference first to the decision of the Court of Appeal in *BNP Paribas Jersey Trust Corp.* Ltd. v. Crociani (2) (" *Crociani*"). Sir William Bailhache, giving the judgment of the court, said (2018 (2) JLR 175, at para. 85):

> "85 The starting point in construing art. 47E is that one must take the ordinary and natural meaning of the words. In our view the natural meaning of art. 47E(2) is that where a settlor has made a mistake having the characteristics set out in para. 3 of that article the court may follow one of three courses:
>
> (i) it may declare the transfer to be avoided and of no effect from the time of its having taken place;
>
> (ii) it may declare the transfer to be avoided from the time of its having taken place but nonetheless be deemed to have had such effect as the court may determine; or
>
> (iii) it may declare the transfer to be avoided from a date subsequent to the time of its having taken place."

He added (*ibid.*, at para. 87):

> "87 In our judgment this construction of art. 47E(2) is consistent with the general approach of the Trusts Law in establishing overall principles and allowing them to be developed flexibly by the Royal Court. In essence, the legislature has conferred upon the court a discretion to determine which of the three courses it would follow if satisfied that the mistake was of so serious a character as to render it just for the court to make any declaration at all under that article."

27 Having examined the relevant Jersey case law prior to the Law being amended so as to incorporate, *inter alia*, art. 47E, Bailhache, J.A. observed (*ibid.*, at para. 93):

> "93 From this examination it can be seen that art. 47E, in almost every salient operational aspect, follows the settled approach of the Royal Court. The nature of a relevant mistake may be of almost any character (save that the doctrine of

> *erreur* is not to be used): see arts. 47B and 47C. The result of the mistake is that the transfer is voidable at the instance of the settlor: see art. 47E read with art. 47I. It is voidable not void and therefore has legal effect until declared avoided … The innovation of the article lies in confirming that the court has alternate powers (a) to allow some effect to the transfer, or (b) to declare that it has been of no effect. That provision, however, may be little more than a reflection of a need to give consideration to the interests of donees and third parties and of the possible availability of change of position defences (as compared with the position of the bona fide purchaser for value and without notice whose protection is maintained under art. 47I(4)).”

28 As to the approach that the court might take to the exercise of its jurisdiction, the court observed (*ibid.*, at para. 94):

> “94 Turning to guiding principles in the exercise of this jurisdiction, the court must first identify, as the Royal Court did below, that the application has been made by an appropriate person and that there has been a mistake bearing the characteristics required by the statute. The court then has a discretion as to whether to declare the transfer voidable and, the jurisdiction being equitable, it may be that, even with the required characteristics, the whole circumstances militate against a declaration. Having determined to make such a declaration the court will bear in mind for its consequent orders that the transfer or disposition will have had legal effect until the point of the declaration. It is only upon the making of the declaration that the trustee will become a bare trustee of the transferred funds or property: declaring the transfer to be of no effect will not result in the relationship of trust never having existed. In considering the effect of the declaration upon donees and third parties (and in this respect the trustee is entitled to be considered as a potentially affected third party) the court may require to adjudicate upon change of position defences. Accordingly, in exercising its discretion as to the appropriate remedies and consequential orders to authorize, the court will have to take into account all factors relevant to those issues.”

29 In respect to the date at which the transfer is avoided, the court made the following helpful observations (*ibid.*, at para. 97):

> “97 Given that we construe art. 47E to be providing a flexible framework, we do not think that it is appropriate to attempt an exclusive list of factors which will be relevant from case to case, but in our judgment potentially many factors could be relevant considerations in the process of identifying the appropriate declaration. In some instances, the parties may be indifferent as to the date as at which the transfer is avoided: an example is the simple mistake, with no taxation consequences and no distributions in the intervening period. On the other hand, a mistaken transfer may well have unattractive taxation consequences and the court must be persuaded that a declaration that the transfer has had no effect is a proper declaration to make. Equally, there may be competing factors to be

> taken into consideration in identifying which, if any, of the effects of a transfer are to be declared to be retained. Where, as here, the transferee is no longer in possession of the assets transferred, the exercise will be more complex."

