Derek Bryon Robinson (by his Attorney Lesley Diane Robinson) v Apex Trust Company Ltd

Jurisdiction:	Jersey
Judge:	Bailiff
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Text

[2014] JRC 133

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, Kt., Bailiff, **and**Jurats Fisher**and**Nicolle.

IN THE MATTER OF THE ROBINSON ANNUITY INVESTMENT TRUST

Between
Derek Bryon Robinson (by his Attorney Lesley Diane Robinson)
Representor
and
Apex Trust Company Limited
Respondent

Advocate P. M. Livingstone **for the Representor**.

D. Petit, **Director for the Respondent**.

Authorities

CC Limited v Apex Trust Limited 2012 (1) JLR 314 .

Tait v Apex Trustees Limited [2012] JRC 148 .

Seggins v Apex Trust Company Limited [2013] JRC 077 .

Insurance Business (Jersey) Law 1996.

Trusts (Jersey) Law 1984.

Trusts (Amendment No.6) (Jersey) Law 2013.

Boyd v Rozel Trustees (Channel Islands) Limited [2014] JRC 056 .

Re Lochmore Trust [2010] JRC 068 .

Trust — application to set aside a trust on ground of mistake.

Bailiff

THE

1 This is an application to set aside a trust on the ground of mistake. It is another unfortunate story arising from the less than satisfactory activities of a firm of English solicitors called Baxendale Walker, two of whose principals were Paul Baxendale-Walker and William Auden. Previous examples relating to schemes marketed by the firm where the Court set aside a trust on the ground of mistake are to be found in *CC Limited v Apex Trust Limited* [2012] (1) JLR 314; *Tait v Apex Trustees Limited* [2012] JRC 148; and *Seggins v Apex Trust Company Limited* [2013] JRC 077. The court was informed that Messrs Baxendale-Walker and Auden have both been struck off the role of solicitors in England and Wales in 2006 and the firm of Baxendale-Walker is no longer in existence.

Factual Background

2 Unfortunately the representor, who is now aged eighty, suffers from illness and is unable to assist the court. These proceedings are brought on his behalf by his daughter to whom he granted a lasting power of attorney under English law on 5 th July, 2012. She has sworn an

affidavit as to the facts. She has produced a number of the relevant documents, but she has also referred to statements made to her by her father before he suffered from dementia. We are content to act on this evidence albeit that some of it is hearsay.

3 The representor was at all material times a widower who was resident and domiciled in the United Kingdom. He has two children. In late 2003 he took tax and estate planning advice from Baxendale-Walker. At the time he was the owner of a property called West Syke Manor in North Yorkshire, in which he lived. It is clear from the evidence that his main purpose in seeking such advice and thereafter entering into the proposed arrangements was to save inheritance tax upon his death.

4 On 18 th November, 2003, Baxendale-Walker produced a document for the representor entitled "Estate Income Plan Arrangements Report" containing their advice. The proposal in very broad outline was that the representor should transfer assets to the trustees (who would be resident outside the United Kingdom) of a trust in exchange for which the trustees would agree to provide a deferred annuity income for the representor. It was asserted in the document that the assets in the trust would be exempt from inheritance tax and could therefore be passed to his children free of inheritance tax. The document also provided that the trust could make provision for assets to be designated as 'restricted assets', which could not be sold by the trustees without consent.

5 The representor decided to go ahead with the scheme put forward by Baxendale-Walker and accordingly on 21 st November, 2003, the Robinson Annuity Investment Trust ("the Trust") was constituted by deed made between a BVI company called Enhance Inc ("Enhance") as settlor (referred to in the deed as 'the Founder') and Atlas Trust Company (Jersey) Limited ("Atlas") as trustee. Enhance appears to have been a company linked to Baxendale-Walker and was provided with the initial trust fund of £100 by the representor. Atlas was an independent Jersey trust company recommended to the representor by Baxendale-Walker. The representor did not see the trust deed prior to its execution.

The terms of the Trust

6 The Trust is expressly governed by the law of Jersey. It is a purpose trust and therefore has no defined beneficiaries. The primary purpose of the Trust is stated at clause 3.1 to be "….the negotiation, arrangement, execution and performance of Authorised Contracts". An Authorised Contract is defined in clause 1.1 to be a written agreement between the trustee and another person by which the trustee agrees to provide a deferred annuity to a person for valuable consideration and which satisfies the conditions precedent contained in Schedule 3 to the trust deed.

