Hawksford Trustees Jersey Ltd v P

Jurisdiction:	Jersey
Judge:	George Bompas
Judgment Date:	06 August 2021
Neutral Citation:	[2021] JCA 201
Reported In:	2021 (2) JLR 20
Court:	Court of Appeal

Text

[2021] JCA 201

COURT OF APPEAL

Before:

George Bompas, **Q.C.**,

Helen Mountfield, **Q.C., and**

Jeremy Storey, **Q.C.**,

Between
Hawksford Trustees Jersey Ltd
Appellant
and
P
Respondent

Advocate E. Moran **for the Appellant**.

The Respondent did not attend.

Authorities

Representation of Hawksford Trustees Jersey Limited re the M Settlement [2021] JRC 130.

Trusts (Jersey) Law 2004.

BNP Paribas Jersey Trust Corporation Ltd v Crociani [2018] JCA 136A.

BNP Paribas Jersey Trust Corporation Limited, Appleby Trust (Mauritius) Limited and Camilla De Bourbon Des Deux [2018] 2 JLR 175, at [72]ff.

Representation re The B Trust [2019] JRC 035.

A v Helm Trust Company Limited [2019] (1) JLR N [4]

Representation re The Grundy Trust [2020] JRC 071,

In the matter of the Representation of the Grundy Trust [2020] 1 JLR 153.

IRC v Levy [1982] STC 422.

Trusts.

JUDGMENT OF THE COURT

George Bompas **QC:**

1 This is the judgment of the Court on an appeal against a decision of the Royal Court (Commissioner J A Clyde-Smith and Jurats Olsen and Ronge) given on 4 May 2021 (Representation of *Hawksford Trustees Jersey Limited re the M Settlement* [2021] JRC 130). The Royal Court refused the Appellant, Hawksford Trustees Jersey Limited ("H"), the relief sought on its Representation to which its wholly-owned subsidiary, P, was the only other party. P had consented to the claimed relief and took no part in the proceedings before the Royal Court. P has taken no part on this appeal, although we have seen P's letter to Advocate Moran supporting the appeal. We have heard only Advocate E Moran for H.

2 H is the current trustee of the M Settlement ("the Trust"), a discretionary trust governed by Jersey law and established on 29 June 2009 with a Trust Instrument of that date. H was appointed in February 2018 in place of the original trustee ("the Trustee")

3 The relief sought by H in its Representation to the Royal Court is the revision of a

transaction which the Trustee entered into in March 2012 as part of a programme involving several other transactions. The transaction in question was the sale of the Trust's 90% shareholding in a company, N, to a newly formed company, P, belonging to the Trust. The price for the shareholding was, and was satisfied by, the amount being loaned back to P on the terms of a facility letter (referred to below as the P Loan Agreement).

4 Before the Royal Court Advocate Moran submitted on H's behalf that what we describe as “the transaction” should in truth be viewed as three separate transactions each involving a separate exercise of a power of the Trustee. The three transactions were the following steps taken on 12 March 2012, namely (a) the making of a sale and purchase agreement between the Trustee and P, (b) the step taken by the Trustee to complete the sale, and (c) the step taken by P to complete its purchase. Essentially the relief sought in H's Representation is to have step (b) treated as though it had only ever stood quite alone, steps (a) and (c) never having happened and there never having been any power exercised by the Trustee in that regard. The power for the Royal Court to give this relief is said to be under Article 47G of the Trusts (Jersey) Law 2004 (“the Trusts Law”). H had obtained an opinion of Mr Lynton Tucker, English counsel, dated 25 March 2021, in support of the Representation. The Opinion was summarised at [24] of the Royal Court's judgment.

5 The purpose of the revision sought by H in the Representation is purely to mitigate the UK Inheritance Tax which, as matters stand, will be charged to the Trust as a result of the transaction having been entered into in the form that it was and then left unchanged until 29 June 2019, when there came to be the discretionary trust charge on the tenth anniversary of the settling of the Trust. The practical effect of the relief sought is to forgive the debt due from P to the Trust, not by the expedient of the Trust now releasing P from its obligation, but by treating it as never having come into existence, while all along P had come to have and to be entitled to retain the N shareholding.

6 The Royal Court's decision was that, while Article 47G may facilitate the setting aside of a transaction, it does not go so far as to allow the Court to substitute a different transaction, namely a simple gift to P; and this, the Royal Court concluded, was what it was in fact being invited to do.

7 H's contention on this appeal is that, in the circumstances of the present case, Article 47G of the Trusts Law does give the Court a discretionary power to bring about or enable a retrospective revision of the Trustee's powers exercised in making the transaction. The Royal Court, so it is submitted, having misdirected itself as to the scope of the available powers, we should reverse the Royal Court's decision and make the order sought in the Representation.

8 H's notice of appeal seeks, as an alternative, to have this Court make an order which directs the revision of the transaction of 12 March 2012 by changing the amount of the price for the N shareholding and of the outstanding debt, the loan, due from P to “such amount as the Court of Appeal may determine as suffices to eliminate the UK inheritance tax

consequences … namely a reduction of the consideration to USD 4,615,918 or less". We address this alternative at the end of this judgment. At this stage we would merely comment that it was not sought in H's original Representation, although that was amended in March 2021 and after the Representation had had a first hearing in September 2020 at which the Royal Court had expressed misgivings about giving the relief sought in the Representation.

9 Article 47G of the Trusts Law is part of a group of provisions which starts with Article 47B and continues to Article 47J. They were introduced by the Trusts (Amendment No.6) (Jersey) Law 2013. Their genesis was explained by this Court in *BNP Paribas Jersey Trust Corporation Ltd v Crociani* [2018] JCA 136A, *BNP Paribas Jersey Trust Corporation Limited, Appleby Trust (Mauritius) Limited and Camilla De Bourbon Des Deux* [2018] 2 JLR 175, at [72]ff. Fundamentally their purpose was to bring into operation in Jersey a code specifying circumstances in which the Court may relieve against mistakes and similar failures in relation to trusts, and the relief which the Court may give: mistake is the key for the exercise of the remedial powers in Articles 47E and 47G, while in Articles 47F and 47H the key is that there was inadequate or irrelevant attention.

