

A v B

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Ramsden, Ronge
Judgment Date:	04 September 2018
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Text

[2018] JRC 159

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, and** Jurats Ramsden **and** Ronge

Representation of A

In the Matter of the G Trust

And in the Matter of Articles 11, 47E, 47I, 51 and 53 of the Trusts (Jersey) Law 1984 (As Amended)

Between

A

Representor

and
B
First Respondent

and
C
Second Respondent

and
D
Third Respondent

and
E
Fourth Respondent

and
F
Fifth Respondent

and
EFG Trust Company Limited
Sixth Respondent

Advocate O. J. Passmore for the Representer and Sixth Respondent.

Authorities

In the matter of the K Trust [\[2017\] JRC 177](#).

Trusts (Jersey) Law 1984.

Re Lochmore Trust [2010] JRC 068.

Re S Trust [\[2011\] JLR 375](#).

In the matter of the S Trust and in the matter of the T Trust [\[2015\] JRC 259](#).

In re Onorati Settlement [2013] (2) JLR 324.

In the matter of the Strathmullen Trust [2014] (1) JLR 309.

In the matter of the Z Trust [2016] JRC 048.

Trust — application to have the trust set aside on the grounds of mistake.

THE COMMISSIONER:

- 1 The representor applies to have the G Trust dated 12th May, 2014, or his dispositions into it set aside on the grounds of mistake, because of the adverse and unintended English tax consequences that have arisen.
- 2 The facts are very similar to those in the case of *In the matter of the K Trust* [\[2017\] JRC 177](#). The representor is a successful Greek entrepreneur, who is neither resident nor domiciled in the United Kingdom, and had no reason to believe that UK taxes would apply to him.
- 3 The representor had a bank account with Eurobank in Luxembourg. It was his understanding that Eurobank and the EFG Group both used to be ultimately owned by interests connected with the family of Spiros Latsis (a well-known Greek business magnate). In 2012, he learnt that Eurobank was being deconsolidated from the EFG Group, and following that, he decided to move his money out of Eurobank.
- 4 The representor held discussions with various people, and was introduced to Mr Demetris Pisiaras of EFG Private Bank Limited in London (“EFG Bank”), to whom he made it clear that succession planning was an important objective, and it was in this context that a trust was suggested by Mr Pisiaras as an appropriate structure. The representor met with Mr Pisiaras (and another representative of EFG Bank) in London on 8th November, 2013, a meeting which was also attended by a representative of EFG Offshore Limited (“EFG Offshore”).
- 5 The note of that meeting refers to succession planning, and a discussion about the type of trust required. Importantly, the representor was advised that in order to transfer the funds held in Eurobank to the proposed trust, it was necessary for him to do so via a new account, which was opened for him with EFG Bank in London.
- 6 The G Trust (“the Trust”), which is a Jersey proper law discretionary trust, was established on 12th May, 2014, with EFG Trust Company Limited (“EFG Trustee”), a wholly owned Jersey incorporated subsidiary of EFG Offshore, as trustee. The beneficiaries of the Trust are the representor and his four children, the first to fourth respondents. There is also a protector, the fifth respondent, whose consent is required to the exercise of certain powers. The representor made a number of transfers to EFG Trustee from his new London bank account, with a Sterling equivalent of £1,135, 931. He also transferred a portfolio of investments of some €3,314,489.37, of which (on a worst case scenario) some £1,729,573.45 comprised UK *situs* assets, i.e. bonds issued by UK resident companies or shares registered in the UK.

- 7 In all of these transfers, the representor assumed that if any tax advice was needed, he would have been told, and he had no reason to believe that there were any potential tax consequences which were not being addressed. At no time, he says, was it suggested to him that these transfers might give rise to any tax liability, or that he needed to take tax advice. Accordingly, he assumed, mistakenly, that no tax liabilities would arise from the transfers.
- 8 In or about 29th November, 2017, EFG Trustee informed the representor that there was a potential issue with regard to the transfers made to the Trust being subject to UK tax. Advice was taken from Mr Oliver Conolly, English Counsel of Pump Court Tax Chambers, who advised that the *situs* of a bank account is the place where the branch in which it is held is located. Accordingly, the London bank account of the representor, which he had been advised to open, was sited in the UK.
- 9 It follows from this that not only was the setting up of his London bank account completely unnecessary, but it gave rise to UK tax liabilities that were entirely avoidable by the simple expedient of the representor simply making the transfers directly from his account with Eurobank. We have no information as to why such flawed and wholly unnecessary advice was given, as it was in the case of *In re K*.
- 10 Counsel advised that the transfer of the UK *situs* assets gave rise to a 20% Inheritance Tax liability, which became due and payable six months after the transfers themselves, of £335,657.63p (plus interest of £32,223.12p), if discharged by the representor, or £279,714.69p (plus interest of £26,852.61p) if discharged by EFG Trustee. There were further adverse tax consequences in terms of 10 yearly charges and exit charges.

