A v Helm Trust Company Ltd

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	03 March 2019
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Date:	03 March 2019
Court:	Royal Court

Text

[2019] JRC 35

ROYAL COURT

(Samedi)

Before:

Sir William Bailhache, Bailiff, **and** Jurats Sparrow **and** Thomas.

In The Matter of the B Trust

And In The Matter of Articles 11 and 47E of the Trusts (Jersey) Law 1984 (as Amended) ("The Law")

Between
A
Representor
and
Helm Trust Company Limited
Respondent

Advocate H. E. Brown **for the Representor**.

Advocate A. M, Saunders **for the Trustee**

Authorities

Trusts (Jersey) Law 1984 (as amended).

Representation of *R in the matter of the S Settlement* [2011] JRC 117.

In the matter of the A Trust [2009] JLR 447.

Pitt v Holt [2013] UK SC 26.

Boyd v Rozel Trustees (Channel Islands) Limited and others [2014] JRC 056.

BNP Paribas Jersey Trust Corporation Limited and others v Crociani and others [2018] JCA 136A.

Re Glubb [1900] 1 Ch 354.

The matter of the Z Trust [2016] 1 JLR 132.

Trust — applications with reference to the validity of the trust and to set aside the trust on grounds of mistake.

Bailiff

THE

1 In his representation the Representor asserts that he is the economic settlor of the Trust, which was established on 2 nd March, 1998, as an instrument of trust declared by Lincoln Trust Company (Jersey) Limited ("Lincoln"), which retired in favour of the Respondent on 7 th January, 2009. The Trust is governed by the proper law of Jersey and the beneficiaries are expressed to be the brothers and sisters of a resident in another jurisdiction, their issue, the spouses of any of the aforementioned, a charitable body of any kind and any person nominated by the trustee by instrument to be members of the class of beneficiaries (other than the trustee from time to time itself).

2 When the representation was presented to Court in June 2018, the Court ordered that the Respondent be served and also that service be affected on Her Majesty's Revenue and Customs. In the event, HMRC have not participated in these proceedings and have indicated they did not intend to be represented at future hearings, and did not wish to make any comment.

3 In the representation, the Representor asserts that by making the trust, and relying upon the trustee's ability to add members to the beneficial class, his intention was that he and his immediate family would be the persons to benefit wholly or primarily from it. In his affidavit, he says that he believed that he was as a matter of law *"in control of the Trust"* through his letter of wishes. Although he is not expressly named in the trust deed, he is a beneficiary himself because the beneficiary in the other jurisdiction referred to above was his uncle, and it follows that he, the Representor, is amongst the *"Issue of the brothers and sisters"* of that person.

4 The Representor made several dispositions of property or assets into the Trust, an initial capital sum of £200,000 in 1998 and thereafter some consultancy fees paid into a company owned by the trustee between 2000 and 2009. From March 2009 the Representor made regular cash payments into the Trust from his pension. The current value of the trust fund at the date of the hearing was said to be approximately £2.4 million.

5 The Representor contends that he made for the purposes of the Law two mistakes relevant to this present application:-

(i) He misunderstood the true nature and effect of establishing a Jersey law trust; and

(ii) He misunderstood the UK inheritance tax treatment of the Trust.

6 He asserts that *"but for"* these two categories of mistakes, he would not have settled assets into the Trust in 1998, nor would he have continued to make dispositions to the Trust during the ensuing years. Instead, he would have used other methods, acceptable to HMRC, in order to reduce his UK inheritance tax bill. He could for example have made large gifts in his lifetime to his wife, those gifts being exempt from UK inheritance tax.