10 Of the group of provisions comprising Articles 47B to 47J of the Trusts Law, it is Article 47G which is directly in point on this appeal. This is set out below, together with parts of and comments on others of those Articles.

(i) Article 47G, headed "Power to set aside the exercise of powers in relation to a trust or trust property due to mistake", provides:

> ***"(1) In this paragraph, "person exercising a power" means a person who, otherwise than in the capacity of trustee, exercises a power over, or in relation to a trust, or trust property*** .
>
> ***(2) The court may on the application of any person specified in Article 47I(2), and in the circumstances set out in paragraph (3), declare that the exercise of a power by a trustee or a person exercising a power over, or in relation to a trust, or trust property, is voidable and –***
>
> > ***(a) has such effect as the court may determine; or***
> >
> > ***(b) is of no effect from the time of its exercise*** .
>
> ***(3) The circumstances are where the trustee or person exercising a power –***
>
> > ***(a) made a mistake in relation to the exercise of his or her power; and***
> >
> > ***(b) would not have exercised the power, or would not have exercised the power in the way it was so exercised, 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."

(ii) Article 47B(2), defining "mistake", the essential requirement for the provisions of Articles 47G (and 47E) to be engaged, provides:

"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."

(iii) Article 47C, headed "Determination of "Mistake"" explains that the Jersey customary doctrine of *"erreur"* as applied to contracts is not to apply to questions concerning the meaning of mistake under Articles 47E or 47G.

(iv) Article 47D, headed "Application of powers under Articles 47E to 47I", explains that those Articles ***"apply in relation to the transfer of other disposition of property to a trust, or the exercise of any power over or in relation to a trust or trust property"***, whether occurring before or after the relevant law amending the Trusts Law. The point to note with this Article is that Articles 47E and 47F are concerned with transfers or dispositions of property to trusts, while Articles 47G and 47H are concerned with the exercise of powers in relation to a trust or trust property: the latter Articles do not in terms refer to transfers or dispositions of property effected in exercise of powers. All four of these Articles have relieving powers set out in a paragraph (2) which is materially similar (Articles 47E and 47F) or identical (Article 47H) to that in Article 47G set out above. We return to this point later.

(v) Article 47I, headed "Applications and orders under Articles 47E to 47H", provides, among other things that:

"(3) Without prejudice to Article 51 and subject to paragraph (4), the court may, consequential upon a declaration made under any of Articles 47E to 47H, make such order as it thinks fit .

(4) No order may be made under paragraph (3) which would prejudice

any bona fide purchaser for value of any trust property without notice of the matters which render the transfer or other disposition of property to a trust, or the exercise of any power over or in relation to a trust or trust property, voidable."

11 In these provisions the reference to "the court" is, by Article 1(1), a reference to *"the Inferior Number of the Royal Court"*.

12 The relevant facts can be summarised quite simply. Before March 2012 the Trust owned 9 of the 10 issued shares of £1 each in the capital of a company, N. This holding of N shares was registered in the name of a nominee holding for the Trust on the terms of a Declaration of Trust ("the First Declaration of Trust"). The remaining N share was owned by C, the trustee of a different trust, the C Trust.

13 It appears that C wished to have cash distributed from N to be available to a beneficiary of the C Trust. The Trust had no need of any cash, but the Trustee appears to have been willing to help C achieve what it wanted for the C Trust, but with the aim of maintaining a broadly 9 to 1 ratio of interest in N between the two trusts.

14 To this end a programme was organised. To start with, P was established by H as its wholly-owned subsidiary to be a new holding company and to be the Trust's vehicle for entering into various transactions described below. The programme was directed at allowing cash to be extracted from N to be enjoyed by the C Trust, while broadly speaking the Trust ended up with the benefit of an indirect debt from N rather than cash, but proportionately greater than the cash received by the C Trust. For its part, C started by establishing a company, Y, to serve a corresponding purpose to that of P.

15 What then followed, to carry out the programme, was the following:

(i) 12 March 2012 (the transaction in question in the present case):

(a) A resolution was passed by the Trustee expressed as approving a sale of the Trust's shareholding in N to P for £18.9m on the terms of a sale and purchase agreement ("the SPA") with the £18.9m price to remain outstanding as a loan on the terms of a facility letter. The detail of the resolution is set out later.

(b) A corresponding resolution was passed by P's Board of Directors.

(c) The SPA was entered into. This provided for completion to be effected by (i) the First Declaration of Trust being cancelled and a fresh one ("the Second Declaration of Trust") being delivered in its place, this time stating that the 90% shareholding in N was held on trust for P, and (ii) P delivering to the Trustee a loan agreement ("the P Loan Agreement") in an amount equal to the £18.9m purchase price. The P Loan Agreement was no doubt the facility letter referred

to in the resolution in (a) above. Further detail of the SPA is set out below. It explained, in particular, that *"The parties hereby acknowledge and agree that the Purchase Price will remain outstanding as a loan made by the Vendor to the Purchaser such loan to be governed in accordance with the terms of the Loan Agreement"*.

(d) The sale and purchase of the 90% shareholding in N provided for by the SPA was completed in accordance with its terms, save that the amount of the loan stated in the P Loan Agreement was expressed as "$18,900,000". A direction was given to the nominee by the Trustee by a Direction Letter to cancel the First Declaration of Trust and to give to P the Second Declaration of Trust as required by (i) in sub-paragraph (c) above, and this was acted on by the nominee making; and the P Loan Agreement was executed.

(ii) Also on 12 March 2012: Corresponding steps were taken by C and Y, so that by the end of the day N was now held as to 90% of its issued share capital by P and as to the remaining 10% by Y.

(iii) 13 March 2012: A special resolution was passed by N's shareholders subdividing the 10 ordinary shares of £1 each into 1,000 ordinary shares of £0.01 each. Accordingly, the Trust was beneficially entitled to of 900 of the shares in N's issued share capital, these shares being held by the nominee, while the remaining 100 shares belonged to Y.

(iv) 20 March 2012: N bought back from P 855 of the 900 shares belonging to P for a sum to be left outstanding on the terms of a second loan agreement ("the N Loan Agreement"); and at the same time N bought back from Y 95 of the 100 shares belonging to Y. In Y's case the price for the shares was paid in cash at completion. The share purchase agreement entered into between P and N was for a price of US$20,336,733, while the N Loan Agreement referred to a loan of £20,336,733. Mr A (an officer of the Trustee in 2012) states in his affidavit that there was a mistake in the amount stated in the N Loan Agreement.