30 As an example of the court taking a flexible approach but within the scope of art. 47H (the power to set aside the exercise of fiduciary powers in relation to a trust or trust property), our attention was drawn to the case of *In re Grundy Trust* (4) (" *Grundy Trust*"), where the court was asked to set aside wholly or in part the exclusion of a beneficiary of a trust, namely the wife of the settlor. Owing to tax advice, the trustee was invited to exclude, and did exclude, the settlor and his wife from benefit under the trust. The settlor was not aware that his wife would be excluded and she was not consulted about the proposed exclusion. The court declared that the exercise by the trustee of its powers to exclude the settlor's wife was voidable and should be set aside on the basis of the trustee's failure to take into account various relevant considerations and/or taking into account of one or more irrelevant considerations. The court declared that the exclusion of the settlor's wife from benefit under the trust should have effect as if the trustee had instead declared that she should be excluded from the date of exclusion, but only during the lifetime of the settlor so that in the event of the death of the settlor she would cease to be an excluded person. The court held that it had a discretion to determine what effects, if any, of an exercise of a fiduciary power were to be retained, but the court was not entitled to rewrite history or to make a new decision that the trustee wished it had made at the time. The trustee had had a duty to consider the exclusion of the settlor's wife very carefully and, had it acted in accordance with its duty, it would have excluded her during the lifetime of the settlor only. For the court to order the exclusion of the wife as a beneficiary to take effect only for the duration of the settlor's life was not to substitute a different transaction from that which was undertaken; to make such an order was squarely within the court's power to declare that the trustee's exercise of its fiduciary power was to have such effect as the court might determine. The Royal Court referred to the decision of the Court of Appeal in *Crociani* (2) including some of the extracts referred to in this judgment.

31 The court referred with approval to the decision of *In re B Trust* (1) (2020 (1) JLR 153, at para. 35):

> "35 That is not to say that the court is entitled to re-write history, or to make a new decision which the trustee wished it had made at the time. That is clear from the statute and from case law. In *In re B Trust* …, the court agreed with the representor that transfers into trust could be voided on the grounds of mistake under art. 47E. However, the representor went further and asked the court to give effect to certain intentions that the representor had at the time of making the transfers into trust. Merely voiding the transfers into trust meant that the assets would fall back into the representor's estate and this would not be as tax efficient as he had intended. The court was asked to make a declaration that the transfers were not merely voidable but should take effect as gifts to the representor's wife. The court refused and said ([2019]JRC035, at paras. 41–42):

> ‘41. … This Court will not be drawn into such schemes. It is one thing to make orders as to the validity of transactions where those orders might have tax consequences, and it is quite another thing to select for one of the parties which order to make so as to achieve the best taxation outcome. That is no part of the business of this Court.
>
> 42. The second submission which Advocate Brown made in this connection was that Article 47E contains innovative powers as described in the *Crociani* case and there is no reason why the Court should not therefore direct the repayment of money not to the Representor but to his wife. For similar reasons as described above, we are not prepared to do this. It requires the Court to take a positive step to improve the taxation outcome for the Representor as though that were the objective itself. It may be the Representor's objective, but it is not the objective of the Court.’”

32 The decision of the Royal Court in *Grundy Trust* (4) was subsequently considered with approval by the Court of Appeal in *Hawksford Trustees Jersey Ltd. v. P* (5) (“ *Hawksford*”), where Bompas, J.A., giving the judgment of the court, upheld the decision of the Royal Court to refuse to grant relief under art. 47G of the Law in circumstances where the Royal Court found that it was being asked to not merely set aside a transaction, but to substitute a different transaction from the one that was originally intended. Commenting on the decision in *Grundy Trust*, the Court of Appeal in *Hawksford* said (2021 (1) JLR 20, at paras. 57–58):

> “57 Thus the essential reasoning of the court in that case was that there was an exercise of a single power, the power of exclusion, which could be avoided to a limited extent, namely so that it excluded only for a limited time by being avoided after that time, and that this limited avoidance did not involve the substitution of a different exercise.
>
> 58 We consider that in these last two cases, as in the present case, the Royal Court rightly concluded that there is no power for the Royal Court, in the guise of avoiding or partially avoiding a transfer or disposition (arts. 47E(2) and 47(F)(2)) or the exercise of a power (arts. 47G(2) and 47H(2)), to bring about a different transfer or disposition or the exercise of a different power. For reasons we have explained already, in our judgment this is a correct view of the scope of what is provided in para. (2) of those articles.”

33 Clearly the Royal Court in *Grundy Trust* and the Court of Appeal in *Hawksford* were dealing with the court's powers under art. 47G, but the authorities under each provision of the article are of assistance (as the Court of Appeal in *Hawksford* observed at para. 43 of the judgment). Further the key consideration for this court having regard to the contents of para. 58 of the judgment of the Court of Appeal in *Hawksford*, is the proposition that there is no power for the court in the guise of avoiding or partially avoiding a transfer to bring about a different transfer or disposition.

34 We now turn to the representor's arguments on the facts of this case. The submission was

that the court should not only set the April 2019 transfer aside, but also declare that the trustee holds the trust assets on the terms of the trust for the beneficiaries of the trust and has done since November 30th, 2020.

