A v B

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	02 April 2019
Neutral Citation:	[2019] JRC 56
Date:	02 April 2019
Court:	Royal Court

Text

[2019] JRC 56

ROYAL COURT

(Samedi)

Before:

Sir William Bailhache, Bailiff, **and** Jurats Blampied **and** Averty

IN THE MATTER OF THE G TRUST

AND IN THE MATTER OF ARTICLES 11, 47E AND 51 OF THE TRUST (JERSEY) LAW 1984 AS AMENDED ("THE LAW")

Between
A and B
Representors

Advocate M. W. Cook **for the Representors**.

Advocate D. P. Le Maistre **for the minor and unborn beneficiaries**.

Authorities

In the matter of the K Trust [2017] JRC 177.

Pitt v Holt [2013] UKSC 26.

Goff and Jones 9th edition.

Re the Strathmullen Trust [2014] (1) JLR 309.

In the matter of the S Trust and the T Trust [2015] JRC 259

Trust — reasons for granting the prayers in the representation.

Bailiff

THE

1 On 11 th March, 2019, the Court gave judgment granting the prayers in the representation brought by the Representors with reasons reserved. This judgment contains those reasons.

2 On 1 st July, 2008, the Representors settled the sum of US$100 on Coutts Offshore Europe Limited, now known as Highvern Trustees Limited ("the Trustee") on the trusts contained in the deed of settlement. The Trust is discretionary trust governed by Jersey law and the present beneficiaries are the Representors, their three adult children and their four grandchildren, with provision for the future issue of the Representors to fall within the class of beneficiaries. All four grandchildren are minors, and they and the unborn beneficiaries are represented in these proceedings by Advocate Le Maistre.

3 When this representation was first presented to the Royal Court on 16 th November, 2018, the Court ordered that Her Majesty's Revenue and Customs (HMRC) should be notified of the application. The Representors duly notified HMRC and by letter dated 15 th January, 2019, HMRC confirmed that it did not wish to be joined in or make any comment upon the application that was being made.

4 The Court also ordered in November that the Attorney General be convened as representing the general charitable interest. The Attorney has indicated that he does not consider there is a sufficient charitable interest to warrant his making submissions in this case and accordingly did not appear.

5 Since the Trust was established, there have been various additional transfers into trust. Four such transfers from UK bank accounts in particular were made. On 13 th November, 2008, there was a transfer of US$660,000 to the trustee by means of a transfer to a BVI company solely owned by the trustee; on 21 st November 2008 the transfer of US$499,974.00, to the trustee by means of a transfer to a different BVI company solely owned by the trustee; on 9 th January, 2014 a transfer of US$1.7 million on the same basis; and on 9 th January, 2014 a transfer of £865,645.35 on the same basis, (together called "the Transfers").

6 The sums transferred by the Transfers came from two different UK bank accounts maintained by Coutts and Co, both in the joint names of the Representors. The evidence before this Court is that the Representors did not contemplate that by making those payments they were exposing themselves to any UK tax liability. Neither of them have been at any material time resident, ordinarily resident or domiciled in the United Kingdom, nor are they British citizens. Neither the Trustee nor the bank gave them any warning as to the tax consequences of making the Transfers. The evidence before us is perfectly clear that, had the Representors been aware of the tax exposure to which they and the Trustee would become subject by making these Transfers from a UK account, they would have taken expert advice and structured the Transfers from non UK bank accounts. In summary, the potential immediately quantifiable exposure to inheritance tax is £188,650 for each of the Representors, but there are the additional consequences that they will be liable for interest and penalties for late payment and late disclosure —the potential of further tax becoming payable if either of them should die within seven years of the date of the Transfers and likely UK inheritance tax at 40% on their respective deaths, less lifetime tax, paid by virtue of the fact that they themselves remain members of the discretionary class of beneficiaries, and therefore the Transfers constituted gifts with a reservation of benefit.

7 Accordingly the Representors brought the present proceedings seeking orders that the Transfers into the Trust were made by mistake and should be set aside.

The Law

8 Although the application is apparently brought under Articles 11 and 47E of the Law, it was clear in the written and oral argument that reliance was placed on Article 47E and not Article 11. We think this was correct. There is no suggestion that the original payment of US$100 constituting the Trust was made by mistake, and there is no suggestion that the Trust itself was a mistake and should be set aside.