16 After March 2012 various transactions took place between P, N and others, with N ultimately becoming a wholly-owned subsidiary of P. In themselves the significance of these is that it is no part of H's contentions that anything in history should be changed as part of or in consequence of the relief sought, save that P should be treated as never having owed the amount (or the full amount) of the loan in the P Loan Agreement.

17 In the transaction between the Trustee and P at sub-paragraph (i) in paragraph 15 above, P was no doubt a bona fide purchaser. However, given that P has not opposed the Representation or this appeal, and given that the relief sought is designed to remove from P the debt (or the bulk of the debt) owed to the Trustee so that P will not be prejudiced by the giving of the relief, it is unnecessary to give any consideration to possible limits resulting from Article 47I(4).

18 In the written contentions before us Advocate Moran for H has submitted that the fact that P was and is the Trust's wholly-owned company is relevant to the questions which arise on this appeal. This submission is not that to all intents and purposes P's assets may be viewed as belonging to the Trust, as though P were the Trust's nominee. On the contrary, the premise underlying the transaction of 12 March 2012, and the Representation, is that P became and remains as against the Trust beneficially entitled to the N shareholding and to the debt from N, and does not hold as nominee or trustee for the Trust. The submission, rather, is that where a person transfers to the person's wholly-owned company, the transfer if made without actual payment and without explanation is not to be viewed as a matter of benevolence or a gift. It is not a donation. Rather, the submission is, it is properly to be viewed as a commercial transaction in the nature of an investment, as it contributes to the value of the company, and hence to the interest of the owner in the company.

19 We return to this, below. The obvious comment, though, is that the character in which the recipient company takes the transferred asset would ordinarily depend on the intention of the owner when making the transfer and of the understanding of the recipient company when receiving it.

20 Although Article 47G is concerned with mistaken exercises of powers by trustees and by persons exercising the powers over or in relation to trust property and the avoidance of such exercises of powers, Advocate Moran for the Trustee did not in her written contentions draw attention to the powers given to the Trustee by the Trust Instrument which H was seeking on its Representation to have avoided. However, in answer to a question from the Court, she pointed to Clause 14 which gives general powers of investment etc of an individual beneficial owner, while Clause 15 also gives such powers while adding, among other specific powers, at paragraph (i) a power: “To invest any or all of the Trust Fund in any shares stocks bonds debentures of or other rights or interests in a company which is in any way associated with the Trustees and the Trustees may invest any or all of the Trust Fund in any unit trust fund or investment trust or company in which they or any company which is in any way associated with the Trustees or any of them are or is interested or which is managed by them or by such company as aforesaid…”

21 The problem which has arisen is that for the purposes of the IHT charge the Trust's holding of shares in N, if retained unchanged, would have qualified for business relief at 100% of their value. Also, the shares in P qualified for business relief. This is so, we understand, even though part of P's value rests in the N Loan Agreement rather than in P's shares in N. On the other hand, the loan due from P under the P Loan Agreement does not qualify for such relief. The effect of this is to bring the value of the loan into the IHT charge, which accordingly reduces the value of the Trust property.

22 To date the amount of the loan to P has been taken to be US$18.9 million, rather than £18.9 million, on the basis there must have been a typing mistake in the 12 March 2012 documents, this not being in the P Loan Agreement but in the other documents. Mr A has sworn an affidavit explaining that the relevant amount was always intended to be US$18.9 million, the accounting and functional currencies always having been in US dollars.

However, there is no explanation, whether by him or anyone else on behalf of H, as to the way in which a price of US$18.9 million (or, for that matter, £18.9 million) came to be arrived at as the price to be paid by P for the Trust's N shareholding, or how the price for the sale between P and N came to be arrived at. One might, perhaps, infer that this last price was connected with the amount of cash which it was intended to be taken from N to be paid to Y for the C Trust rather than any specific commercial value attributed to the shareholding itself; but there is no evidence on the point.

23 Plainly there are many ways this IHT problem could have been avoided. For example, the problem would have been avoided if the transaction between the Trust and P had been carried out so that P did not end up as a debtor owing the Trust the amount in the P Loan Agreement. This could have been by providing at the outset for the purchase consideration from P to the Trust to be the issue of fully paid shares in P rather than the payment of money. It could have been avoided if, at any time before June 2019, there had been a share subscription in P satisfied by the amount due from P to the Trust, or there had been a capital contribution made to P by the Trust of that amount.

24 Indeed, we have been told that as a result of dealings between the Trust and P in the period before June 2019 the net balance due from P had been reduced to US$14,284,082, so that that was in fact the amount of the P Loan brought into the IHT charge without business property relief, and so that what was needed to retrospectively avoid the charge was not after all the whole of the sale price and the P Loan of US$18.9, but only some US$14,284,082 of that amount: we were told that, had the sale price for the N shareholding in 2012 been US$4,615,918 or less, the IHT charge would have been avoided.

25 The Royal Court was not invited simply to remove P from the picture, making void the first transaction in the programme summarised above, so that the Trust was to be treated as if it had always continued in the position of owner of the 90% shareholding in N. This is because this approach would achieve nothing to avoid the IHT charge, as the Trust would still hold and be treated as having always held the benefit of the N Loan Agreement made as the price for N's purchase of its shares from P.

26 Instead, as we have mentioned, the transaction was to be pared down to become simply the Direction Letter and the Second Declaration of Trust, with P being left as entitled as against the Trustee to the benefit of the N shareholding. This was to be achieved, so H contended (see paragraphs (d) to (ei) in the prayer for relief in H's Amended Representation), by having the SPA and the P Loan Agreement declared to be “set aside … and … of no effect” from the date when made (paragraphs (d) and (e) respectively), while leaving in place the direction to the nominee to cancel the First Declaration and the nominee's making of the Second Declaration of Trust (paragraph (ei)). As the point is relevant for the discussion concerning Article 47G which follows, it should be noted that none of these paragraphs in the Representation refers to any declaration concerning the exercise of a power, while the discretionary power given to the Court by Article 47G(2) is to make such declarations. Instead, the paragraphs are directed at transactional instruments.

