

Jeffrey Paul Mileham v Valla Ltd

Jurisdiction:	Jersey
Judge:	Jurats Thomas, Ronge, Sir Michael Birt
Judgment Date:	11 March 2020
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Text

[2020] JRC 45

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, **Commissioner and** Jurats Thomas **and** Ronge

In the Matter of The F.G. Mileham (Building Contractors) Limited Remuneration Trust

Between

(1) Jeffrey Paul Mileham

(2) Caroline Bridget Mileham

(3) F. G. Mileham (Building Contractors Limited)

Representors

and

(1) Valla Limited

(2) Advocate N. G. A. Pearmain (as Representative of the beneficiaries with the exception

of the Representors)
Respondent

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

Mr D. Petit, **Director of the First Respondent.**

Advocate N. G. A. Pearmain **in person.**

Authorities

Trusts (Jersey) Law 1984.

Pitt v Holt, Futter v Futter [\[2013\] UKSC 26](#).

Re The B Trust [\[2019\] JRC 035](#).

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

THE COMMISSIONER:

- 1 This is an application to set aside the F.G. Mileham (Building Contractors) Limited Remuneration Trust (“the Trust”) on the ground of mistake. It is yet another case of such an application being made following the establishment of a trust on the mistaken advice of the firm of Baxendale Walker, English solicitors, which firm has long since ceased to exist.
- 2 At the conclusion of the hearing, we granted the application and now give our reasons.

Background

- 3 The Court has been provided with an affidavit sworn by the First Representor (“Mr Mileham”) which sets out the history of the matter and exhibits relevant documents. On the basis of that evidence we find the facts to be as follows.
- 4 The Third Representor (“the Company”) is a company incorporated in England and Wales which carried on business as a building contractor. At all material times, the Company was beneficially owned by Mr Mileham and his brother Barry Mileham, each of whom owned 50% of the share capital. At the time of the creation of the Trust, the Company had approximately 23 employees.
- 5 Following an approach by a tax advisor in 1999, Mr and Mrs Mileham were introduced to the firm of Baxendale Walker. Baxendale Walker advised that the Company should

constitute a remuneration trust for the purposes of reducing the taxable profits of the Company. It was said also to have inheritance tax benefits. Mr and Mrs Mileham were advised that they would be able to receive loans from the Trust which would be rolled over and not be repayable until after their death, thereby reducing the inheritance tax payable on their estates. Mr and Mrs Mileham decided to go ahead with the scheme in respect of Mr Mileham's 50% interest in the Company but Barry Mileham did not do so in respect of his share.

- 6 The Trust was established by the Company as settlor (described in the trust deed as 'the Founder') on 27th January, 2000. It is in a form which has become familiar to this Court as a result of the various previous applications in connection with the activities of Baxendale Walker. It is a discretionary trust governed by English law.
- 7 The class of beneficiaries is described in Clause 1.1.4 as meaning the "*present, past and future employees from time to time of the Founder and the wives, husbands, widows, widowers, children, step-children and remoter issue of such employees and the spouses and former spouses (whether or not remarried) of such children and remoter issue ... provided that no Excluded Person shall be a Beneficiary*".
- 8 Pursuant to Schedule 2 of the trust deed, the following were Excluded Persons:-
 - "1.1 the Founder;*
 - 1.2 any person connected with the Founder;*
 - 1.3 any Participator in the Founder;*
 - 1.4 any person connected with such Participator."*
- 9 Mr Mileham was a Participator in the Founder as a shareholder and Mrs Mileham was a person connected with a Participator as she was connected with Mr Mileham. They therefore were and remain Excluded Persons.
- 10 Paragraph 1.2.16 of Schedule 1 gives the trustees power to lend any part of the trust fund to any person whether or not taking security and generally on such terms as the trustees might think fit.
- 11 On 20th May 2002, by deed of amendment, the definition of beneficiaries was changed to read:-
 - "1.1.4 "The Beneficiaries" means the Providers and Past Providers from time to time of the Founder and the wives, husbands, widows, widowers, children, step-children and remoter issue of such Providers and the spouses and former spouses (whether or not remarried) of such children and remoter issue ...*

provided that no Excluded Person shall be a beneficiary;

1.1.4.1 A "Provider" means a person who provides or has provided service or services or custom or products (save for items of a capital nature) to the Founder."

- 12 On 23rd September 2005, by a Deed of Rectification and Amendment, the definition of Beneficiaries was again amended. That Deed provided, *inter alia*, that:-

"The class of beneficiary of the trust hereof shall not include, as from 1 November 2002, any employee or former employee of the Founder (but shall continue to include spouses, dependents and remoter descendants of such description of person)."