7 Paragraph 1 of Schedule 3 contains as the first such condition precedent:–

"The purchaser of the annuity (hereafter in this Schedule "the Purchaser") must

be an employee or director or former employee or director of the Founder or other person approved by the Founder or any other person."

Clause 3.6 provided that the primary purpose could not be exercised so as to provide any benefit of any kind to any Excluded Person, which was defined as meaning ' *each and every person who is connected with the Founder (as that phrase is defined in the Income and Corporation Taxes Act 1988 of the English Parliament)*'.

8 As can be seen immediately — and as was discussed in *Tait* at para 19 — paragraph 1 of Schedule 3 is very hard to make sense of and appears on its face to be inconsistent with the requirement that an annuity cannot be provided to an Excluded Person.

9 The trust deed goes on to provide at clause 4.1 that, subject to the execution of the primary purpose, the trustee may appoint the trust fund upon trusts for persons or classes of persons as beneficiaries subject to the written consent of the Enforcer and provided that no Excluded Person should be capable of receiving any benefit under any such appointment.

Subsequent Events

10 Four days later, on 25 th November, 2003, the representor entered into an Estate Annuity Purchase Deed ("the 2003 EAPD") drafted by Baxendale-Walker whereby Atlas would pay the representor an annuity in consideration of the transfer to Atlas of the beneficial ownership of West Syke Manor. The annuity was to commence on the representor's 75 th birthday. He was born on 20 th December, 1934, and his 75 th birthday was therefore on 20 th December, 2009, i.e. some six years later. Under the 2003 EAPD the representor was stated to hold legal title to West Syke Manor upon trust for Atlas. The document was expressed to be governed by the law of England and Wales. It made no mention of the Trust or the capacity in which Atlas was entering into the deed, although it seems clear from the surrounding circumstances that it must have been doing so as trustee of the Trust.

11 The same day, Atlas (as landlord) and the representor (as tenant) entered into a tenancy agreement, drafted by Baxendale-Walker, under which Atlas leased West Syke Manor to the representor for a term of seven years in consideration of a rental of £4,000 per month. In the tenancy agreement, Atlas was expressed to be acting as trustee of the Trust. No rental was ever sought or paid in respect of the tenancy agreement and the representor explained to his daughter that it had always been represented to him by Baxendale-Walker that he would not in fact have to pay any rent.

12 Under the trust deed, the Enforcer has power to designate any asset of the Trust as a *'Restricted Asset'* which cannot then be sold without the prior consent in writing of the Enforcer. Enhance was designated as the first Enforcer under the deed. On 26 th November, Enhance wrote in its capacity as Enforcer to Atlas and designated West Syke Manor as a Restricted Asset.

13 The trust deed also provided that, if an Enforcer resigned without appointing a successor, the trustee could appoint a new Enforcer. By letter dated 1 st October, 2004, Atlas purported to appoint the representor as Enforcer with effect from 1 st December, 2003, stating that Enhance had resigned as Enforcer on 21 st November, 2003. If that was correct, Enhance would not of course have been able to designate West Syke Manor as a Restricted Asset on 26 th November. Furthermore, clause 10.4 of the trust deed provides that the Enforcer may resign on any date following the date of the trust deed. The purported resignation bore the same date as the trust deed and is accordingly arguably of no effect. The position therefore is that there is complete uncertainty as to whether Enhance or the representor is the Enforcer and whether West Syke Manor was a Restricted Asset.

14 On 16 th January, 2004, the representor entered into a second Estate Annuity Purchase Deed ("the 2004 EAPD") which was in very similar form to the 2003 EAPD and provided that Atlas would pay the representor an annuity in consideration of the transfer to Atlas of the sum of £75,209.60. Payment of the annuity was again to commence on the representor's 75 th birthday. Again there was no mention of the capacity in which Atlas was entering into the 2004 EAPD.

15 The sum in question was transferred by the representor to Atlas shortly afterwards. The representor had agreed to undertake a land development project in partnership with his son-in-law and daughter on a 50–50 basis. A BVI company called Tameron Limited ("Tameron") was incorporated on 2 nd January, 2004. Atlas transferred the above sum of money to Tameron which in turn used it to contribute the representor's share of the development project (known as the "Knaresborough Project"). Although the record keeping of Atlas appears to have been rather poor and there was no record at the time that Tameron was owned by the Trust, its shares were held by companies associated with Atlas and it is accepted that the shares in Tameron are and have always been owned by the Trust. The Knaresborough Project was completed in about 2008 and 50% of the net proceeds from the venture were transferred to Tameron, namely the sum of £243,750. Tameron paid corporation tax to Her Majesty's Revenue and Customs ("HMRC") on its share of the profits and retained the balance.