27 H's contention, in this regard, is that the sale of the N shareholding to P can be turned into a gift or donation to P of the same shareholding, there being power to achieve this given by Article 47G, by the simple process of avoiding parts of the sale and purchase transaction while leaving in place the handing over of the N shareholding.

28 Paragraph (ei) of the Representation, added by amendment after the first hearing of this Representation before the Royal Court in September 2020, seems to have been designed to reinforce the idea that the avoidance sought by H was not of the whole transaction, but only of several parts, and that the surviving part left standing alone would achieve the result mentioned in the previous paragraph. The paragraph seeks a declaration in the following terms:

> *"… that, for the avoidance of doubt, nothing in the orders sought in the [previous paragraphs] prejudices [the] validity or effect of the Letter of Direction dated 12 March 2012 or the Declaration of Trust dated 12 March 2012 or any letters of direction or declarations of trust concerning shares in [N] which subsequently directly or indirectly replaced that Letter of Direction and Declaration of Trust"*.

29 What, though, paragraph (ei) seeks to do is to establish that the removal of the SPA and the P Loan Agreement, so that they are taken to have been void all along, has no impact on P's right to the N shareholding as against the Trust.

30 The Royal Court found, on the evidence before it, that in the present case the Trustee had made a mistake when exercising its power to enter into and complete the N Share Sale Agreement, and also judged that in principle the mistake was of so serious a character that the Court had a discretionary power to make a declaration under Article 47G as regards the exercise of the power.

31 The point, as it was presented to the Royal Court, was that when deciding on the sale of the N shareholding to P, a decision taken it would seem to assist C and the C trust, the Trustee (a) did not recognise that if the disposition was by way of purchase with a loan left outstanding, there could be at some future time an avoidable IHT charge in the absence of further action, and (b) if aware of the position at the time, the Trustee could and would have acted differently as to the decision taken.

32 As regards the counter-factual proposition, that the Trustee could and would have acted differently, the contention before the Royal Court was not that the Trustee would have decided to sell the N shareholding on different terms to those agreed and carried into effect, but that the Trustee would simply have made a voluntary disposition of the N shareholding to P.

33 The evidence before the Royal Court concerning the mistake in relation to the transaction and what might otherwise have been done if the Trustee had foreseen the possible IHT

charge, seems to us slight. For example, there is no evidence at all as to the way in which the price for the sale of the Trust's N shareholding was arrived at, why the money price was left outstanding, or why indeed there was a sale. There may have been good reasons at the time: for example, the Trustee may have wished to have in the short to medium term the ability to draw cash up out of N, corresponding to the cash taken by Y, and then through the group structure to fund the Trust, without having to make future dividends or distributions. Bearing in mind that there was plenty of time before the 10-year discretionary trust IHT charge would need to be addressed, the structure put in place in March 2012 may not have involved any mistake at all.

34 However, there has been no appeal from the Royal Court's decision on that point, we have heard no argument on it, and so proceed on the basis that on the facts found the conditions in Articles 47B(2) and 47G(3) were indeed met.

35 Before considering H's contentions on this appeal in detail, it is appropriate to describe further the various documents for the transaction, the documents referred to in sub-paragraph (i) of paragraph 15 above:

(i) The resolution was signed by two directors (one of whose signatures resembles that of Mark A) on behalf of the Trustee. It was said to be a resolution of the Trustees' directors *"relating to the trusteeship of [P]"*. It recited that the Trustee *"has agreed to sell its beneficial interest in 9 shares … in the share capital of [N] to [P]…for a purchase price of £18,900,000 … under the terms of a sale and purchase agreement in the form attached …"*, and that pursuant to the SPA *"the Purchase Price is to remain outstanding as a loan … made by [the Trustee] as lender to [P] the borrower"*. The operative part of the resolution contained a resolution:

> *"(i) to sell the Shares on the terms of the [SPA] and for this purpose to authorise any 2 directors to sign the [SPA], and*
>
> *(ii) to make the Loan available on the terms set out in the facility letter attached hereto … and to authorise any director of [the Trustee] to sign the Facility Letter*.
>
> *(iii) to authorise any director of [the Trustee] to sign and, upon satisfactory Completion of the sale of the Shares as defined in the [SPA], to deliver to [the nominee] a letter in the form attached instructing the Nominee to execute a declaration of trust relating to the Shares in favour of the Purchaser."*

(ii) The SPA was signed for the Trustee, seemingly by Mr A and another, in each case over the legend "Director", and was also signed for P. The SPA recited the agreement of the Trustee in its capacity as trustee of the Trust to sell its shareholding in P. There were definitions of, among other matters, the Loan Agreement *("a loan agreement to be made on or around the date of this Agreement between the Vendor (as the lender) and the Purchaser (as the borrower) relating to a loan in an amount equal to the*

Purchase Price"), the Purchase Price (namely £18,900,000) and Sale Shares. There was an explanation that "the Nominee" held the Sale Shares as the Trustee's nominee under declarations of trust. The main operative provisions were clauses 2 and 3, headed respectively *"Sale/Purchase of Sales Shares"* and *"Completion"*. The former provided for the sale of the N shareholding for the Purchase Price, and also that the Parties *"hereby acknowledge and agree that the Purchase Price will remain outstanding as a loan made by the Vendor to the Purchaser such loan to be governed in accordance with the terms of the Loan Agreement"*. The latter provided:

> *"On [12 March 2012]:*
>
> > *(i) the Vendor shall procure that the Nominee shall:*
> >
> > > *(a) cancel the Declaration[s] of Trust, and*
> > >
> > > *(b) execute and deliver to the Purchaser a new declaration of trust whereby the Nominee will declare that it holds the Sale Shares as nominee for and to the order of the Purchaser*.
> >
> > *(ii) The Purchaser shall deliver to the Vendor a counterpart of the Loan Agreement duly signed."*

(iii) The P Loan Agreement was signed for the Trustee, seemingly by Mr A, containing an offer from the Trustee, accepted by P by a director, of a loan of US$18.9 million. There were various, typical provisions concerning availability, interest, repayment on demand, representations and warranties by P, and events of default.