The advice

7 The trust advice which the Representor was given came from Lincoln, the first trustee. It was premised on the position from a UK tax perspective if he established the Trust. It contained this language:-

> ***"Clearly we need to find an arrangement which offers 'the best of both worlds', in the sense of the ownership of the assets truly resting elsewhere, and yet the control remaining in your hands.*** The only vehicle which will provide such a structure is an offshore Discretionary Trust .
>
> …
>
> ***In short therefore we require a structure which will remove the assets out of your name so that any statement by you that the assets do not belong***

to you, cannot be refuted and further that on your demise the control will pass to those you wish, both validly, and also without any impact on your personal estate .

… ***Incidentally, should we fail to comply with your instructions under the letter of wishes your right of redress would clearly not be under the Trust Law, for breach of trust (where clearly we have complete discretion, on the face of it) but would be under contract law for our not complying with the terms of the letter of wishes, which is regarded as an implied contract***."

8 Advice was given by Lincoln that it would be desirable to ensure that the trust deed did not contain the list of real beneficiaries, because that would hardly be very anonymous. Thus the suggestion was made that Lincoln would take an elderly relative, perhaps an uncle, who had emigrated from the United Kingdom many years previously and was now resident and domiciled in another jurisdiction. As the initial trust fund would be a nominal £100 or US$100, it was said that making the Trust with such a person as settlor would cause little difficulty for him because that was the extent of his contribution to trust property.

9 The Representor asserts that Lincoln also gave him some emigration advice. Having asserted that income tax liability was based primarily on residence and capital gains tax on residence and ordinary residence, the emigration advice went as follows:-

"Inheritance tax, in contrast, is based on domicile. If a person is domiciled in the UK he is liable to UK inheritance tax on his word-wide assets even though he may be both resident and ordinarily resident in another country. If a person is not domiciled in the UK he is liable to inheritance tax on UK assets in his own name, only .

… ***Whilst it is comparatively easy to shed UK residence, it is somewhat more difficult to shed UK domicile.*** In order to shed UK domicile, a person will ***need to build up evidence to show that he has abandoned his domicile and has a new domicile of choice.*** However, it must be pointed out that you are still deemed domiciled in the UK until a person has spent at least three tax years non-resident in the UK. Once a person is considered non-domiciled in the UK it is worth remembering that if he were to still hold assets in the UK in his own name they would still potentially be liable to inheritance tax. These assets should be held through the avenue of an offshore company.

In order to shed his UK domicile, a person would need to build up evidence to show both that he has abandoned his UK domicile of origin and that he has acquired a new domicile of choice. The prospective emigrant should take as many steps as possible in order to evidence that he has abandoned his English domicile and acquired a new domicile, including the purchase of a private residence in the new country, the drawing of a new will under the laws of the new country, taking the nationality of the new country, joining clubs and social organisations in the new country, closing English bank

accounts etc …”

The Representor's personal circumstances

10 The Representor spent most of his working life in the oil industry, which necessitated moving periodically from country to country. Between June 1985 and December 1996 he was resident outside the UK, and indeed from 1969 until 1996 only paid UK income tax during the period 1979 to 1985. On leaving his employer in 1997 and commencing consultancy work, he was outside the UK from January 1997 until January 2000 and carried out further consultancies between January 2000 and 2005, principally in France and Romania. The Representor and his wife bought a home abroad in 2001 where they still live and intend to stay. Before doing so, they had looked at purchasing property and settling back in the United Kingdom, and indeed had three failed attempts to purchase property.

11 In his affidavit, the Representor says that he understood that he would still be in control of the trust property, having made dispositions into that Trust. He has since been advised that the letter of wishes is not contractually enforceable. He says that if he had known that the trustee was not obliged to behave in accordance with the letter of wishes, he would not have transferred the property to the Trust which he did.