The Law

- 11 The application is brought under Article 11 and Article 47E of the Trusts (Jersey) Law 1984 ("the Trusts Law").
- 12 Article 11 of the Trusts Law is in these terms, to the extent relevant:-

"11 Validity of a Jersey trust

1. ...

2. Subject to Article 12, a trust shall be invalid –

a. ...

b. to the extent that the court declares that –

(i) the trust was established by duress, fraud, mistake, undue influence or

misrepresentation or in breach of fiduciary duty .

(ii) ...

(iii) ...

(6) Property as to which a trust is wholly or partially invalid shall, subject to paragraph (5) and subject to any order of the court, be held by the trustee in trust for the settlor absolutely or if the settlor is dead for his or her personal representative .

(7) In paragraph (6) “settlor” means the particular person who provided the property as to which the trust is wholly or partially invalid .

(8) An application to the court under this Article may be made by any person referred to in Article 51(3).”

The representor is a person referred to in Article 51(3), and is therefore entitled to make an application under Article 11.

13 Article 47E is in the following terms:-

“47E Power to set aside a transfer or disposition of property to a trust due to mistake .

(1) In this paragraph, “person exercising a power” means a person who exercises a power to transfer or make other disposition of property to a trust on behalf of a settlor .

(2) The court may on the application of any person specified in Article 47I(I), 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.”

The representor is a person specified in Article 47I(l) and is therefore entitled to make the application under Article 47E.

14 It is also relevant to set out Article 47B(2), which defines what is meant by “***mistake***”.

“47B Articles 47D to 47J: Interpretation

(1) ...

(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.”

15 The test to be applied under Article 11 was summarised in *Re Lochmore Trust* [2010] JRC 068 and settled in *Re S Trust* [2011] JLR 375. The Court must 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?

16 Whilst there may be a fine distinction between the test under Article 11 and the test under Article 47E, they are, for these purposes, the same (see *In the matter of the S Trust and in the matter of the T Trust* [2015] JRC 259 at paragraph 20).

Decision

- 17 The application of the test to the facts in this case, as in so many of these cases, presents the Court with no difficulty. Clearly, there was a mistake on the part of the representor as to the tax consequences of the transfers that he made. No-one in his position would intentionally create a tax liability in a jurisdiction in which he was neither resident nor domiciled, when there was no reason to do so. The advice given to him at a meeting in the presence of two London bankers and a representative of EFG Offshore that he should make the transfers from a newly created account in London seems inexplicable.
- 18 In terms of the third part of the test, the representor drew to our attention that:-
- (i) In EFG Offshore's questionnaire he had signed for the formation of the Trust, he was asked to confirm whether he had any professional advisers and answered "No". He also acknowledged that EFG Offshore did not give advice on tax consequences arising outside Jersey, and that it strongly recommended that this advice was sought prior to the formation of the Trust.
 - (ii) When making certain of the transfers, he signed a letter confirming that he had taken appropriate advice as to the effect of settling his assets into the Trust.
- 19 The representor had not in fact taken advice on the tax consequences of creating the Trust, and if he had done so, this mistake might well have been avoided. Should he and the other beneficiaries therefore suffer the consequences of his failure to do so? We noted two points in this respect:-
- (i) These forms/letters had been drafted by EFG Offshore to protect its own position and that of EFG Trustee in relation to these matters.
 - (ii) It was not unreasonable for the representor to rely on the professionals involved, experienced in creating such trusts, to flag up a potential tax issue, particularly where they had given positive advice that the transfers into the trust should be routed through a new London bank account.
- 20 The donee in this case is EFG Trustee, and it rested on the wisdom of the Court. The other beneficiaries and the protector supported the representor's application. Ultimately, it seems to us that it would be unjust for these transfers to remain in the Trust with the serious tax consequences that would flow from that, and accordingly, the third part of the test is met.
- 21 Not all of the assets transferred to the trust were UK *situs* assets, and the question arose as to whether the whole trust should be set aside (pursuant to Article 11) or just those transfers that gave rise to a tax liability (Article 47E), which would leave some assets within the Trust. The representor, supported by the other beneficiaries, asked for the whole trust to be

set aside, pursuant to Article 11.

