

# IFM Corporate Trustees Ltd v Jeanine Helliwell and Geraldine Louise Mountain

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	The Bailiff
<b>Judgment Date:</b>	31 July 2015
<b>Neutral Citation:</b>	[2015] JRC 160
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<b>Court:</b>	Royal Court
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## Text

[2015] JRC 160

ROYAL COURT

(Samedi)

Before:

W. J. Bailhache, **Esq.**, Bailiff, **and** Jurats Fisher **and** Olsen

Between:  
IFM Corporate Trustees Limited  
Representor  
and  
Jeanine Helliwell  
First Respondent  
and

Geraldine Louise Mountain  
Second Respondent

**Advocate H. E. Brown for the Representor.**

**Authorities**

Trusts (Jersey) Law 1981.

*In the matter of the Exeter Settlement* [\[2010\] JLR 169](#).

Trust — reasons for making of an order for rectification in accordance with the representation.

**The Bailiff**

- 1 On 8<sup>th</sup> June the Court heard an application for rectification of a trust pursuant to the Court's powers under Article 51 of the Trusts (Jersey) Law 1981 ("TJL"). The Court gave judgment making an order for rectification in accordance with the prayer of the representation with reasons reserved. This judgment contains those reasons.
- 2 The Representor is trustee of the Contractor Solutions Employer-Financed Retirement Benefit Scheme 2012 ("the Trust"). The Trust was established upon the acquisition of an employment business by Lighthouse Trustees Limited as trustee of the K2 Contractor Solutions Trust ("the Settlor") by an instrument dated 14<sup>th</sup> May, 2012, ("the Trust Instrument"). The business of the Settlor was to second its staff to third parties, primarily in the UK, and the Settlor ceased its trade on 31<sup>st</sup> March, 2014. As a consequence the Trust is no longer active.
- 3 The Trust was an employer financed retirement benefits scheme under which the employees could benefit, and as such was intended to motivate and incentivise the employees of the Settlor, which employed approximately 2000 employees all of whom were intended to form part of the class of beneficiaries under the Trust. The principal trusts were for the trustee to hold and invest the trust fund, accumulating income as an accretion to capital save insofar as the same was appointed, and otherwise upon the expiration of the trust period to appropriate the income and capital amongst the persons entitled to benefit at the absolute discretion of the trustee as to the recipient and as to the quantum of benefit. The trustee had discretionary power to make appointments before the end of the trust period if it thought fit.
- 4 The predecessor owner of the Settlor's business carried out a similar business and put in place a similar structure for rewarding employees as was put in place by the Settlor. It is

clear that both the Settlor and the trustee intended that the employees should be rewarded in the way in which employees of the previous business had been rewarded.

- 5 Essentially the Settlor paid employees the UK national minimum wage as a salary. This payment was made quite independently of the Trust. In addition to the salary, the Settlor also made discretionary loans to employees by way of reward for their services. These loans again were made at the sole discretion of the Settlor, and were not made in any sense by the trustee or by the Trust. At the end of each month, the Settlor transferred the right to repayment of the discretionary loans to the Trust. At the same time the Settlor would make a cash contribution to the Trust. Discretionary loans, loan rights and cash contributions were all generally contributed to the Trust on a monthly basis.
- 6 The loan rights and contributions, once settled into trust, were handled in the following way:-
  - (i) The loan rights were held on the trusts of one sub-fund ("the Initial Sub-Fund"), which had only two main beneficiaries, including the First Respondent (a specified employee) and the Second Respondent ("the Missing Beneficiary"). The cash contributions were held on the trusts of other sub-funds ("the Subsequent Sub-Funds") which had a large and variable number of main beneficiaries.
  - (ii) Following the appointment of the loan rights and cash contributions, the trustee entered into an instrument of transposition by which the loan rights and the cash contributions would be transposed so that the Initial Sub-Fund held all the cash contributions and the Subsequent Sub-Funds held the loan rights. In this way, on the repayment of a discretionary loan by an employee, the trustee could potentially benefit employees who were beneficiaries of the Subsequent Sub-Fund. There is no dispute that the Settlor motivated its employees in this way so that various tax advantages in the UK might be secured. The trustee has been advised that no change in the UK tax treatment of the Trust, the Settlor or the beneficiaries would occur if the order for rectification were made.
- 7 The terms of the Trust include a definition of the expression "*beneficiaries*" which extends to any specified employee, the spouse for the time being and widow of any specified employee, the children or remoter issue, and parent or remoter ancestor of any specified employee and the spouse of issue and ancestors who were the spouse of such a person immediately before their death. There were other potential beneficiaries, but what was missing from the Trust was language which would have added other classes of beneficiaries, namely:-

*"(i) Any child or remoter issue of any grandparent of any specified employee.*

*(ii) The spouses of all persons described in paragraph 1 above.*

*(iii) Any person who was the spouse of a person described in paragraph 1 above immediately before his death.”*

- 8 In relation to the Initial Sub-Fund, the problem arises because the third schedule to the Trust which sets out the beneficiaries does not include paragraphs (i), (ii) and (iii) set out above and the trustee seeks rectification to introduce those potential objects as beneficiaries of the Trust. This would enable the Second Respondent to benefit from the Initial Sub-Fund.
- 9 The test for rectification has been considered by the Royal Court on a number of occasions, one of which is *In the matter of the Exeter Settlement* [\[2010\] JLR 169](#). As Birt, Bailiff, said then at paragraph 37:–