(iv) The Direction Letter was signed by Mr A, it would seem, for the Trustee and was in the following terms: "We refer to declarations of trust … dated 30 June 2009 whereby [the Nominee] declared that it held a total of 9 shares in [N] … as nominee for the Trustee. The Trustee hereby instructs you … to cancel the [declarations of trust] and execute another in similar form declaring that you hold the Shares as nominee for [P] …"

(v) The Second Declaration of Trust was in a conventional form, the nominee declaring that it held the N shareholding to the exclusive order of P.

(vi) P's Board of Directors had passed the resolution referred to in paragraph 15(i)(b) above. This in terms provided:

> *"Purchase of Shares in [N]*
>
> *The chairman presented to the meeting a sale and purchase agreement (the "Agreement") between [the Trustee] (the "Vendor") in its capacity as trustee of the [Trust] and the Company (as the Purchaser) pursuant to which the Company would purchase 9 shares (the "Shares") in the share capital of [N] for a purchase price of £18,900,000 (the "Purchase Price").* It was noted that the terms of the Agreement provide that the Purchase Price

will remain outstanding as a loan (the "Loan") made by the Vendor to the Company. The chairman also presented to the meeting a facility letter relating to the Loan.

IT WAS RESOLVED:

(i) to purchase the Shares and to authorize any one director (or two directors should that be necessary) to sign the Agreement:

(ii) to accept the offer of the Loan and for this purpose to authorize any one director of the Company to sign the copy of the Facility Letter and return it to the Vendor."

36 It will be appreciated that H's Representation sought to have the documents at sub-paragraphs (ii) and (iii) in the previous paragraph treated as though never made, leaving the documents at sub-paragraphs (i), (iv), (v) and (vi). From the perspective of the Trustee, the document at (ii) was made under the authority of the resolution at (i), the document at (v) being made pursuant to the document at (iv).

37 It follows that as between the Trustee and P, any avoidance of the documents at (ii) and (iii) leaves unexplained the position, as regards the N shareholding, as between the Trustee and P, unless by reference to the resolutions at (i) and (vi) and the avoided sale and purchase of the N shareholding for the amount of the avoided loan. It is this point which paragraph (ei) of the prayer in the Representation was designed to address.

38 In the judgment of the Royal Court, when refusing the requested relief, the Commissioner noted at [28(iv)] that H accepted in its submission that

> ***"where a trustee enters into a sale agreement under its administrative powers and the sale is set aside on the ground of mistake, it follows that a transfer of ownership to the buyer should also be set aside because the transfer is consequential on the sale and if the sale goes so too should the transfer.*** … this is because, if a sale goes ahead and the transfer does not, the transaction is transformed into a voluntary transfer …"

39 The Commissioner went on to explain the consequence once the sale and purchase of the N shareholding by the Trust to P is treated as removed and why, as a result, it was not appropriate for the Royal Court to give the requested relief:

> ***"[28(vi)] …Left on its own the disposition of beneficial ownership changes the nature of the transaction from a sale to a gift.*** The Court may be able to limit the effect of the sale, but arguably not so as to transform it into a different transaction, namely a gift" .

40 The Commissioner then went on to say at [29]:

> ***"Standing back we can see that the arguments for and against the Court having the power to give partial effect to the transaction in this case are finely balanced, but we are not persuaded that the circumstances here do give the Court the power under Article 47G(2)(a) to effectively substitute a different transaction from that which the parties entered into.*** In our view the Court may have the power to determine the extent to which the sale transaction is given effect to, but not to the point where it is transformed into a different transaction; namely where it ceases to be a sale and become a gift. To do so would be to rewrite history by substituting a different transaction for that which was undertaken."

41 We understand that on this appeal there is no challenge to the general principle described in the extract from the Commissioner's judgment set out in paragraphs 39 – 40 above. That is to say, it is accepted that there is a limit to what lies within the ambit of the Court's powers under Article 47G(2) (and 47I(3)). The question is whether the relief sought by H lies beyond that limit.

42 With this we turn to the authorities which have been helpfully put before us by Advocate Moran. By way of introduction, the critical issues in the present case concern the identification of the relevant "exercise of a power" which is to be declared voidable, and the scope of the declaration which may be made as to that exercise.

43 The first of the authorities is the *BNP Paribas Jersey Trust Corp* case, referred to above. This was concerned with transfers of property put into a trust, and thus focussed on Article 47E and not Article 47G. Nevertheless, it is of assistance. Thus, it was noted at [85] in the judgment of the Court given by the Bailiff (Sir William Bailhache) that "The starting point in construing Article 47E is that one must take the ordinary and natural meaning of the words". This, we think, must apply generally in relation to the Articles 47B to 47J, and in particular to Article 47G.

44 As mentioned, Article 47E is concerned with mistake in relation to transfers or dispositions of property to a trust for a settlor. In paragraph (2) of the Article, when explaining the power given to the Court as regards such a *"transfer or other disposition of property to a trust"*, the language used is almost the same as that in Article 47G(2), namely to declare that the transfer or disposition "is voidable and (a) has such effect as the court may determine, or (b) is of no effect from the time of its exercise". Pausing there, as a matter of first impression, sub-paragraph (b) appears to indicate that the declaration to be made in that instance would be one that was tantamount to a declaration that the transfer or disposition was wholly void: it is to be declared voidable and to have had no effect. Sub-paragraph (a) contemplates, in contrast, that although voidable the transfer or disposition is to have some effect.