- 13 Following the establishment of the Trust, a total of £1,167,100 was paid by the Company to the Trust on various occasions between January 2000 and January 2003. No payments to the Trust have been made since then because in 2003 HMRC started querying whether such payments could in fact be set off against the corporation tax liability of the Company as had been advised by Baxendale Walker.
- 14 In accordance with the advice of Baxendale Walker, various loans were made by the Trust to Mr and Mrs Mileham jointly between June 2000 and January 2005 totalling £678,670. The expectation was that such loans would be rolled over into further loans when their respective 10 year terms expired. However, by the time the first of the loans had reached this milestone, Valla Limited (under its then name of Apex Trust Company Limited) had been appointed as trustee in place of the previous trustees. Valla considered that there was no power to lend to Mr and Mrs Mileham on the terms in question because, as there was never any intention that the loans should in fact be repaid and the loans were without security and with interest being rolled up, they were on terms which no commercial lender would ever agree to and were in fact therefore a benefit to Mr and Mrs Mileham, who were Excluded Persons and not entitled to benefit. Valla therefore asked Mr and Mrs Mileham to repay the loans (which they could not do) and have not been willing to make any further loans since then.
- 15 After many years' negotiations, a settlement was reached with HMRC in 2013 in respect of the Company's corporation tax, which resulted in the Company paying corporation tax and interest totalling £191,459 in settlement, with such sum being paid entirely from Mr Mileham's half of the Company's profits. This amount was considerably more than would have been due if corporation tax had been paid in the usual way by the Company prior to the establishment of the Trust.
- 16 As a result of these events, the current position of the Trust is as follows:-

(i) The sum of approximately £425,000 remains in the Trust and has been there,

effectively frozen, since 2009. The trustee considers that it is not allowed to loan money to Mr and Mrs Mileham on the advantageous terms upon which monies were previously loaned to them as this would be to confer a benefit on them and they cannot benefit as Excluded Persons.

(ii) Mr and Mrs Mileham are indebted to the Trust in a sum which, together with interest, totalled £1,142,102 as at 30th April 2017. The trustee has demanded repayment.

17 The upshot is that Mr and Mrs Mileham are unable to gain access to the assets of the Trust by way of loan and the affairs of the Trust are effectively frozen.

18 It is in those circumstances that the Representors now seek to have the Trust set aside on the ground of mistake. They contend that there are two operative mistakes:-

(i) The Trust was established in the mistaken belief that corporation tax would be saved by the Company; and

(ii) The Trust was established in the mistaken belief that Mr and Mrs Mileham would be able to benefit from the Trust by way of loans under which interest would accrue but not be paid and which loans would be rolled over and not repaid until their deaths.

The law on mistake

19 The skeleton argument of the Representors indicated reliance on Article 11 of the Trusts (Jersey) Law 1984. However, although the trustee is a Jersey company and the administration of the Trust is carried on in the Island (so that this Court has jurisdiction under Article 5 of the 1984 Law), the proper law of the Trust is English law. Article 11 is therefore irrelevant. The Court must decide the matter according to English law.

20 We have to say that we expected to be provided with an opinion from English counsel setting out the relevant English law on mistake and applying it to the facts of this case. However, no such opinion was produced. We had therefore to consider whether we were willing to proceed in its absence. We concluded that, given that English law on this topic has been authoritatively established in the case of *Pitt v Holt, Futter v Futter* [2013] UKSC 26 and that this Court is very familiar with the terms of the judgment in that case, we were willing to proceed without an opinion on English law. However, we think that best practice in future cases would be that the application should be supported by an opinion from English counsel where the trust is governed by English law.

21 Drawing on Advocate Pearmain's helpful summary on behalf of the beneficiaries, we would summarise the key requirements for a trust to be set aside for mistake under English law as follows (with reference to paragraph numbers being to those of Lord Walker's judgment in *Pitt v Holt*):-

- (i) There must be a distinct mistake as distinguished from mere ignorance or inadvertence or a 'misprediction' relating to a possible future event. However, forgetfulness, inadvertence or ignorance can lead to a false belief or assumption which the court will recognise as a legally relevant mistake (paragraphs 104 – 105).
- (ii) A mistake may be a relevant mistake even if it was due to carelessness on the part of a person making the voluntary disposition unless the circumstances are such as to show that he/she deliberately ran the risk, or must be taken to have run the risk, of being wrong (paragraph 114).
- (iii) The decision in *Gibbon v Mitchell* [1990] 1 WLR 1304 to the effect that a mistake must be about the effect of the transaction and not its consequences (with only the former being sufficient for the transaction to be set aside) was overruled in *Pitt v Holt* and the test is simply whether there was a causative mistake of sufficient gravity.
- (iv) The causative mistake must be of sufficient gravity as to make it unjust or unconscionable to leave the mistake uncorrected (paragraph 128).
- (v) Tax consequences of a mistake are relevant to the gravity of the mistake (paragraph 132).
- (vi) However, in some cases of artificial tax avoidance, the Court might think it right to refuse relief, either on the grounds that such claimants, acting on supposedly expert advice, must be taken to have accepted the risk that the scheme would prove ineffective, or on the ground that discretionary relief should be refused on grounds of public policy.