9 Article 47E of the Law provides as follows:-

> "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."

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?

11 Article 47B(2) defines what a mistake is for the purposes of the Law. It is defined as including:-

"(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."

12 A mistake as to the tax consequences of transfers to a trust has been held on numbers of occasions in this Court to be a mistake for the purposes of Article 47E — see, for example, *In the matter of the K Trust* [2017] JRC 177.

13 It seems to us to be important to distinguish the Jersey law of mistake from the law of mistake as it applies in England and Wales, where it is governed by the Supreme Court decision in *Pitt v Holt* [2013] UKSC 26. As is pointed out by the authors of Goff and Jones 9th edition at paragraphs 9—41 to 9—54, English law distinguishes three different situations:-

(i) Incorrect conscious beliefs, where, owing to the claimant's ignorance of some fact or facts, he held an incorrect conscious belief which caused him to act;

(ii) Incorrect tacit assumptions, where the claimant acted on the basis of a tacit assumption about some fact which was falsified by some other fact of which he was ignorant, or simply he acted on the basis of an incorrect tacit assumption about a fact; and

(iii) Mere causative ignorance, where the claimant made neither an active nor a tacit mistake and simply acted in a state of what is called mere causative ignorance. He might not have acted as he did had he known of the fact of which he was ignorant, but when he acted, he held no belief or assumption about that fact, consciously or tacitly, and no conscious belief or tacit assumption on which he acted was falsified by his ignorance of the relevant fact.

14 In *Pitt v Holt*, the Supreme Court noted that the authors of Goff and Jones were on balance in favour of treating mere causative ignorance as sufficient, but nonetheless their Lordships did not share that view. Accordingly the English position appears to be that in equity the Court has no power to give relief where there is mere causative ignorance.

15 In our view this is not the approach which is to be taken under the law of Jersey when the Court receives applications under Article 47E. This is because the jurisdiction to give relief

as conferred by the statute requires the Court to decide whether there was any mistake as defined by Article 47B(2) of the Law in considering the application of the tests mentioned at paragraph 10 above. As regards the test in paragraph 10(i) above, the Court does not ask itself whether the alleged mistake was one of causative ignorance but, in accordance with the statute, asks whether the alleged mistake falls within the definition of a mistake and related to the transfer into the Trust.

16 We are pleased to be able to reach the conclusion that it is inappropriate to make the distinctions as to incorrect conscious beliefs, incorrect tacit assumptions or mere causative ignorance because in our view the distinction between an incorrect tacit assumption and mere causative ignorance is rather artificial. We note first that the phrase *"mere causative ignorance"* is not one which reflects generally why these applications before us come about. Ignorance does not usually cause the transfer to be made —indeed it cannot really be regarded as causative of anything very much. The cause of the transfer is usually an intention to benefit the trust. That cause is almost invariably not removed by the ignorance which might accompany it and it is difficult to say in those circumstances that the ignorance caused the transfer. It is more to the point that the transferors would have made the transfer in a different way, e.g. by making the transfer from a non UK bank account if they had known the effects or consequences of the transfer might have been. Secondly, the intellectual space between incorrect tacit assumptions and mere causative ignorance is in our judgment almost impossible to find because tacit assumptions will invariably be mistakes only when the maker of the assumption is ignorant of some material fact.

17 We would like however to add some further commentary as to the third test which the Court has to apply — once it is satisfied that there has been a mistake made in relation to the transfer into trust and that that transfer would not have been made but for the mistake, the Court needs to ask itself whether the mistake was of such a serious character as to render it just for the Court to make a declaration. The grammar of the question makes it plain that there are two component parts; the first is to whether the mistake was of a serious character and the second as to whether it is just for the Court to make a declaration. The seriousness of the mistake will often be analysed by reference to the effect both on the transferor and potentially on the trustees and beneficiaries of the trust. In the context of taxation consequences, the mistake may not be of a very serious character if the quantum of tax exposure is very limited as compared with the value of the Trust Fund or of the remaining assets held by the transferor, although that might also depend on whether there are any future consequences including the loss of future potential in relation to the trust as a result of the particular transfer which is impugned. The mistake would also be of a serious character if the consequence of the mistake is that different people would have the right to benefit from the transfer than the transferor intended — the trust, for example, might include the spouses or partners of the beneficiaries whereas the transferor thought it was the beneficiaries alone who could benefit, or it might be a fixed income trust where the transferor thought it was a discretionary trust, or vice versa. All those types of mistakes are capable of being serious.