45 In the Court's judgment in the *BNP Paribas Jersey Trust Corp* case at [85] to [87], the Bailiff

went on to explain paragraph (2) of Article 47E in the following terms:

> ***"[85] … In our view the natural meaning of Article 47E(2) is that where a settlor has made a mistake having the characteristics set out in paragraph 3 of that Article the Court may follow one of three courses:***
>
> > ***(i) It may declare the transfer to be avoided and of no effect from the time of its having taken place;***
> >
> > ***(ii) It may declare the transfer to be avoided from the time of its having taken place but nonetheless be deemed to have had such effect as the Court may determine; or***
> >
> > ***(iii) It may declare the transfer to be avoided from a date subsequent to the time of its having taken place*** .
>
> ***[86] The second and third of those options flow from the language of sub paragraph (i), namely that the transfer may have such effect as the court may determine.*** It may deal appropriately with the justice of the case with an order that the transfer is avoided at the date it is made; but that nonetheless a trustee which has exercised its powers of investment pursuant to the trust deed in good faith in the interim should not find itself faced with criticism for having done so. Or that a trustee which has charged fees ought fairly to retain them, or, the trust having profited from permitted investments under the terms of the deed, the trustee might retain associated fees or permitted profits. By contrast, it may sometimes be the case that some events have taken place between the date of the transfer and the date on which it is set aside which make it just to declare that the transfer be of no effect from a later date than the date it was made .
>
> ***[87] In our judgment this construction of Article 47E(2) is consistent with the general approach of the Trusts Law in establishing overall principles and allowing them to be developed flexibly by the Royal Court.*** In essence, the legislature has conferred upon the court a discretion to determine which of the three courses it would follow if satisfied that the mistake was of so serious a character as to render it just for the court to make any declaration at all under that Article."

46 At [93] of the judgment the Bailiff explained that in most operational aspects Article 47E followed the settled, pre-amendment, approach of the Royal Court, and then added:

> ***"… 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))."

47 In the following paragraph of the judgment in the *BNP Paribas Jersey Trust Corp* case the Bailiff went on to explain the scope of the discretionary powers under Article 47E(2) as being comparatively moderate and requiring care in their exercise. This is how it was explained:

> ***"[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."

48 There is no warrant, we think, for taking it that in Article 47E(2), or for that matter in the corresponding language in Articles 47F(2), 47G(2) and 47H(2), where the provision gives power to declare the relevant transfer, disposition or exercise of a power "voidable and …" what follows in sub-paragraph (a) is to be taken as enabling the Court to reform the transfer, disposition or exercise so that it becomes a new and different one from that made voidable. As this Court summarised the power in [85] of the Bailiff's judgment, quoted above, what is set out in sub-paragraph (a) is contrasted with sub-paragraph (b) in that the latter points to the mistaken matter being made altogether void and of no effect at all, while sub-paragraph (a) allows the mistaken matter to be partially avoided so that some effect is given to it. But when sub-paragraph (a) refers to the declaration of voidability including the voidable matter having *"such effect as the court may determine"*, the reference in the context must be to preserving, or allowing to survive, some aspect of what is otherwise declared voidable. The reference cannot reasonably be taken to allow expansion upon or development of what is voidable and to be partially made void.

49 Specifically in Article 47G(2), as in Article 47H(2), what is allowed is a declaration of voidability as to the relevant exercise of a power, and as to the effect or absence of effect of the voidable exercise. It cannot be a correct interpretation of the Article that when a Court declares an exercise of a power to be voidable it may at the same time declare that it is to have effect as if an effective exercise of a different power. We note that Advocate Moran has not contended otherwise on this appeal, and consider that she was correct in this. She

did nevertheless seek to emphasise that the power given by paragraph (2) is very wide, seeking to argue that at the same time as declaring an exercise of a power to be voidable, the exercise would be directed to have some effect by a process of reforming the terms of the exercise. This argument she relied on in particular in support of the second ground of appeal addressed at the end of this judgment.

50 We reject the submission that the power given in Article 47G(2) goes that far. We consider that the approach to the scope of the power in that paragraph (2) was intended in the Trusts Law to be the same as that in Articles 47E(2) and 47F(2), which use materially the same words. Further, putting the point in simple terms, it is difficult to see how the relevant words in paragraph (2) of the four Articles (47E, 47F, 47G and 47(H)) can be interpreted so that on the one hand a matter (that is transfer, disposition or exercise of a power) is declared voidable, and on the other hand it is in the same declaration declared to have effect as a different matter. In our judgment the words do not go that far. Succinctly, it is one thing to give the Court a discretion to choose between complete or partial avoidance, and not to be confined to an all or nothing choice as might have been the position before the 2013 amendment to the Trusts Law. It is another thing to give the Court a power to rectify so as to replace something erroneous with a different thing which would have been better but might not have been the thing actually done or intended at the time.

51 Support for the proposition that there should be this limit to the power given by Article 47G(2) appears from the judgment of the Royal Court in *Representation re The B Trust* [2019] JRC 035, *A v Helm Trust Company Limited* [2019] (1) JLR N[4]. In that case a transfer by a settlor into a trust was sought to be avoided on the ground of mistake. The Royal Court rejected the submission that on declaring the transfer voidable the Court should direct the transfer to be taken as having been a gift to the representor's spouse, and with repayment being to her, such a gift being the disposition which would most closely have achieved the representor's original intention. The short point was that it is one thing to avoid, wholly or partially, a transfer and another for the Court, under the guise of partial avoidance and consequential direction, to put in place a different disposition.

52 On this appeal H accepts that the *B Trust* case was correctly decided, and that there is the limit to the Court's powers of avoidance given by paragraph (2) of the various Articles which we have described. As we explain below, the contention is that what is sought in H's Representation does not go beyond that limit, and the *B Trust* case is distinguishable.

53 In passing we note that, from the way the Royal Court expressed the point at [41] of the judgment in the *B Trust* case, putting in place such a disposition " *to achieve the best taxation outcome*" would not necessarily be an appropriate exercise of the discretionary power given to the Court, even if available. We have not had any argument as to the approach to be taken by the Court to the exercise of its discretion in giving relief when, as in the present case, the assistance of the Court is only sought at all to reverse something as a matter of history, when the exact same matter can be achieved without any assistance at all, and the purpose of involving the Court is purely to avoid or mitigate tax.

54 In *Representation re The Grundy Trust* [2020] JRC 071, *In the matter of the Representation of the Grundy Trust* [2020] 1 JLR 153, the Royal Court was asked to give a declaration concerning a trustee's exercise of its power of exclusion of a particular individual as a beneficiary. What had happened was that S and his wife had been excluded, when the exclusion of the wife was appropriate only during S's life: the declaration sought, and made by the Court, was that the exclusion should be declared to be voidable but of effect for a limited time only (S's lifetime) and then of no effect. This result was considered by the Royal Court to lie within the scope of the power given by Article 47H(2) in exactly the same terms as that in Article 47G(2).

