The Representation of G

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	19 September 2016
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[2016] JRC 166C

ROYAL COURT

(Samedi)

Before:

W. J. Bailhache, Esq., Bailiff, and Jurats Marett-Crosby and Thomas

In the Matter of the Representation of G
And in the Matter of the D Trust, the E Trust and the F Trust
And in the Matter of Articles 47E, 51 and 53 of the Trusts (Jersey) Law 1984

Advocate N. M. Sanders **for the Representor**.

Authorities

Trusts (Jersey) Law 1984.

CC Limited v Apex Trust Limited [2012] (1) JLR 314.

Robinson Annuity Investment Trust [2014] JRC 133.

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

The S Trust and The T Trust [2015] JRC 259.

Trusts — application to have transfers set aside on grounds of mistake and be declared void and for declaration that shares have been held on bare trust on behalf of the Representor.

Bailiff

THE

1 On 23 rd December, 2011, the Representor entered into three transfer agreements with retention of a usufruct pursuant to which he transferred to trustees his shares in A ("A") and ("B") (the "Transfers"). His current application is to have the transfers set aside on the grounds of mistake and be declared void *ab initio* pursuant to Article 47E of the Trusts (Jersey) Law 1984 (the "Law") and for a declaration that the shares have been held on bare trust on behalf of the Representor at all times.

2 The circumstances underlying the application are these. On 20 th March, 2009, the Representor established three trusts, the C Trust, the H Trust and the J Trust. Each of the three trusts was constituted by the settlement of cash in the sum of US$100 upon the three trustees of each trust – an independent trustee, a family trustee and an administrative trustee. The principal trusts were for the Representor during his lifetime as to both capital and income, and from and after his death for such of the beneficiaries as the independent trustee might in her unreviewable discretion determine. The family trustee had certain reserved powers in connection with the appointment of trustees after the death of the settlor (the Representor), but these are not very material for the purposes of the present application. The third trust, namely the J Trust acted as a form of "feeder trust" into the other two trusts in respect of any income and principal of the trust arising after the Representor's death.

3 Although these trusts were established in 2009, no assets were added to them for over two years. Towards the autumn of 2011, the Representor became aware of the potential enactment of a 20% estate tax in Switzerland ("the Swiss Tax Issue"), where he is resident. This was of particular concern because his assets included a major shareholding in a very substantial corporation whose shares are publically listed on an international stock exchange. His family's interest in that company had been long-standing, as it had originally

been started by his father before subsequently it went public. Indeed the Representor had received over half of his current shareholding from his father by *inter vivos* or testamentary gifts. The Representor deposes that the original structure was designed to provide him with the right to benefit during his lifetime, to determine who would be trustees and whether the trusts might be amended, varied or revoked, but fundamentally the trusts were intended to be tax efficient vehicles for succession planning for his family.

4 The two sons of the Representor, K and L, are both resident in the United States of America. The trust deeds are governed by the proper law of Jersey, but they are in a form which clearly reflects that a good deal of US advice has been obtained in the way in which they have been drafted. The Representor deposes that the trusts were originally established to achieve four US tax objectives:-

(i) To ensure that any distributions to L or K were not subject to US tax.

(ii) If L or K predeceased him, to ensure that no part of the assets held by the trusts would be subject to US estate tax.

(iii) If he predeceased L or K, to ensure that no part of the assets held by the Trusts would be subject to US estate tax.

(iv) To ensure that L and K received a stepped up basis in the assets held by the trusts upon his death without the imposition of US tax.

5 Securing these objectives became even more challenging when the Swiss tax issue arose in 2011, because the basis for the original trusts was to ensure as far as possible that the trusts were revocable by the Representor without the consent of any other person, but such a provision might well have led to an assessment of all those assets for Swiss estate tax on his death.

6 Considerable advice was taken during the latter part of 2011, and on 23 rd December, 2011, the Representor executed amendment indentures in relation to the three trusts. As a result, the C Trust became known as the M Trust, the H Trust became the N Trust and the J Trust became the F Trust. The changes introduced were however wider than this, and each of the trusts became a Jersey law governed non-discretionary irrevocable trust. K and L collectively are the family trustees for the F Trust, K the family trustee for the M Trust and L the family trustee for the N Trust. Their sister P became the independent trustee for each of the three trusts, while Sempersen Trustee Limited (Jersey) remained as the administrative trustee.