16 On 20 th February, 2006, the representor sold West Syke Manor for £1,045,000. The proceeds of sale and some additional funds provided by the representor were sent to Atlas which arranged for Tameron to buy the representor's current home Stone Garth, also in Yorkshire. Tameron remains the registered owner of Stone Garth. No tenancy agreement in respect of Stone Garth has ever been entered into between the representor and Tameron (or Atlas). Similarly no Estate Annuity Purchase Deed was ever entered into regarding Stone Garth.

17 Atlas resigned as trustee in favour of Nautilus Trustees Limited on 29 th February, 2008, and Nautilus Trustees Limited in turn resigned as trustee in January 2009 in favour of Apex.

18 No annuity has ever been paid to the representor despite the fact that such payments should have begun on 20 th December, 2009.

19 The scheme, the terms of the Trust and the provisions of the two EAPD's were in almost identical form to the equivalent documents in *Seggins* referred to at paragraph 1 and, in our judgment, the legal consequences of what has occurred are much the same as in that case. We can accordingly deal with the matter comparatively briefly.

The Mistakes

20 Advocate Livingstone referred to a number of difficulties in relation to the Trust. However we would prefer to consider the matter under two broad headings:–

(a) Mistake as to Tax Consequences

21 It is quite clear from the evidence that the representor established the Trust in order to avoid inheritance tax on those assets which he transferred to the Trust. Whilst, technically, Enhance was the named settlor, it is clear that all assets which were transferred into the Trust (including the initial funds) were provided by the representor and accordingly he is the settlor. He made the transfers in the belief that inheritance tax would be avoided because that was what he had been advised by Baxendale-Walker. This assertion by Baxendale-Walker is to be found not only in the scheme document to which we have referred at para 4 above, but also in a letter dated 28 thAugust, 2003, from Baxendale-Walker to the representor in which they confirmed that any property held in the Trust would be exempt from inheritance tax and would therefore pass to beneficiaries on death free of inheritance tax. Advice from tax counsel has been sought for the purposes of this application and we have had the opportunity of considering it. It is clear from counsel's advice that the original advice from Baxendale-Walker was completely wrong and that inheritance tax remains payable on the assets in the Trust in the event of the settlor's death.

(b) Impossibility of performance

22 We are satisfied that the scheme could not be performed in the manner which was advised to the settlor by Baxendale-Walker and was therefore intended by the settlor. Thus:–

> (i) Under Schedule 1 of the Insurance Business (Jersey) Law 1996 (“the Insurance Law”) contracts to pay annuities are classified as long term insurance business. By virtue of Article 5 of the Insurance Law, it is an offence for any person to carry out long term insurance business unless he holds a permit for that purpose issued by the Jersey Financial Services Commission. Neither Atlas nor any of the successor

trustees has at any stage held such a permit and the EAPD's were accordingly illegal contracts to the extent that they imposed an obligation on Atlas to pay a deferred annuity. They could not lawfully be performed by Atlas.

(ii) On the evidence, it would never have been possible to pay the deferred annuity in accordance with the scheme; there were always going to be insufficient assets in the Trust to pay it. Thus:–

(a) Under both EAPDs, the annuity rate was described as being calculated as the product of the Flat Life Office Annuity Rate plus 2% and the Flat Indexed Capital Value. The Flat Indexed Capital Value was defined as meaning the value of the property transferred to the Trust at the date of the EAPD plus the sum (to the relevant payment date) of each Deemed Flat Annual Accretion. The latter expression was defined as meaning in each year the product of the original value of the property plus the aggregate of any and all earlier Deemed Flat Annual Accretions and the annual increase in the retail price index from the previous year. Thus, at the end of the first year after the EAPD was entered into, the Flat Indexed Capital Value would be the original value of the property as increased by the increase in the retail price index for that year. In the following year, one would start with the increased value from the previous year and increase it again by the increase in the retail price index. Thus there was a compounding element. There would have been a considerable increase in the original value by the time the first annuity payment was due on the settlor's 75 th birthday. The Flat Life Office Annuity Rate is defined as meaning the annuity rate quoted in writing by any life office to Atlas within six months of the EAPD failing which 6%. No such quotation was received and accordingly the effective rate was 6% plus 2% i.e. 8%. Thus the annual annuity payment was to be 8% of an increasing capital sum by reference to the value of the property transferred.