55 In the judgment of the Court given by the Deputy Bailiff, Mr R.J. MacRae, it was noted at [34] and [35] that while " ***The Court has a discretion as to determining what effects, if any, of the exercise of the trustees' fiduciary powers are to be retained … That is not to say that the Court is entitled to re-write history, or to make a new decision which the trustee wished it had made at the time"***. In this connection the Deputy Bailiff referred to, and quoted from, the judgment in *Representation re The B Trust*.

56 The Court then went on to find, on the facts, that it had power to give the requested relief. As the Deputy Bailiff explained at [36]:

> ***"Accordingly for the Court to order the exclusion of the settlor's wife as a beneficiary to take effect only for the duration of the settlor's life is not to substitute a different transaction for that which was undertaken.*** To make such an order is squarely within the Court's power to declare that the Former ***Trustee's exercise of its fiduciary power shall have such effect as the Court may determine."***

57 Thus the essential reasoning of the Court in that case was that there was an exercise of a single power, the power of exclusion, which could be avoided to a limited extent, namely so that it excluded only for a limited time by being avoided after that time, and that this limited avoidance did not involve the substitution of a different exercise.

58 We consider that in these last two cases, as in the present case, the Royal Court rightly concluded that there is no power for the Royal Court, in the guise of avoiding or partially avoiding a transfer or disposition (Articles 47E(2) and 47(F)(2)) or the exercise of a power (Articles 47G(2) and 47H(2)), to bring about a different transfer or disposition or the exercise of a different power. For reasons we have explained already, in our judgment this is a correct view of the scope of what is provided in paragraph (2) of those Articles.

59 None of the three cases referred to above assists with the question whether, as H contended before the Royal Court, the reference in Article 47G to *"the exercise of a power"* can be taken to be a reference to the making of any instrument or action made pursuant to and to give effect to the exercise of a power. In the present case H sought to parse the

transaction at step (i) of the programme into the several transactional instruments made by or between the Trustee and P (namely the SPA, the Loan Agreement, and the Directions Letter (and with that the Second Declaration of Trust)), notwithstanding that these instruments were all, so far as concerns the Trustee, made pursuant to the Resolution. The Representation sought the avoidance of the first two of these, with the third and fourth (the Directions Letter and the Second Declaration of Trust) left standing.

60 Consistently with this approach, the Opinion we have referred to above, said that there had been *"one overall transaction"* of which *"the powers exercised by [the Trustee] as trustee of the Trust … formed parts"*. In other words, H's contention was that the single overall transaction of sale and purchase was comprised of several different exercises of different powers. The Opinion then postulated that it was permissible for the Court to set aside certain of the dispositions, while preserving "the transfer of beneficial ownership of the [N] shareholding in [N] to [P]".

61 The difficulty with this approach, as it seems to us, is that it ignores the fact that the SPA and the P Loan Agreement were both made with a third party, P, each of these two instruments being authorised to be made as part of the same exercise of power (namely the Resolution) which authorised and resulted in the Direction Letter and then the P Declaration of Trust: in each case the execution of the instrument for the Trust was by officers (in the case of the SPA) or an officer (in the case of the P Loan Agreement) acting under the authority given by the Resolution. The only authority given to Mr A (or whichever other officer of the Trustee signed the Direction Letter) was given by that Resolution.

62 A further difficulty with this approach is that leaving in the landscape simply the Directions Letter and the Second Declaration of Trust does not assist with the question whether, as a matter of fact, the beneficial interest in the N shareholding is to be taken to have arrived and remained with P without the Trust having any rights to the shareholding as between itself and P. Jersey law does, after all, recognise the concept of resulting trust. In circumstances where P received an asset from the Trustee in return for the unpaid price under an avoided contract of sale and purchase, the obvious question would be whether P is entitled to retain the asset as against the Trustee in the absence of some change of position defence or the like. We have already quoted from the Commissioner's judgment in the present case in which the point was discussed. Ordinarily we consider, in agreement with the Royal Court, that the avoidance of the sale would also avoid the right of the recipient to retain the sold property.

63 Further, we consider that in the present case there are good practical reasons for thinking that the ordinary result would follow. This is because P's Board had resolved to purchase the N shareholding from the Trust in consideration for the P Loan. That decision on the part of P's Board is not touched by the relief sought. On the putatively revised history, P received via the Second Declaration of Trust the benefit of the N shareholding as against the nominee, and shortly after received some of those shares and the proceeds of sale of the remainder. How this came about is a matter of record from P's point of view. Nothing will change that history: P by its Board had intended, and resolved and agreed, to pay to the

Trust a large amount of money for these benefits. But given that the sale and purchase was now to be avoided as never having happened and in consequence the money as never having been owed, it is not clear to us that without something more being done P could claim to retain what it had received in return for its failed promise of payment.

64 To meet the resulting trust point H contended, before the Royal Court and on this appeal, that the correct inference, in a case where simply there were the Directions Letter and the Second Declaration of Trust, would be that because P was wholly-owned by the Trust there was a beneficial disposition of interest. But no authority was cited for this proposition, whether before the Royal Court or before us, and we are not persuaded that the contention is correct. As mentioned above, paragraph (ei) in the prayer in H's Representation seems plainly designed to show that despite the avoidance of the bargain under which P took and promised to pay for the N shareholding, P's beneficial interest remains undisturbed. We are not certain that in the way it is expressed it would be sufficient to make the position certain. Recasting it, however, would only demonstrate that the Representation seeks to turn an acquisition by P on purchase from the Trustee into an acquisition by way of donation.

65 There was one decision of the High Court of England and Wales which H relied upon before us to support the proposition that for the Trustee to have transferred the benefit of the N shareholding to P without any price, to have transferred it in other words as a voluntary donation, was no different from the transfer of the beneficial interest on sale. This was *IRC v Levy* [1982] STC 422, a decision of Nourse J. In that case the issue was whether the making of an interest-free loan by a trust to a 99% owned company involved the making of a “settlement” so as to allow UK income tax to be charged to the trust by reference to income from the company's investment of the loan proceeds. There was previous authority which established that if, but only if, a transaction had an element of bounty (described by Nourse J as an expression, not of definition, but of “judicial gloss”), it might be characterised for income tax purposes as a settlement. Nourse J upheld the Special Commissioners' decision that the loan did not have that element; whether viewed subjectively from the perspective of the maker or looking at the transaction objectively there was no element of “bounty”.