- 22 As the Court said in the case of *In the matter of the S Trust and in the matter of the T Trust* [2015] JRC 259 at paragraph 17:-

“The Courts approach these matters with realism and the arrangements in relation to a trust are usually looked at in the round.”

Looking at the arrangements for this trust in the round, we consider that the same mistake operated on the mind of the settlor in relation to the creation of the Trust and the subsequent transfers to it, the bulk of which took place within a few months of its creation. We will therefore proceed under Article 11 and declare that the Trust is invalid.

- 23 The effect of this is that the Trust is voided as if it had never existed and the trust fund has at all times been held on bare trust for the representor as settlor (see *In re Onorati Settlement* [2013(2)] JLR 324 and *In the matter of the Strathmullen Trust* [2014(1)] JLR 309). Whilst EFG Trustee cannot rely on the provisions of the trust deed for the payment of its remuneration and the reimbursement of its costs and expenses, it can, as the Court pointed out in the case of *In re Strathmullen* at paragraph 35, still rely on Article 26 of the Trusts Law, now extended to include remuneration, and the Court's inherent jurisdiction. The representor seeks an order making it clear that EFG Trustee can retain remuneration and the reimbursement of costs and expenses it has already received and can continue to charge reasonable remuneration and reimburse itself for all costs and expenses reasonably incurred up to the date of this declaration of invalidity. We agree that it is fair to make such an order.
- 24 EFG Trustee has administered the trust fund from inception in good faith, making administrative decisions and a number of distributions to the representor. The Court has an affidavit from Ms Constance Clark of EFG Trustee dated 19th June, 2018, setting out the history of the administration of the Trust in detail.
- 25 The representor therefore sought an order that EFG Trustee be directed to administer the Trust on the same footing as though the investment and other administrative steps carried out by it prior to the date of this order, including all distributions to the representor, had been carried out by it as bare trustee for the representor.
- 26 The distributions to the representor (there were no other distributions) do not give rise to any difficulty, in that the assets were held on bare trust for him in any event.
- 27 The order sought is the third form of confirmation referred to in the case of *In the matter of the Z Trust* [2016] JRC 048 at paragraph 64(iii), which constitutes a direction to a trustee to continue administering the trust by leaving previous acts or omissions undisturbed.

- 28 In this case, we have an invalid trust, and we are not concerned with giving directions for its ongoing administration. EFG Trustee can have no exposure to claims of breach of trust brought by the beneficiaries of the Trust, as there has never been such a trust and they have never been beneficiaries. It is exposed, however, to claims brought by the representor, for whom, unbeknownst to it, it has always held the trust assets on bare trust.
- 29 In our view, this potential exposure is best addressed by the use of Article 45 of the Trusts Law to relieve EFG Trustee from personal liability for any breach of the bare trust it may have committed on the ground that it honestly and reasonably did not know it was acting as a bare trustee. However, it should not be given a free ride for breaches of trust it may have committed, assuming the Trust was valid, so this relief will not extend to breaches of bare trust which would also have constituted breaches of the Trust if it had been validly constituted.

Conclusion

- 30 For all these reasons, we make the following orders:-

- (i) We declare the Trust invalid for mistake pursuant to Article 11(2)(b)(i) of the Trusts Law.
- (ii) The trust fund shall be held by EFG Trustee on trust for the representor as settlor absolutely.
- (iii) EFG Trustee can retain the remuneration it has already charged and the reimbursement it has already received for expenses and liabilities reasonably incurred, and can continue to charge its reasonable remuneration and reimburse itself for all expenses and liabilities reasonably incurred up to the date of this declaration.
- (iv) EFG Trustee is relieved from personal liability for any breach of the bare trust upon which it has held the trust assets, save to the extent that any breach of the bare trust would also have constituted a breach of the Trust, assuming it had been validly constituted.