**“... The test for rectification is well established as follows:–**

***(i) The court must be satisfied that as a result of a genuine mistake the trust deed does not carry out the true intentions of the parties and the settlor in particular;***

***(ii) There must be full and frank disclosure; and***

***(iii) There should be no other practical remedy.”***

- 10 We apply that test here.
- 11 The Court has before it an affidavit of Mr Juan Luis Medina, a director of the corporate trustee, and also a director of the corporate settlor. Mr Medina deposes that he was involved with the decision making process of both trustee and Settlor and in relation to this particular sub-fund, he indicates that it was the Settlor's intention that the Missing Beneficiary was to be a beneficiary of the Trust and was one of the people whom it was anticipated the trustee would be likely to benefit. Although there are some 2000 named beneficiaries of the Trust itself, the Sub-Fund defines beneficiaries by reference to named individuals and accordingly the beneficiaries of any of the Subsequent Sub-Funds will be unaffected by any rectification of the Initial Sub-Fund. The first respondent who is a specified beneficiary does not object and in those circumstances, the Court is faced with an application where trustee and Settlor are agreed that a mistake was made at the time of the creation of the Initial Sub-Fund, the only person likely to benefit from that Sub-Fund does not oppose the rectification on the grounds of mistake and there is no other practical remedy for enabling benefit to be paid from the Sub-Fund to the Missing Beneficiary. We are satisfied that there was a genuine mistake in that the trust instrument does not reflect the intentions of the Settlor and the trustee, and that there is no practical remedy other than rectification.
- 12 That leaves over the question of full and frank disclosure. In the papers which were submitted to the Court, there was little mention of the tax position in the United Kingdom

and the Court was initially concerned that this particular scheme might have fallen into the category of aggressive tax avoidance and, if that were so, might therefore have been the sort of scheme where in the exercise of its discretion, the Court should consider whether such a fact, if true, should lead to the refusal to exercise discretion in favour of the applicant. If it had been necessary to do so, we would have appointed an amicus to argue this point against Advocate Brown who contended that this was an irrelevant consideration both generally and especially in the present case, as the arrangement underlying the present trust did not constitute any unacceptable tax avoidance. This Court recognises that there are strong ethical arguments why tax payers should recognise their obligations to the state in which they live, making their fair and appropriate contribution towards the outgoings which any modern state has in the provision of services for the benefit of the community. Indeed, many tax payers across the world recognise those obligations and, some uncomplainingly, make their contributions accordingly. On the other hand, it has long been the case that, as a matter of law, a citizen is entitled to retain his property unless by appropriate legislation, the state takes it away, or makes it chargeable to tax. That is the basis of the distinction between tax evasion, which is unlawful, and tax avoidance, which is not. To organise one's affairs so as to minimise tax has often been seen as a fundamental freedom, enabling the individual to live his life in accordance with the rules which the state sets down, of which taxation is but one. It might be said that there would be great uncertainty if citizens did not know what they could or could not lawfully do to minimise tax.

- 13 Historically, the courts have always applied the principles of law rather than what are perhaps inchoate and uncertain ethical considerations in this area. What seems to us perhaps to be open to argument is whether, in an area which involves the exercise of a judicial discretion in cases where the court's assistance is being sought for a mistake which has been made, there is room for the argument that the discretion ought not to be exercised if on the facts of a particular case, the scheme in question is lawful but appears to be so contrived and artificial that it leaves the Court with distaste if, in effect, it is required to endorse it.
- 14 It turned out in argument that these considerations did not apply in the present case. It was only in the course of argument that the Court understood that this was a DOTAS scheme — this regime allowing Her Majesty's Revenue and Customs to keep up to date with what types of tax avoidance schemes are in circulation. Advocate Brown advised us that HMRC were aware of the scheme generally, the scheme promoter having been required to disclose the main elements to HMRC who are then enabled to monitor the scheme's use and if necessary legislate to terminate it. It would have been helpful if this information had been provided on affidavit to us rather than through submissions by counsel, but we have accepted them as she is an officer of this Court, given that there is no underlying dispute between those involved. There has therefore been full and frank disclosure, albeit rather late.
- 15 In connection with lateness, we mention also that the papers were received on the Friday afternoon before the Court sat the following Monday to hear the representation. This was too late, and all advocates are reminded of the need to comply with the practice directions

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for the delivery of bundles in good time before the hearing takes place.

- 16 The Court is satisfied that the relevant criteria for rectification have been met, for the reasons given above, and we therefore order that, in order to give effect to the intention of the Settlor and the trustee at the time, the Trust instrument is rectified by inserting the following words after paragraph (H) of the Third Schedule to the trust instrument, before the words “provided that no excluded person shall be a beneficiary”:-

*“(i) Any child or remoter issue of any grandparent of any specified employee*

*(j) The spouses of all persons described in paragraph (i) above*

*(k) Any person who was the spouse of a person described in paragraph (i) above immediately before his death.”*