The Lochmore Trust

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	30 March 2010
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Date:	30 March 2010

Text

[2010] JRC 68

ROYAL COURT

(Samedi Division)

Before:

M. C. St. J. Birt, **Esq.**, Bailiff, **and** Jurats Liddiard **and** Fisher

In the Matter of the Lochmore Trust

Advocate F. B. Robertson **for the Settlor.**

Advocate M. C. Goulborn **for the Unborn Beneficiaries.**

The Trustee and the adult Beneficiaries were convened but did not appear and were not represented at the hearing.

Authorities

Re the A Trust [2009] JRC 245.

Gibbon v Mitchell (1991) 1 WLR 1304.

Ogilvie v Allen (1889) 15 TLR 294.

Trusts (Jersey) Law 1984.

Bailiff

THE

1 This is an application by the settlor to set aside the Lochmore Trust ("the Trust") on the grounds of mistake.

2 The Court has received affidavits from the settlor, from Mr David Jenner, a director of Lutea Trustees Limited ("Lutea") and Mr Michael Dawes, the current tax adviser of the settlor.

The Background

3 We find the facts to be as follows. Although not domiciled in the United Kingdom in the conventional sense, the settlor is deemed to be domiciled in the UK for inheritance tax purposes. In 1995 he caused to be incorporated in Jersey a company called Lochmore Holdings Limited ("the Company"). The shares in the Company were held by Lutea and another company in the Lutea group as nominees for the settlor.

4 In the early part of 2008 the settlor was advised by his then tax advisers BKL Tax that there would be advantages from a capital gains tax point of view for the shares in Lochmore to be contributed to a trust. That advice was summarised in a letter to the settlor dated 21st February, 2008. It was pointed out in the letter that, in order to avoid a charge to inheritance tax at 20% on the transfer of the shares to the Trust, the transfer should not be by way of gift but would have to be by way of sale, with the sale price left outstanding as a loan.

5 The settlor decided to proceed and got in touch with Mr Jenner at Lutea. Lutea agreed to act as trustee of a discretionary trust. There were various telephone conversations between the settlor and Mr Jenner and the settlor came to Jersey on 31st March, 2008, when he executed the trust deed constituting the Trust. Unfortunately, there appears to have been no direct contact between Lutea and BKL Tax and the latter never reviewed the trust deed. The Trust was a discretionary trust in fairly conventional form and the deed was executed by the settlor and Lutea. The beneficiaries are defined as the settlor, the settlor's spouse and widow and the settlor's children and remoter issue. There is power to add beneficiaries

but none have been added. The “trust fund” is defined in the deed as the settlor's interest in the Company and any other property transferred to the trustees from time to time. No other property has in fact been transferred with the result that the shares in the Company remain the sole asset of the Trust.

6 It is quite clear from the evidence before us that there was a fundamental misunderstanding between the settlor and Mr Jenner. The settlor thought that, in accordance with the advice of BKL Tax, the shares had been transferred to the Trust by way of a sale with the sale price remaining outstanding as a loan. Lutea, on the other hand, had not appreciated that this was required and had simply transferred beneficial ownership of the shares in the Company to the Trust on 31st March, 2008. for no consideration, so that it operated as a gift by the settlor to the Trust.

7 The fact that the shares had been gifted rather than sold to the Trust only emerged in November 2008 when Mr Dawes of TWP Accounting, the current tax advisors of the settlor, reviewed the trust deed. Mr Dawes advised that, as a result of the shares being transferred by way of gift rather than sale, a chargeable transfer for inheritance tax purposes had arisen which meant that the settlor was liable to an immediate charge to UK inheritance tax at the rate of 20% on the value of the shares. The evidence before the Court suggests that this inheritance tax liability is likely to be in the region of £800,000.

8 There has been some delay since then whilst the parties considered what to do and there were differences of opinion as to whose fault it was that the mistake had occurred. However, the parties are agreed that we do not need to resolve that issue. The settlor has now presented this representation seeking to set the transfer of the shares to the Trust aside on the grounds of his mistake.

9 All the adult beneficiaries (comprising the four children of the settlor and the settlor's wife) have been convened and have indicated that they do not oppose the relief sought by the settlor. There are no minor beneficiaries. Lutea has rested on the wisdom of the Court. Advocate Goulborn has been appointed to represent the interest of the unborn beneficiaries. He has reviewed the position and does not oppose the relief sought.

The Law

10 The law regarding the setting aside of a trust on the ground of mistake has been considered in depth and clarified in the recent decision of the Royal Court in *Re the A Trust* [2009] JRC 245. In that judgement, Commissioner Clyde-Smith reviewed the different tests as set out in *Gibbon v Mitchell* (1991) 1 WLR 1304 on the one hand and *Ogilvie v Allen* (1889) 15 TLR 294 on the other and adopted the test set out in the latter case, namely whether the donor or settlor was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him. In applying that test, the Court must be satisfied that the donor or settlor would not have entered into the transaction

"but for" the mistake. The Court rejected the distinction between a mistake as to the "effect" of a transaction and a mistake as to the "consequences" of a transaction as formulated in *Gibbon v Mitchell*.

11 It follows that the Court has to ask itself the following questions:-

(i) Was there a mistake on the part of the settlor?

(ii) Would the settlor not have entered into the transaction "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?

12 Taking these in turn the Court is quite clear that there was here a mistake of fact on the part of the settlor. He believed that the transaction had been by way of a sale whereas in fact it had been effected by way of a gift. He was therefore mistaken in a fundamental way as to the nature of the transaction. We would add that Mr Jenner has said in his affidavit that Lutea would not in any event have in fact been willing to proceed by way of a purchase of the shares with the sale price outstanding as a loan. However we do not think that this takes the matter any further.

13 As to the second question, we are quite satisfied that the settlor would not have agreed to establish the Trust and contribute to the shares in the Company to the Trust "but for" the mistake. He had been advised that a transfer by way of gift would lead to an immediate charge to inheritance tax of 20% of the value of the shares and he did not wish to incur such a charge.

14 As to the third issue, we are satisfied that this is indeed a case of a mistake of so serious a character as to render it unjust on the part of the trustee and beneficiaries to retain the property. As a result of the shares being gifted into the Trust rather sold, a chargeable transfer for inheritance tax purposes has arisen which means that the settlor is liable to a charge to inheritance tax in the approximate sum of £800,000. This is clearly a mistake of a serious nature and it would be unjust for the beneficiaries to be able to retain the benefit of the trust fund at a time when the settlor is incurring a charge of £800,000 for inheritance tax which he did not intend to incur. It is also of note that all the adult beneficiaries have agreed to the relief sought and do not wish to assert that it would be fair for them to retain the trust fund when the consequences for the settlor are so serious.

15 For these reasons, we declare, in accordance with Article 11 of the Trusts (Jersey) Law 1984 that the Trust was established by reason of mistake and is therefore invalid. We set aside the transfer of the shares in the Company to the Trust.