12 As to the second mistake, namely as to the UK inheritance tax position, he understood that the trust deed was structured in such a way that the trustee had the ability to make capital distributions to beneficiaries in the United Kingdom without having any tax liability, whether to income tax, capital gains tax or any form of capital taxation. He has since been advised that, because he had not obtained a domicile of choice outside the United Kingdom when he made the gifts into trust, the Trust is subject to the relevant property regime with the consequence that trust property will be taxed every ten years and upon every occasion the property leaves the Trust. He says that the sole reason for putting the property into trust was so that it was held tax efficiently, and he had worked outside the United Kingdom for almost his entire working life. He certainly did not intend to leave himself trapped within the UK tax regime forever, having once made the dispositions into trust, and that had he known that that was the effective result, he would never have given the property to the Trust at all.

13 Thus it is that the Representor sought orders declaring that the transfers into trust were voidable and of no effect from the times when they were made, pursuant to Article 47E of the Trust Law on the basis of his mistake; and that pursuant to Article 47I of the Trust Law, the trust property should be returned to his wife, or alternatively be returned to him; and in addition or alternatively, the Court should declare pursuant to Article 11 of the Trust Law that the trust itself was invalid on the basis that it was established by mistake.

The present application

14 We now consider those various claims against the established law.

15 We deal first with Article 11 of the Trust Law, which in its material terms provides as follows:-

> ***"11 Validity of a Jersey trust***
>
> ***(1) Subject to paragraphs (2) and (3), a trust shall be valid and enforceable in accordance with its terms*** .
>
> ***(2) Subject to Article 12, a trust shall be invalid*** –
>
> ***(a)***
>
> ***(b) to the extent that the court declares that*** –
>
> ***(i) the trust was established by duress, fraud, mistake, undue influence or misrepresentation or in breach of fiduciary duty,*** …"

16 The existing case law in respect of applications to set aside a trust under Article 11(2)(b) on the grounds of mistake is well established – see the Representation of *R in the matter of the S Settlement* [2011] JRC 117, *In the matter of the A Trust* [2009] JLR 447. The Court asks itself three questions:-

> (i) Was there a mistake on the part of the settlor?
>
> (ii) Would the settlor not have made the trust *"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?

17 We note that a mistake about the tax effects of a particular arrangement can be treated as relevant mistakes for the purposes of Article 11 of the Trust Law as was said in *Boyd*, this Court has noted that in *Pitt v Holt* [2013] UK SC 26, the submission by HMRC that a mistake which related exclusively to tax could not in any circumstances be relieved was rejected by the Supreme Court (at paragraph 132) as being much too wide and unsupported by principle or authority.

18 On the facts in this particular case, there was no identified settlor because Lincoln made a declaration of trust in respect of the US$100 which it held. The trust instrument does not indicate where that $100 came from. Neither the Representor's first nor second affidavits indicates that he paid these US$ into the fund for the purposes of constituting the Trust – save perhaps by implication where in his first affidavit he says "My initial transfer of funds to set up the Trust, in 1998, was some £200,000." On the other hand, the Representor also says that "I was not named as a settlor of the Trust because I have been advised that it

would be beneficial if I were not. Consequently, a relative of mine was named as the settlor of the Trust. I now understand that for UK tax purposes I am still considered a settlor of the Trust – even though I am not named – because as a matter of fact I gave the property to the Trust. I refer to this as being an 'economic settlor.'" We will refer to this cloak of invisibility later in this judgment.

19 This Court held in *Boyd v Rozel Trustees (Channel Islands) Limited and others* [2014] JRC 056 that where there is no property held by the trustee, whether for the benefit of a beneficiary or for the application of a purpose, there is no trust. Here however, there is the initial trust fund; but there is no evidence from Lincoln, nor from the Respondent, as to where the initial trust fund came from.