18 The question of justice is more nuanced. It is well settled that mistakes in relation to tax are

capable of being taken into account by the Court in deciding whether or not to set aside a transfer or disposition into trust or indeed the trust itself. In *Re the Strathmullen Trust* [2014] (1) JLR 309 the Court said this:-

> "23. … We note also that in *Pitt v Holt* HMRC contended that a mistake which related exclusively to tax could not in any circumstances be relieved. The submission was that Parliament's general intention, in enacting tax statutes, was that tax should be paid on some transactions of a specified type, whether or not the tax payer is aware of the tax liability. This submission was rejected by the Supreme Court as being much too wide and unsupported by principle or authority (see paragraph 132).
>
> 24. We also note that at paragraph 135 of his judgment, Lord Walker said this:-
>
> '… Had mistake been raised in *Futter* there would have been an issue of some importance as to whether the Court should assist in extricating payments from a tax avoidance scheme which had gone wrong. The scheme adopted by Mr Futter would by no means be at the extreme of artificiality (compare, for instance, that in *Abacus Trust Co (Isle of Man) Limited v NSPCC* [2001] STC 1344, (2001) 3 ITELR 846 but it was hardly an exercise in good citizenship. In some cases of artificial tax avoidance the Court might think it right to refuse relief, either on the ground 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. Since the seminal decision of the House of Lords in *WT Ramsay Limited v ILC*, *Eilbeck (Inspector of Taxes) v Rawling* [1981] STC 174 [1982] AC 300 there has been an increasingly strong and general recognition that artificial tax avoidance is a social evil which puts an unfair burden on the shoulders of those that do not adopt such measures. But it is unnecessary to consider that further on these appeals.'
>
> 25. There is clearly more than one approach that one could take to what Lord Walker describes as an issue of some importance in the United Kingdom, and the arguments would be further complicated in this jurisdiction by a recognition that the social evil of artificial tax avoidance which puts an unnecessary burden on the shoulders of those who do not adopt such measures might receive a different emphasis where it is not our domestic taxation system which is being avoided. The complexity of such arguments, including the difficulties in establishing what amounts to a social evil where the relevant jurisdiction's legislature can be assumed to have taxed everything that it intended to tax (which makes avoidance, on one analysis, entirely legitimate) emphasises that in the absence of any contentions to the contrary, it is unnecessary to consider such an issue further in this case."

19 The question of the justice of making an order was raised also in *In the matter of the S Trust and the T Trust* [2015] JRC 259. In that case, although a substantial tax liability arose as a result of the mistakes, there was an indemnity which had been put in place following

contested proceedings in the High Court in the United Kingdom. As a result of that indemnity, there was no risk of loss to the trust or to the beneficiaries.

20 HMRC did not appear before the Court but sent letters to the representors in which various points were taken, those letters being presented to the Court. These HMRC representations were considered between paragraphs 23 and 28 of the Court's judgment in that case, and the Court emphasised that United Kingdom distinctions between consequences and effect and whether mistakes were mistakes of law or mistakes of fact would not be applied in this jurisdiction because they were inconsistent with our statutory provisions.