35 The motive for seeking such a declaration is that from the settlor's perspective the “clock” on the settlement of the trust (or another trust) needs to start to run as early as possible and the settlor would lose two and a half years of the five-year period, with potential adverse Canadian tax consequences, if he were required to re-settle the assets on trust. It was said that if the settlor is required to re-settle the trust assets again, then he and his wife will have to “choose whether to wait a further five years before returning to Canada by which time they will be in their nineties” or subject the “Trust and its beneficiaries to Canadian tax consequences that he thought his careful planning has avoided.”

36 We query the latter part of this proposition as, of course, the effect of setting aside the 2019 transfer is that the trust was never constituted by the receipt of assets and accordingly in fact and in law never came into existence. Accordingly, contrary to the suggestion made by the representors, there is no question of the “status of the Trust and its assets” being “uncertain” as a consequence of the decision to avoid the transfer with effect from April 2019. The trustee holds the assets on bare trust for the settlor and the trust settled in 2019 simply falls away. There are no assets held on trust under the trust and there is no uncertainty.

37 However, the argument that the representors make in support of the additional relief they seek is as follows:

> (i) On April 1st, 2019, pursuant to the trust, the settlor and his wife were appointed original trustees and the settlor settled the shares in the BVI company on the terms of the trust. The representors call this “Transaction 1.”
>
> (ii) On April 2nd, 2019, the original trustees transferred and divided the ownership of the shares in the BVI company to and between J Ltd. and S Ltd. in return for shares in the said companies being issued to the original trustees.
>
> (iii) On November 30th, 2020, in his capacity as one of the original trustees of the trust, the settlor transferred legal ownership of the shares in the BVI company to the trustee and it is said that notwithstanding the avoiding of the 2019 transfer, the November 2020 transfer had the effect of transferring legal ownership of the shares such that they were now legally owned by the trustee, and the trustee received the shares from the settlor on the basis that they were to be held on trust and on the terms of the trust. It was argued that owing to the effect of the mistake made in 2019, when the settlor retired as trustee in favour of the trustee in November 2020, ownership of the shares passed directly from him (or from him and his wife as his nominees) to the trustee rather than from himself and his wife in their capacity as original trustees of the trust. The representors call this “Transaction 2.”

(iv) It is argued in those circumstances that the settlor effectively resettled the trust on the terms of the trust in November 2020 when he transferred legal ownership of the shares in J Ltd. and S Ltd. (and ultimate ownership of the BVI company shares) to the trustee, with the intention that the trustee would hold the shares on the terms of the trust for the benefit of its beneficiaries. Accordingly, the court is invited to declare that the trustee holds the trust assets on the terms of the trust for its beneficiaries and has since November 30th, 2020. The representors argue that such a declaration is the "logical consequence" of the sequence of events and parties to Transaction 1 and Transaction 2. The representors say that they are not inventing or manufacturing a transaction that did not occur; rather they seek to have Transaction 1 set aside, but not Transaction 2 which should have the effect that it was meant to as a matter of law. It is argued that the mistake in relation to Transaction 1 in 2019 (the settlor's failure to understand the tax consequences of settling the shares into trust) was a vitiating mistake and that Transaction 1 should be set aside. In relation to Transaction 2, although the settlor made a mistake in that he thought that he (and his wife) were transferring assets already held pursuant to the trust to a new trustee, he was in fact transferring assets to which he was beneficially entitled under a bare trust and this transaction should not be set aside.

38 The parties convened to the hearing of the representation wrote to the court in support of both claims for relief. We also received a helpful letter from HMRC dated February 2nd, 2023 which indicated that HMRC did not wish to make any comment on the declaration sought that pursuant to art. 47E the disposition of property, by virtue of which the trust was established on April 1st, 2019, is voidable and of no effect. But HMRC did comment extensively on the second order sought and expressed the view (having regard to the decision in *In re B Trust* (1), *Grundy Trust* (4) and *Hawksford* (5), all of which we have referred to in this judgment) that "an order declaring that a new trust has been in existence since 30 November 2020 would go beyond the powers available to the Court under Article 47E."