7 The recitals to the M Trust and L Trust 2011 indentures set out the intentions:-

" *Whereas, the Settlor wishes to amend the trust to become a fixed interest non-discretionary trust, renounce his right of revocation and limit a number of the broad existing powers of the trustees, including their power to amend the terms*

> *of the trust and to use trust property to establish new trusts.* This reflects the Settlor's intention that the trust comprise a completed gift to specific ultimate beneficiaries, and in case his son dies before the trust terminates, his children named in this Indenture, who are the Settlor's grandchildren;
>
> *Whereas, the trust having heretofore been a discretionary trust with trust corpus of only USD100, the Settlor now desires to fund the trust during his lifetime by transferring shares of A, a Luxembourg holding company that indirectly holds approximately 32% of the ordinary shares of Q ("Q"), to the trust, subject to a usufruct … under Luxembourg law under which the usufructuary enjoys voting rights during his lifetime*."

The recital to the 2011 F Trust indenture was in similar terms save that the specific ultimate beneficiaries were described as the Representor's two sons and that the reference was to the transfer of shares in B in respect of which the usufructuary did not enjoy voting rights.

8 Thus it was that the Settlor tried to address the Swiss tax issue whilst not losing sight of the original US tax objectives.

9 We should mention that each of the trusts terminates on 1 st December, 2041.

10 Following the amendment of the trusts and as part of the restructuring process to achieve the various objectives, the Representor transferred his interests in Q ("Q") the publically traded Dutch company, into the amended trusts. The Representor held his shares in Q through two Luxembourg holding companies – A, which holds 32% of the shares in Q and B, which holds 49% of the shares in Q. On 23 rd December, 2011, the day on which the amendment indentures were executed, the Representor entered into three transfer agreements with the retention of a usufruct, pursuant to which he transferred to the trusts his shares in A and B, and it is these transfers which are the subject of the current application.

11 Unfortunately the amending trust instruments executed on 23 rd December, 2011, contained one particular amendment which has given rise to a potentially serious US tax problem. Clause 2b of the M Trust Indenture provided as follows:-

> " *The Trust Protector may, from time to time, remove and appoint the Independent Trustee and the Family Trustee.* The Family Trustee shall have all powers not reserved to the Independent Trustee or the Trust Protector or K, his widow and the Beneficiaries hereunder, in particular, powers as to management of the trust corpus and voting any shares held by the trust."

12 A similar provision appears in the N Trust and in the F Trust. The advice from US lawyers now received is that with the amended trusts as drafted, if either of the Representor's sons were to die holding the general power of appointment prior to the expiration of the term of the trusts in December 2041, US estate tax, at a rate of up to 40% plus possible additional

state tax, could be imposed on the value of the assets held by the trusts of which the son is a beneficiary. The advice is that the US estate tax risk arises even if the Representor survives either or both his sons, and the imposition of US estate tax could lead to a very substantial charge on the respective estates of K or L – indeed such is the amount of the prospective charge that their beneficial interest in the shares in the family company might mean the shares had to be sold in order to discharge the taxes due.

13 Ironically, not only was the relevant provision which created this risk unnecessary for the purposes of the Swiss tax issue, but indeed the whole Swiss tax issue appears to have gone away in that no Swiss estate duty has been introduced.

14 It is evident that instead of the transfers being made to trusts which in their amended form were tax efficient, in fact the transfers have been made to trusts which attract a significant risk to the Representor's family of a substantial US estate tax liability if either of K or L should die before the end of the respective trust periods in 2041. The Representor deposes that he would not have effected the transfers onto the trusts in their amended form had he known and appreciated the potential US estate tax consequences.

15 Before we turn to the provisions of Article 47E of the Law, there is one conflict of law issue upon which we touch briefly. The transfer agreements by which the shares were transferred to the relevant trusts all provide as follows:-

> " *Swiss substantive law applies to the Agreement, unless Luxembourg law is compulsory or mandatory pursuant to Paragraph 4 and Paragraph 6.1.* The courts in Meggen shall have exclusive jurisdiction for all disputes arising from or in connection with this Agreement."

16 The parties therefore, which included the Representor and the trustees of each trust selected the Courts of the Representor's home town in Switzerland as having exclusive jurisdiction, and selected Swiss law save to the extent that Luxembourg law might be mandatory having regard to the fact that the underlying companies in which the shares were to be transferred were Luxembourg registered companies.

17 When this proper law provision was put to Advocate Sanders, he made two primary submissions. The first was that there was no dispute in this case, and therefore nothing under the terms of the transfer agreement which was required to be referred to the Courts in Meggen in any event. The second submission was that as a matter of Jersey law, the validity of any transfer to a Jersey trust fell to be determined solely in accordance with Jersey law. For that proposition he relied upon Article 9 of the Law which in its material parts is as follows:-

> ***"(1) Subject to paragraph (3), any question concerning –***
>
> ***(a) …;***

(b) the validity or effect of any transfer or other disposition of property to a trust;

...

shall be determined in accordance with the law of Jersey and no rule of foreign law shall affect such question ."