21 The Court dealt with the justice of the case at paragraphs 32 *et seq*, and at paragraph 36 said this:-

> "There is something unattractive about the proposition that the Court should come to the rescue of foreign tax payers who, anxious to avoid paying the contribution towards the outgoings of their own jurisdiction's government, and thus meet their own obligations as citizens of that jurisdiction, make schemes of this nature. No doubt they congratulated themselves for some years on the smart move which they had made to avoid the relevant taxes and get benefits for themselves in the meantime. The Court can have only limited sympathy for those people who later find that actually things have not worked out quite as they planned, and here of course the sympathy is even less because there is no financial downside if the Court were not to come to their rescue, because they have an EFG indemnity. Nonetheless, by a small margin, the Court has determined to exercise its discretion to set the transfers aside and grant the relief in the prayers to the representations. It does so without any sympathy at all for EFG as the indemnifier, and with only some sympathy for the representors — and that sympathy arises from a recognition that all litigation is stressful, and that risky litigation against professional advisers between 2009 and 2013 will obviously have generated a great deal of anxiety for them; and indeed that anxiety would have been increased by the knowledge that if the litigation were to be unsuccessful, there were really serous tax consequences flowing from the misguided attempts to avoid their obligations as citizens of the United Kingdom in the first place. The Court thinks this was a pretty naked attempt to avoid those obligations. In the event, we are granting the relief because we recognise the stress of the last three years for the representors, and the stress of this litigation as well. We recognise the possibility, perhaps even probability, that a refusal of relief is likely to lead to further litigation on appeal, and given their tax position will be the same if we make the order as it would have been if the transfers into trust had not been made in the first place. On balance we think that these representors and their families have suffered enough."

22 We do not regard *In the matter of the S Trust and the T Trust* as establishing a set of factual circumstances in which there will automatically be relief. It is an example where, on all the facts which were available to the Court in that case, the Court resolved that the mistake was

such that it was just to grant relief. The case demonstrates that there is a real discretion to the exercised.

The present case

23 We consider the facts of this case against the three questions:-

(i) Was there a mistake on the part of the Representors in relation to the Transfers?

24 The evidence is clear that there was such a mistake. It was open to the Representors to make transfers equivalent to the sums transferred but from a different account, and in those circumstances the transfers would not have attracted adverse tax consequences.

(ii) Would the Representors not have made the Transfers but for the mistake?

25 The evidence is quite clear that they would not have done so and we are so satisfied.

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

26 Given the amount of tax which is involved, we think that the mistake was of a serious character and we have taken that into account in the context of exercising our discretion as to what the justice of the case requires. We take into account that the rationale for the Trust was an intention to build the Trust assets for the benefit of the heirs of the Representors, in particular the youngest of their heirs, by consolidating family resources in one structure under the same financial management and away from the political turmoil and military conflicts which might have affected the family. We take into account that the Representors are not UK citizens, and have not been at any relevant time domiciled or resident in the United Kingdom. We take into account that the evidence discloses there were other sources of funds to make the transfers which would not have attracted the adverse tax consequences which the transfers have attracted. We also have noted the intention expressed by the Representors to replenish the Trust with an amount of money equivalent to the Transfers once the Transfers have been set aside. Given the rationale for the Trust, we think this statement of intent is one we can accept, and, on behalf of the minor and unborn beneficiaries, Advocate Le Maistre also confirms that he supports the application. He makes the point that the minor and unborn beneficiaries would not expect a personal tax liability to be imposed on grandparents whose intentions have been to confer a gratuitous benefit on them.

27 Having regard to all these factors, we are satisfied that it is just to make the orders sought and in those circumstances, we granted the prayers in the Representation pursuant to

Article 47E(2) of the Law. We declared that the Transfers were voidable and of no effect from the time of their being made, and we granted the further declaration that the Trustee holds and has at all times since the date of each of the Transfers held the property transferred by the Transfers on bare trust for the Representors absolutely. We further ordered that the Trustee and/or C Limited, a company wholly owned by the Trustee (C Limited), to whose account the First Transfer was made be entitled to retain (to the extent already paid) or pay itself out of the Trust property, (to the extent not yet paid) the remuneration it has already charged and retain the reimbursement out of the Trust property (to the extent already reimbursed) or to reimburse itself out of the Trust property (to the extent not yet reimbursed) for expenses and liabilities reasonably incurred, and be entitled to continue to charge its reasonable remuneration and reimburse itself for all expenses and liabilities reasonably incurred up to the date of our declaration. Furthermore, the Trustee and/or C Limited are relieved from personal liability for any breach of the bare trust upon which it has held the Trust property, save to the extent that it would have been liable for a breach of trust. The costs of Advocate Le Maistre as appointed representative of the minor and unborn beneficiaries shall be met from the Trust fund.