20 There is no doubt from the evidence we have seen that the Representor provided the overwhelming majority of the trust fund; but that is not the test for the purposes of Article 11. That Article deals with the validity of a Jersey trust. Although it is sometimes convenient to refer to a trust as if it had a corporate status of its own, the question of what is a trust is not directly addressed in definitive terms in the Trust Law. The interpretation provisions in Article 1 contain an inclusive definition – a trust includes the trust property and the rights, powers, duties, interests, relationships and obligations under a trust. By Article 2:-

> ***"Existence of a trust***
>
> ***A trust exists where a person (known as a trustee) holds or has vested in the person or is deemed to hold or have vested in the person property (of which the person is not the owner in the person's own right)*** –
>
> > ***(a) for the benefit of any person (known as a beneficiary) whether or not yet ascertained or in existence;***
> >
> > ***(b) for any purpose which is not for the benefit only of the trustee; or***
> >
> > ***(c) for such benefit as is mentioned in sub-paragraph (a) and also for any such purpose as is mentioned in sub-paragraph (b)*** ."

21 We have not been fully addressed on this issue, but we are proceeding today on the traditional basis that the Trust does not have a corporate status and therefore the trust deed can reflect the trusts on which the different portions of money or other assets may have been transferred to the trustee from time to time. There is thus a distinction between the US$100 which provided the initial constitution of the trust fund and the remaining assets subsequently transferred into the Trust by the Representor. Even if the transfers into the Trust by the Representor were to be set aside for mistake, that still leaves the initial trust fund – and as there is no evidence that the Trust in relation to that fund was declared by Lincoln by mistake, it seems to us that the application to have the whole trust set aside under Article 11 must fail.

22 Advocate Brown maintained that the establishment of the Trust came about by the payment of money to the trustees and not by the instrument itself, and she thus submitted that we do not know what the terms of the Trust are without looking at the Representor's affidavit. Because the instrument did not establish the Trust, she contended that the Court could proceed under Article 11, albeit it could also proceed under Article 47E. We do not accept that the instrument of trust does not establish the terms of the Trust and we reject that submission. Advocate Saunders contended that without the transfer of the initial US$100, the trust would not have been established and that the first payment of $200,000 by the Representor into the Trust was made shortly afterwards. She submitted the Court was entitled to look at the matter in the round. Attractively though this proposition was put, it requires us to make an assumption as to the provenance of the initial trust fund which, in the absence of evidence, may or may not be correct. As it is not material because the Court is proceeding under Article 47E, we decline to proceed under Article 11.

23 Article 47E of the Trust Law is in these terms:-

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

24 The Representor is on the evidence the settlor of the entire trust fund other than the initial fund and he is therefore a person authorised to bring an application under Article 47E on the grounds that he made mistakes in relation to the transfer or other disposition of property to the Trust and would not have made that transfer or other disposition but for those mistakes.

25 As to the tax mistakes, the Representor asserts that he was not a sophisticated person in the financial world, and he was very poorly advised by Lincoln. He was told not to have his name on the deed. He was not told in particular how to acquire a domicile of choice. The tax advice he was given was incomplete and consequently wrong. He was not told for example that he should take independent tax advice. Advocate Brown pressed on us that in 1998, when the trust instrument was made, tax avoidance was not headline news. She said that trusts for non-UK domiciled people are not morally repugnant and in any event the Court should not make moral judgments on tax issues. The law was difficult enough and it would have to be egregious tax misconduct to go to the exercise of discretion.

26 Furthermore domicile itself is a complicated concept. The Representor had been outside the United Kingdom for long periods of time and asserted that he understood himself not to have been domiciled in the UK in 1998.

27 Tax counsel has advised that he considers the Representor retained his UK domicile of origin at the time the Trust was established. As a consequence of that, transfers of value to the trust were chargeable at lifetime rates unless an exemption applied, and property in the Trust was relevant property and was subject to ten year charges and exit charges. Furthermore, property in the Trust was subject to a reservation which would be deemed to form part of the Representor's estate on death. The Respondent advised the Representor in May 2017 that although it was not a tax adviser, it calculated as a best estimate that there would be inheritance tax charges in the sum of £530,000.