18 Article 9(2) of the Law expressly requires that any determination of the validity or effect of any transfer or other disposition of property to a Jersey trust is to be determined without consideration of whether or not the foreign law prohibits or does not recognise the concept of a trust. However, Article 9(2A) provides that paragraph (1) of that Article does not, in determining the capacity of a corporation, affect the recognition of the law of its place of incorporation, nor does it affect the recognition of the law of any other jurisdiction prescribing the formalities for the disposition of property.

19 Article 9 was considered by this Court in *CC Limited v Apex Trust Limited* [2012] (1) JLR 314, a case involving one of the many Baxendale Walker Trusts which have exercised this Court from time to time. The Court decided that although there was a material difference between English law and Jersey law on the setting aside of a gift into trust on the grounds of mistake on the part of the donor, that difference in law did not make any difference to the outcome of the case in question because whichever system of law which was applied, the Court was satisfied that the two mistakes made by the company in question were both mistakes as to the effect of the transaction, and relief would be given. As a result, the Court's conclusions as to which law applied were probably *obiter*. Nonetheless, although the matter does not appear to have been the subject of dispute between the parties, the Court reached the conclusion that it was Jersey law which had to be applied because of the provision in Article 9 to which we have referred above. This was described as being *"clear and unambiguous in its terms."* This conclusion was followed by this Court in the matter of the *Robinson Annuity Investment Trust* [2014] JRC 133 at paragraph 23. It is not clear from the judgment whether it was necessary to determine whether Jersey or English law would govern the application in that case although as it involved another Baxendale Walker trust, it may well be that the Court would have reached the same conclusion on the application of either Jersey or English test. However, we note that only Jersey authorities were put before the Court on that occasion and we note also that the Court had no difficulty in applying *CC Limited v Apex Trust Limited* notwithstanding that the underlying estate annuity purchase deeds were expressed to be governed by English law. Advocate Sanders therefore relies upon the *Robinson Annuity Investment Trust* decision as supporting the submission that this Court should apply Jersey law to the validity of the transfers, notwithstanding the provisions of the transfer deed which would suggest that any dispute around the transfers should be referred to the Meggen court as the court of exclusive jurisdiction.

20 Statutory provisions of the kind which appear in Article 9 of the Law are capable of causing difficulty, but we agree with the conclusion of the Court in *CC Limited v Apex Trust Limited*

that the provisions are clear and unambiguous. The statute requires the Court to consider the validity of a transfer into trust solely under Jersey law, because Jersey is the proper law of the trust. The exceptions in Article 9(2A) show that the legislature did not contemplate that otherwise invalid dispositions or transfers could be made valid by the application of Jersey law, but we think that Advocate Sanders was also correct in his submission that the consequence of any order under Jersey law that a transfer was invalid would merely have the consequence that the trustee, as transferee, would hold the asset upon a different trust – namely as bare trustee for the transferor, rather than on the trusts of the settlement in question. One could therefore technically have the position whereby a transfer of assets to the trustee was deemed to be a valid transfer in a foreign court under the proper law of the transfer deed, whereas it was held to be invalid in Jersey on the application of the law of Jersey; the consequence of which would merely be to vary the trusts upon which the trustee held the asset which had been validly transferred to it, according to the foreign law in question. This is not an inconsistent result, albeit it goes to show that the same argument might have different outcomes depending upon the jurisdiction in which it takes place.

21 That may all be academic in the instant case in any event, as the Court was shown advice from Ogier lawyers, expert in the law of Luxembourg, to the effect that if the Jersey Court were to set aside the transfer of the shares, the share registers of the two companies would have to be rectified to restore the Representor as the registered owner of the shares. The expert evidence is that under Luxembourg law it is possible to rectify the share register of a company in circumstances where a change of ownership has been determined to be void and, in the opinion of the Ogier Luxembourg lawyers, such a rectification could be effective on the basis of a declaration of a competent court with regard to the validity of the transfer of the shares to the current registered owners, and a judgment of the Royal Court of Jersey would be sufficient to enable that rectification to take place. It would appear therefore that the consequence of the application of Jersey law to the validity of the transfer to trustees of a Jersey trust could not result in a conflict which rendered the establishment of the true legal owner of the shares in question different, according to the jurisdiction in which that conflict arose.