22 In our judgment, both the 'mistakes' set out in paragraph 18 above are mistakes as explained in *Pitt v Holt*. We are satisfied that the Company and Mr and Mrs Mileham held the genuine but mistaken belief that the Company would avoid corporation tax on the sums paid to the Trust and that Mr and Mrs Mileham would be able to gain access to monies in the Trust by way of loans which would be rolled over and not repaid until their deaths. They believed therefore that Mr and Mrs Mileham would continue to have access to the monies paid to the Trust in the same way as they would have had access to the funds if they had been paid out by way of dividend in the ordinary way. These two mistaken beliefs were held as a result of the faulty advice of Baxendale Walker on whom the Company and Mr and Mrs Mileham were completely reliant.

23 We are further satisfied that both mistakes are causative mistakes; in other words the Company would not have created the Trust but for these mistaken beliefs.

24 We consider further that the mistakes are of sufficient gravity as to make it unjust to leave them unremedied. The Company has not made any further contributions to the Trust since 2003 and in fact has had no employees other than family members for the last 14 years. The Company has paid the corporation tax which ought to have been paid on the sums

contributed to the Trust. HMRC were notified of this application and elected not to take part. Setting aside the Trust would not result in any avoidance or reduction in tax payable to HMRC. Conversely, the funds in the Trust are effectively frozen and Mr and Mrs Mileham are unable to have access to the trust fund in the events which have happened. We see the justice of the situation as being strongly in favour of setting the Trust aside because of the mistake which was made.

- 25 It is of course necessary in this connection to have regard to the interests of other beneficiaries. As already mentioned, there have been no employees (other than family members) of the Company since about 2005. Attempts to contact former employees (who were largely of Irish and Romanian origin) have been unsuccessful. Certain staff bonuses were paid from the Trust between 2000 and 2002 totalling £15,450.
- 26 Advocate Pearmain was appointed to represent the interests of other beneficiaries. He accepts that their interest is remote given the clear intention that the Trust was established substantially for the benefit of Mr and Mrs Mileham and their family and he does not oppose the Trust being set aside.
- 27 Turning to Lord Walker's comment at para 135 of his judgment concerning the Court's discretion to refuse relief and that it might think it right to do so in some cases of artificial tax avoidance, we do not think it appropriate to refuse relief in this case on that ground. Whilst tax avoidance was undoubtedly the reason for the establishment of the Trust, we do not consider it to have been particularly artificial. Furthermore, as already noted, the corporation tax has been paid so that no loss has accrued to HMRC and no further loss of tax revenue will occur in the event of the Trust being set aside. Given the hardship to Mr and Mrs Mileham caused by continued existence of the Trust, we do not think that we should refuse relief on the taxation ground.
- 28 Finally, we consider the question of delay. It is clear that delay can be a ground for refusing discretionary relief – see the observation of Sir William Bailhache, Bailiff, in *Re The B Trust* [\[2019\] JRC 035](#) at para 30. On the face of it, the delay in this case has been very lengthy. Settlement was reached with HMRC in 2013 and one might have expected an application to be brought within a reasonable period after that event.
- 29 However, we were informed that, under the terms of the agreement with Baxendale Walker, that firm would give free legal advice. Accordingly Mr and Mrs Mileham and the Company felt they should approach it first in order that the firm could try and rectify the problems which its advice had caused. This process appears to have taken a considerable period before eventually the Representors decided to seek alternative advice in 2017. We were informed that other remedies (such as rectification) were considered first but ultimately the Representors were advised that an application to set aside the Trust was the preferable remedy and the representation was tabled on 24th October 2019.

- 30 We do not think it would be right to punish the Representors for being somewhat slow in bringing this application by rejecting it as a matter of discretion. The fact is that the adverse consequences for Mr and Mrs Mileham if the Trust continues will be very considerable. They have been let down by advice from Baxendale Walker which has already cost them substantially and we think it would be rubbing salt in the wound by holding that, because they had taken some time to decide how best to proceed, they should be denied relief.
- 31 In the circumstances, we are satisfied that the requirements for setting aside a trust on the ground of mistake as laid down in *Pitt v Holt* are met in this case and that it would be an appropriate discretionary decision to grant the relief sought. Accordingly, we set aside the Trust and declare it void, with the consequence that the legal position is as if the Trust had never been created. It follows that Valla, as trustee of the Trust, now holds the assets in the Trust (including the benefit of the loans to Mr and Mrs Mileham) upon trust for the Company absolutely and has in law been so holding those assets since they were transferred to the Trust.