28 As the Representor put it in his first affidavit, the sole reason for putting the property into the Trust in the first place was that it was held tax efficiently. Had he known that the property which he introduced to the Trust would effectively always be subject to UK tax, he would never have given it to the Trust at all.

29 We accept his evidence in that respect and consider that Article 47E(3)(a) and (b) are satisfied. We now have to consider whether the mistake is of so serious a character as to render it just for the Court to make a declaration under that Article.

30 On this question, we look first at the issue of delay. The question of mistake was raised by the Respondent with the Representor on 20 th May, 2017, but it was only on 1 st June, 2018, that the representation was first presented to the Royal Court. Such a long delay

does not work to the benefit of the Representor. It suggests that as far as he is concerned the mistake which was made may not have been quite so serious as he now needs to persuade the Court that it was – after all, if a serious mistake has been made, one would expect a very prompt application to correct it. Advocate Brown informed us that she did not know why the process had taken so long. She submitted it was not a significant delay in any event, but for the reason we have given, we do not agree with that last submission. Nonetheless we accept that where the mistake relates to a trust which has been in operation for 17 or 18 years, the consequences of the mistake may take some unravelling. In the present case, it does not appear to us that it ought to have been that difficult to do so, but we have exercised our discretion in favour of the Representor on this point notwithstanding that it seems to us to have been on these facts a delay at the margins of what was acceptable. One consideration in this respect is that the loss of approximately 25% of the trust fund shows the mistake to have been of a serious character.

31 We now go on to consider whether it is just that the Representor should have relief.

32 Advocate Brown submitted that there was no evidence that the Representor was a dishonest man or was trying to hoodwink anyone. Justice required the gifts to be set aside because, she said, the Representor had been badly misled and poorly advised. He came to a Jersey trust company and was entitled to rely on the advice which it gave him and there is no reason why he should not get relief, particularly in the context of the tax problem which would arise if he does not get the declaratory relief which he now seeks. In Advocate Brown's submission, there was a difference between a person who takes advice which is plainly wrong and a person who does not take advice at all when he should. The Court should look at all the circumstances and here the worst that could be said of the Representor is that he acted foolishly or perhaps carelessly. He relied on Lincoln who never told him to get his own detailed advice which, with hindsight, clearly he should have done. Supporting those submissions, Advocate Saunders said that the Lincoln advice focussed on the impact on beneficiaries, and not on the settlor. Thus it was reasonable for the Representor to assume that there would not be any problem for him. She pointed out that in his affidavit the Representor said this:-

> *"Russell and his colleagues indicated categorically that I would have no long-term tax exposure to UK taxes whilst living and working abroad.* They emphasised that a discretionary trust was the most efficient manner for the distribution of assets to my children after death. I recall they also enforced their position by saying that their operation was and would continue to be the most efficient manner of minimising taxes."

33 Advocate Saunders also submitted that the evidence was clear that the Representor did not look to establish a trust. It was Lincoln which suggested it.

34 The contrary position would be – and no one was present to argue it – that the Court should not exercise its discretion to help a transferor who does get advice which should put him on notice but ignores it; is associated with a trust which deliberately hides his identity

and his status as a beneficiary; and indeed who arguably demonstrated as late as February 2017, once he had realised there was a tax problem, a willingness to be less than frank with HMRC. In an email to the Respondent dated 1 st February, 2017, he said this in relation to the tax position:-

> *"Helm, the trustees, will revise all the paperwork relating to the B Trust such that the only beneficiaries of the B Trust are my children, C, D, E, F and G. To assist in the management of the B Trust the document will not show the names of F and E.* Their names will be immediately restored after my demise."

35 As we understand it those two children F and E had dual UK/US nationality at the relevant time.

36 The Court's view is that the Representor accepted what he was told by Lincoln because it was what he wanted to hear. We have no doubt that he is not to be treated as a particularly unsophisticated or naïve man – his career in the oil industry shows him to be a man of business, albeit not one with technical skills in this area. On the other hand, he probably did not fully understand the question of domicile and the legal and taxation issues which arose out of it. He was in our judgment foolish and although it is a matter of fine margins, we think it would be just for the Court to make a declaration in this case.