22 In most of the applications since the Trusts (Amendment No.6) (Jersey) Law 2013 came into force, the Court has been faced with an application brought both under Article 47E and also under Article 11, and it has not been of any consequence as to whichever approach was taken. In the present case, the application was made firmly under Article 47E, because there is no application to set aside either the trusts as originally made or as amended by the 2011 instruments. What is sought to be set aside are the transfers of shares in 2011 to the amended trusts.

23 That being so, there are three questions for this Court to address:-

(i) Was there a mistake on the part of the Settlor (also the transferor, beneficially and the Representor)?

(ii) Would the Settlor 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?

24 The evidence firmly establishes that the Representor's intention was to plan financially for his and his family's future in the most tax effective manner. The trusts were indeed fundamental to that objective and approach. We are satisfied the Representor believed that the amended trusts were in a form that achieved his intended objectives, and that he believed that in making the transfers to the trusts in that form he was not only achieving the US tax objectives but also nullifying any risk which arose under the Swiss Tax Issue. In fact he was wrong because with the trusts in the form they are, there is a risk of a substantial US estate tax charge. The mistake was accordingly one which relates to the fiscal consequences or advantages of the transfer of the shares to the trusts, and we are satisfied that it falls within Article 47B(2) and Article 47E(2) of the Law. There is no doubt on authority in relation to the setting aside of Jersey trusts for mistake that a mistake as to fiscal consequences can form the basis of an application to set aside.

25 We are also completely satisfied that the Representor would not have made the transfers *"but for"* the mistake. That is his evidence on affidavit and it is indeed consistent with a comparison of the original deeds of trust in 2009 with the amended deeds in 2011. We accept Advocate Sanders' contention that the Representor would not have effected the transfers but for his mistaken understanding that there would be tax advantages, namely a shielding of the shares from a potential Swiss estate tax and also a deferral of US estate tax until at least the deaths of his grandchildren.

26 The third question – was the mistake of so serious a character as to render it just for the Court to make a declaration – is more problematic. In most of the cases of this kind which have come before this Court, if not in all of them, the result of the mistake has been that there was an existing liability for tax. The only case in which this may not be so is the *Robinson Annuity Investment Trust* case, although it is not entirely clear that absent setting aside those dispositions for mistake, there was any avoidable contingency which might have resulted in tax not being payable. In the instant case, that is not so because if L and K were to survive until December 2041 when the trusts in question come to an end, it appears as if the problems contemplated in the US tax advice will not have come to pass and there will be no enormous tax liability of the kind contemplated in the present advice. We have thus had to consider whether the mistake can be said to be of such a serious character as to render it just for the Court to make a declaration when, quite feasibly there are no tax risks of the kind envisaged in the evidence put before us.

27 Thus the real issue for us is whether the potential risk of a very significant tax liability if either of L or K should die prior to the expiry of the term of the trusts is a consequence which renders the mistake so serious that it is just that the transfers be set aside. Although this is something of a fine margin, we think that it is and that relief ought to be given. Our reasons for reaching this conclusion are as follows:-

(i) Although the risk may be thought to be far from certain of coming to pass (the two sons are both aged in their 40s, and would only have to survive until December 2041) the potential tax bill for their estates is huge. We accept that it was never intended that the shares transferred should form part of the sons' estates for tax purposes and that the tax bill would have arisen in these circumstances without any compensating benefit. Indeed they might have to divest themselves of the family business, formed by the Representor's father.

(ii) It is clear that the Representor ultimately wants the assets to go to his children and remoter issue. Accordingly we think that no trust beneficiaries are likely to suffer either immediately or in the long term if the transfer of the shares is set aside.

(iii) The Representor is not a tax payer in the United States and the mistake goes to the treatment of his sons' estates and not to his own. This is not an artificial scheme or device as was the case with *The S Trust and The T Trust* [2015] JRC 259. The arrangements do not attract the same criticism that the Court is asked to come to the rescue of foreign tax payers, who, anxious to avoid meeting their obligations of citizens of that jurisdiction, make a scheme which ultimately does not achieve what was intended. The present arrangements are made for the disposition of the Representor's estate in a tax efficient way and he has gained no interim advantage by the structures which were adopted, which might make it inequitable to confer new advantages now.

(iv) Although the trustees and the beneficiaries were not required to consent to the representation and similarly such consent was not a pre-requisite for the exercise of the court's jurisdiction to set aside the transfers, all the trustees and all the beneficiaries have agreed with the Representor's prayer for relief and accept that it is in their interests that it should be granted.

28 Accordingly we order that the Transfers be set aside on the grounds of mistake and are avoidable pursuant to Article 47E of the Law. We make the further declaration that the shares in A and B which have been in the registered ownership of the trustees, including all profit derived from those assets, have been held on bare trust by the trustees on behalf of the Representor and have been so held at all times.