Discussion

39 In respect of Transaction 2, as it was described by the representors, our attention was not drawn in the course of argument to cases such as *Shinorvic Trust* (6), where the court considered its powers to aid beneficiaries in the context of a defective exercise of a power, or *In re T 1998 Discretionary Settlement* (7) (referred to in *In re Shinorvic Trust*, 2012 (1) JLR 324, at para. 59), which considered the circumstances in which the law may impute an intention to exercise a power (arguably the creation of the trust in November 2020) where the *donee* of the power did not have such an intention. In *Shinorvic*, the court said the following (*ibid.*, at para. 64):

"64 Thirdly, *Lewin, op.* cit., summarizes the position as follows (para. 29–176, at 1050–1051):

> ‘There may be a good exercise of a power without any reference to the power, even in general terms, or to the property (if any) subject to it and without taking the least notice of it. When, in the case of a dispositive power, the intention to pass the property can be collected then it will pass under the power, if the exercise of the power is necessary for the disposition to take effect; an intention to dispose of the property is enough and there is no need to show also an intention to dispose of it by means of the power. Similarly when, in the case of some other power, the intention to effect a given transaction can be collected then the power will be taken as having been exercised, if the exercise is necessary for that transaction to take effect … Since the intention to exercise the power is inferred from the intention to effect the given transaction, it does not matter that an actual intention to exercise the power cannot be discerned, unless an [*sic*] positive intention not to exercise it is to be inferred.’”

40 Having considered additional authorities, the court in *Shinorvic* said this (*ibid*., at para. 75):

> “75 Nevertheless, it seems to us that it is appropriate and in the interests of justice to treat this extended principle as applicable under Jersey law. In *Davis* …, Scott, J. described the ‘necessity’ principle as an ‘ameliorating principle of equity’ ([1990] 1 W.L.R. at 1531). That principle goes so far as to impute an intention to exercise a power in circumstances where there is no reference to the power and in fact no intention to exercise it. It is a fiction on the part of the law which imputes an intention which did not exist at the time of the execution of the document in question and where there has in fact never been an intention to exercise the power (as in *Davis* itself where there was simply an assumption that the trustee had validly retired and there was no intention on the part of the company ever to exercise its power to remove the trustee).”

41 Whether these principles might extend on the facts of this case to the circumstances described by the representors as Transaction 2 is a matter that has not been the subject of argument and upon which we express no opinion.

42 In the course of argument, the advocate for the representors accepted that there was an “air of unreality” regarding the submissions so far as they purported to identify a second transaction which the court should or ought to give effect to in this case. We suggested in the course of argument that the representors were trying to have their cake and eat it. In supplemental submissions filed after the hearing, the representors submitted in response that “there are, in fact, in this instance, two cakes.”

43 Even if the arguments put forward by the representor were good ones, the court would have difficulty in regarding it as “just” to in effect set aside a trust (which is the effect of setting aside the April 2019 transfer into trust) for tax reasons and, at the same time, find that the settlor can enjoy the benefit (for tax reasons) of setting up the same trust by virtue of

a later change of trusteeship.

44 Further, a consequence of the decision to set aside the transfer into trust at the time it was made meant in fact, as appears to be accepted, that the trust was not declared/settled in April 2019 as at that time the effect, if any, of the attempt to place assets into trust was only that the settlor and his wife held those assets on bare trust for the settlor and not on the terms of the trust. The assertion that the settlor then effectively settled the assets, which he held as bare trustee, on the terms of the trust when he and his wife retired in favour of the trustee in November 2020 is a matter which, although in some circumstances might be possible (as touched on at paras. 39–41 above), did not represent the reality of the situation, namely that in this case not only the settlor but also the trustee has, owing to our decision on the first issue, always held the BVI company shares as bare trustee on behalf of the settlor and not on the terms of the trust. There is a fundamental inconsistency between setting aside the transfer of the shares into trust in April 2019 and thereafter treating the trust as validly created by the settlor as a Jersey law discretionary trust in November 2020.

45 Whether or not the court's broad powers under art. 47E would permit the court to make the order sought, which we doubt, we decline to exercise our discretion to grant this secondary relief. The court has declared that the April 2019 transfer is voidable and was of no effect at the time of its exercise. In our judgment, it is difficult in those circumstances to see the scope for granting the second declaration.

46 In any event, in the exercise of the court's discretion as to whether or not to grant such declaratory relief, we are satisfied that it would not be appropriate, even if the court had the power, to do so on the facts revealed by this case. In the course of argument we alerted counsel to the fact that we were troubled by the second prayer for relief that was sought and invited him to confirm that, in the event of the court declining to grant such relief, the representors still sought the primary relief claimed. He gave that confirmation and accordingly we order that the disposition of property by the settlor pursuant to which the trust was established on April 1st, 2019 is voidable and of no effect.

47 We also order that the trustee is entitled to retain or pay itself out of the trust for remuneration that has already been charged and retain such reimbursement out of the trust property for expenses and liabilities reasonably incurred including the costs of and incidental to this representation; that the trustee is relieved from personal liability for any breach of the bare trust upon which it has held the trust property since November 2020, save to the extent that any of its decisions or acts may give rise to liability for breach of trust.

48 We direct counsel for the representors to provide a copy of this judgment to HMRC.

Ruling accordingly.