66 In our judgment, however, the Levy case does not assist H, as the difference between a loan and a gift does not depend on whether or not there is an element of bounty to be found, but on the intention with which the disposition is made. Further, the case is not authority that where a disposition is made to a wholly-owned or substantially-owned company without any evidence at all as to the maker's intention, the inference is necessarily that the disposition was voluntary and intended to be a gift rather than held for the maker by the company.

67 Thus, in the present case the intention of the Trustee, so far as it can be inferred from the resolution passed by the Trustee on 12 March 2012 and the documents executed, was to sell the shareholding for a price; and the subjective intention of P was similarly to bind itself to pay the price. That was also the parties' objective intention, if one looks simply at all the

transaction documents standing apart from the resolutions each passed. That was a perfectly conventional business transaction intended by each party. But if there had instead been intentionally a donation made of the beneficial shareholding without any payment obligation owed by P to the Trust, each party's intention would have been quite different. While the Trustee may have seen the Trust as receiving a return, or value, for the Trust through an increase in P's net assets by reason of the donation, still the disposition would have been one of gift in that the Trust was intentionally choosing to give without any payment, or promise of payment, by P for the property disposed of in P's favour.

68 In short, we do not find that the *Levy* case does anything to cast doubt on what was said by the Royal Court at [28(iv)] of the Commissioner's judgment, quoted in paragraph 38 above.

69 On the appeal before us the position taken by H in the notice of appeal and H's contentions is, we think, rather more realistic. This contention is that what is in issue is a single exercise of a power by the Trustee. However, H then seeks to characterise this exercise so as to arrive at the conclusion that turning the result of what is said to be its (voidable) exercise from a sale to a donation is simply the result of partial avoidance. The submission is that the power exercised was one of “administration” and was exercised by deciding on and implementing the transaction. This exercise was mistaken, so it is submitted, only insofar as it involved the transaction being implemented by way of sale and purchase with the debt left outstanding. Nonetheless, so it is submitted, what was intended was to have the benefit of the N shareholding pass to P: that was the decision made by the Trustee and the power exercised, and the making of the SPA and the rest of it were mere mechanics to give effect to that intention and decision. On the basis that the mechanics may be broken down into the individual component parts, namely the SPA, the Loan Agreement, the Directions Letter and the Second Declaration of Trust, then while declaring the exercise of the power voidable the Court could also declare that the last two of these four parts should remain while the first two should be treated as if they had never happened. This, so it is said, is to give partial effect to the voidable exercise of a power and not to bring about a different exercise of a power.

70 Leaving on one side the difficulty that merely setting aside the SPA and the Loan Agreement still leaves the position of P unclear, logically H's argument has therefore to be that the Court, in the process of declaring the relevant exercise of the Trustee's power voidable and having such effect as the Court determines, may declare that it has the effect of resulting in a donation instead of a sale. That is, however, beyond the limit of the Court's power, for reasons we have explained already.

71 Quite simply, the exercise of the Trustee's power to be declared voidable was when the Trustee resolved upon the sale of the N shareholding and authorised the matters in the Trustee's resolution of 12 March 2012; that is, the transaction in paragraph 15(i)(a) above; being the disposition of the Trust's interest in the N shareholding to P by way of sale. It was not to be effected as some independent donation. The only authority given to Mr A to give the Directions Letter was do that *“upon satisfactory Completion of the sale of the Shares”*; otherwise the Directions Letter was unauthorised.

72 The Trustee never considered exercising any power of disposition of property by way of voluntary transfer to P, and P never understood that it was receiving the benefit of the N shareholding in that way and not by way of purchase. To seek, under the guise of avoiding the transaction which was resolved upon and effected, namely a sale and purchase, to bring about retrospectively the discharge of a debt for the purchase price and to turn the transaction into a donation goes beyond the scope of Article 47G(2).

73 We reject also the alternative contention on this appeal, namely that there should be a declaration of voidability as to the Trustee's exercise of power in selling the N shareholding and as to that exercise having effect, but only for a sale at a price reduced sufficiently to avoid the IHT charge. As we have stated, this application for alternative relief was not contained in H's Amended Representation dated 15 March 2021 and so was not sought from the Royal Court. Advocate Moran sought to argue that it was raised by H's claim in the prayer for "(h) such further relief at [sic] the Court deems appropriate", but we reject this – this is a consequential not a substantive order. In any event, it fails to meet the point that no alternative relief was in fact sought from the Royal Court, no argument presented, and no decision made from which to appeal to this Court. If we thought that there might be any grounds for the alternative declaration being made, we would have simply directed H to apply to the Royal Court, it being for the Royal Court in the first instance to consider and decide on the relief, if any, to be given on an application which it has yet to have before it. However, we do not consider that grounds exist for making this alternative declaration.

74 First, it seems to us that Article 47G(2)(a) or (b) can only apply once the Court has declared that the exercise of a power by a trustee "is voidable". Here, the Representor is not seeking such a declaration and no power is said to be voidable (see paragraphs 26 and 49 above). Changing the price is not avoiding a power or even a transaction.

75 Second, it seems to us that it seeks, under the guise of allowing a voidable exercise of a power to have partial effect, to substitute a new price into the SPA and the Loan Agreement in the place of the price set between the Trustee and P in March 2012. The Royal Court had no information as to how the price was arrived at or why (see paragraphs 22 and 33 above). It is as if those instruments are to be rectified on the basis that they misstated the price for the N shareholding and the amount of P's debt. This is ultimately little different from rectifying those instruments to effect a gift by changing the price to a purely nominal one or minimal one: the aim is to bring about a different transaction from that made by the voidable exercise of the Trustee's investment power. The only basis for the Court rewriting the price as US$4,615,918 or less would be to reduce the Trustee's liability to IHT to zero. While the Court has statutory power to undo or alter a mistaken step by a trustee, the Court has no power to take a positive step to assess or fix the price at the figure to reflect the best taxation outcome for the Representor (see *Representation re The B Trust* at [41] – [42]). We were offered no compass as to how the Court should begin to approach such a power: if it were to exist, the price need not be US$4.6 million, but might be lower (as the notice of appeal contemplates) or indeed higher.

76 In the result we dismiss H's appeal.