37 Having resolved that the Court should make a declaration under Article 47E that the dispositions of the property by the Representor into the Trust are voidable, the question now arises as to whether they should be voided from the time of their being made or from some other date. This question was analysed by the Court of Appeal in *BNP Paribas Jersey Trust Corporation Limited and others v Crociani and others* [2018] JCA 136A at paragraphs 85 *et seq*. In particular, the Court of Appeal said this:-

> ***"93. From this examination it can be seen that Article 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 Articles 47B and 47C. The result of the mistake is that the transfer is voidable at the instance of the settlor: see Article 47E read with Article 47I. It is voidable not void and therefore has legal effect until declared avoided. The effect of avoiding the transfer may bear upon donees and third parties: compare the power to identify that a transfer may have had some effect. We therefore find that, upon a proper interpretation, Article 47E is the statutory embodiment of an existing equitable jurisdiction, the purpose of which is to enable a mistaken transferor to recover his or her property, with the appropriate remedial declaration and consequential orders being at the discretion of the court. 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 Article 47I(4)) .

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 authorise, the court will have to take into account all factors relevant to those issues .

95. It follows, therefore, that as regards the consequences of an exercise of the now statutory jurisdiction the court may determine that, albeit the transfer has had some effects, none of those are to be a bar to the transferor potentially achieving full recovery. Thus, an appropriate order could have the effect of allowing the settlor to make a claim against the trustee for moneys distributed to beneficiaries, as a result of which the trustee would make a claim against the beneficiaries; both claims being subject, in principle, to the response of a change of position defence. In practice, however, a declaration of no effect from the date of the transfer will often require the making of sometimes numerous consequential orders: see *Z Trust* 2016(1) JLR 132 ***and*** *Link Trustee Services* [2018] JRC 043.

96. Upon this analysis, neither the proper operation of the statutory framework nor the orders of the court would run counter to the presumption against the retroactive operation of legislation: see, for example, *Wilson v First County Trust Ltd (No. 2)* [2004] 1 AC 816, ***especially at paragraphs 186 to 196 (Lord Rodger of Earlsferry). There is no change to the effect in law of juristic acts carried out before the date upon which the court makes the declaration: rather the statute gives the court power to use a consequential order to create a right to obtain the reconveyance of property or payment of a monetary equivalent when, prior to that date, the settlor had no such right. The remedy is restitutionary: see the*** *S Trust* ***at paragraphs 56 and 57***.

97. Given that we construe Article 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 ."

38 Given the mistakes which we have accepted were made, we think the transfers into the Trust should be voided at the dates each respective transfer was made. There are some consequential orders which are required which we will consider later in this judgment.

39 Advocate Brown submitted that the first limb of Article 47E(2)(a) permitted the Court to go further than merely voiding the transfers and declaring them to be of no effect, and actually to give effect instead to the intentions of the Representor on his making the transfers into the Trust, in this case up to 20 years ago. It was pointed out that merely voiding the transfers into the Trust so that the assets fell back into the Representor's estate would not be tax efficient as he had intended. Accordingly she submitted the Representor should have a declaration that the transfers to the Trust since 2 nd March, 1998, were voidable and take effect as gifts to the Representor's wife, because that would come closest to achieving his intentions under the Trust and his donative intent, namely that his wife and children can be provided for tax efficiently.

40 Advocate Brown advanced a number of bases upon which she submitted the Court could do this. The first was based upon the case of *Re Glubb* [1900] 1 Ch 354. The case concerned the administration of the estate of the late Reverend Glubb who had made a complex will. At page 363, Romer LJ summarised it as follows:-

"The committee of the institution wrote to their subscribers and represented to them that the institution was in a position to obtain the testator's original gift if subscribers would come forward with their subscriptions before a specified date. On the footing and the faith of that representation of fact subscribers gave their money. It is perfectly clear, both from the terms of the circular which was sent and from the objects which we know both the committee and the subscribers had in their minds, that the money was subscribed solely for the purpose of obtaining the original gift. So it is clear that the subscriptions were given in reliance upon and solely because of the representation of fact which I have mentioned. After the subscriptions had been obtained the committee found that they had made a mistake and that they were not at the time when they obtained the subscriptions in a position to obtain the

> original gift. So that the representation of fact which they had made was not true in substance – was indeed untrue, though of course in stating it as a fact the committee were not knowingly guilty of any deception. When the committee found that the representation – the sole representation of fact which induced the subscriptions – was untrue, what followed? The committee were not in a position to say, as against the subscribers who had had advanced their moneys solely because of that representation of fact that their subscriptions should be retained. There was a duty cast upon the committee to offer to ***return the money to the subscribers if they wished it, and to say to the subscribers, 'Now you know the true facts, what will you do with your money?'*** and the subscribers, in my opinion, have the right, when they were told the true facts, to say, 'we will dispose of the money now as we wish, in this way or in that way' ."

41 In that case the Court of Appeal agreed that the subscribers had by their conduct in effect agreed that the monies could remain with the committee of the charities concerned. We do not think this helps the Representor at all. It is one thing to say that the Representor has the right to give his money where he likes if it is returned to him following a declaration by the Court voiding his original gift; but it is another to say that the Court should act according to his direction as to who should have benefit. In the latter case, the Representor is making the new gift; in effect the Court is making the gift as requested by him. That clearly has potential tax implications which are of a different character than the implications of an order merely returning the original gift into trust. 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.

43 Accordingly we declared that the transfers of the various sums by the Representor into the Trust were voidable and of no effect from the dates on which they were made. The Respondent thus held those sums upon trust for the Representor absolutely, subject to the further provisions which we now discuss.

44 On 21 st January, 2010, a capital distribution was made to the Representor's child E in the sum of £50,600.45. Subsequently, in April 2014, that beneficiary was revocably removed from the class of beneficiaries. Notwithstanding the declaration which we have made that the Representor's transfers into trust were voidable and of no effect from the date

respectively on which they were made, the making of the capital distribution by the trustee in January 2010 is declared to have been valid. The type of circumstances which arose in *Crociani* do not apply in this case and hence that particular appointment of capital has been validated. The Respondent acted lawfully in exercise of its powers under the Trust and it would be wrong to set in train a course of events that might end up with the beneficiary being required to repay the advance which was made.

45 Advocate Saunders also pointed out that the accounts of the Trust showed that a number of professional fees had been taken from the Trust Fund and that there had also been various loan interest payments made and received. In all cases, these followed upon the understanding of the trustee at that time that the transfers into trust, which have now been declared voidable, were valid. Clyde-Smith, Commissioner, considered a similar problem in *The matter of the Z Trust* [2016] 1 JLR 132. Given that both the Representor and the Respondent wish us to make orders of this kind and we think it is just and equitable to do so and in accordance with the broad discretion described by the Court of Appeal in Crociani, we order that the Respondent be relieved from liability in respect of any (and all) of its acts or omissions in connection with the Trust in respect of the period from its appointment until the date of this order, other than for acts or omissions which constituted breaches of trust for which they would be liable if action were taken against them.

46 Furthermore, the Respondent's reasonable costs of the Representor's application (including as to legal fees and disbursements) are to be paid on the trustee indemnity basis out of the trust fund before the restitution of monies to the Representor.

47 In addition the Respondent may retain its reasonable remuneration and costs and expenses which to date have been taken out of the Trust Fund.

48 As we understand it none of these ancillary orders are the subject of dispute. We request counsel to agree a detailed form of Act for our approval if it should be necessary to do so.