(b) The value of West Syke Manor at the time of transfer was estimated to be between £800,000 and £1 million. Even assuming no increase, this would have meant an annuity of £64,000–£80,000 per annum. In practice the figure would have been greater because of the formula for increasing the value of the property between 2003 and 2009 when the annuity would have become due. In relation to the 2004 EAPD, the value of the cash transferred was £75,209 although this would also have been increased annually on a compound basis by reference to the increase in the retail price index between 2004 and 2009. Even on the original figure, this would have led to an annuity at 8% of £6,024. Thus, even on the original values, the total annuity payable under the two EAPDs would have been £72,000–£86,000.

(c) Given that it was never intended that any rental should be paid under the tenancy agreement and given also that the representor intended to be able to remain in his home if he so wished, there would clearly have been wholly insufficient funds to pay an annuity at this level. The scheme was therefore incapable of performance.

The applicable law

23 The Trust is governed by Jersey law. Although the two EAPDs are expressed to be governed by English law, Article 9(1) of the Trusts (Jersey) Law 1984 ("the Law") provides that the validity of a Jersey trust (Art 9(1)(a)) and the validity and effect of any transfer of property to a Jersey trust (Art 9(1)(b)) shall be determined in accordance with the law of Jersey and no rule of foreign law shall affect such question. The Court held in *CC Limited v Apex Trust Limited* that this means the domestic law of Jersey (i.e. without reference to its conflict of law principles). Thus we must apply the Jersey law of mistake to the issue before us.

24 We also agree with the decision in both *Tait* (at para 18) and *Seggins* (at para 24) that the creation of the Trust itself and the EAPDs are so closely linked that they must all be considered together. The EAPDs were an essential part of the scheme which led to the establishment of the Trust and they were entered into as part of the scheme to establish the Trust.

25 Advocate Livingstone submits that the Court should consider this application under Article 11 of the Law. This provides, so far as relevant, as follows:–

> ***"(1) Subject to paragraphs (2) and (3), a trust shall be valid and enforceable in accordance with its terms.***
>
> ***(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, …"***

26 However the Law has been subject to a recent amendment by the introduction of Articles 47B — 47J pursuant to the Trusts (Amendment No.6) (Jersey) Law 2013 ("the Amending Law"). The relevant provisions for our purposes are as follows:–

> ***"47B***
>
> ***(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.

…

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

(1) …

(2) The court may on the application of any person specified in Article 47I(1), and in the circumstances set out in paragraph (3), declare that a transfer or other disposition of property to a trust –

(a) by a settlor acting in person (whether alone or with any other settlor); or

(b) through a person exercising a power,

is voidable and –

(i) has such effect as the court may determine, or

(ii) is of no effect from the time of its exercise.

(3) The circumstances are where the settlor or person exercising a power –

(a) made a mistake in relation to the transfer or other disposition of property to a trust; and

(b) would not have made that transfer or other disposition but for that mistake, and

the mistake is of so serious a character as to render it just for the court to make a declaration under this Article."

27 The introduction of these provisions immediately raises the question of the relationship between Article 11 and Article 47E. We have to say that, like the Court, presided over by Bailhache, Deputy Bailiff, in *Boyd v Rozel Trustees (Channel Islands) Limited*

[2014] JRC 056 we have not found this to be very easy. Article 47E appears to be dealing only with dispositions to a trust whereas Article 11 is dealing with the trust itself; but in many cases the two are inextricably linked, because without any trust property there can be no trust. Furthermore, in many if not most cases, the transfer of property will occur at much the same time as the creation of the trust and the same mistake will be operating on the mind of the settlor both in relation to the creation of the trust and the transfer of the property to it. It is therefore somewhat surprising to find the legislature dealing with the creation of a trust and the transfer of property to a trust in completely separate parts of the Law.

28 What is clear, however, is that the test to be applied by the Court is identical whether the matter is considered under Article 11 or under Article 47E. Thus the statutory test enunciated in Article 47E(3) is for all practical purposes identical to the test established by the Court prior to the Amending Law and encapsulated in a number of cases which were summarised in *Re Lochmore Trust* [2010] JRC 068 where at paragraph 11 the Court said:–

> ***"It follows that the Court has to ask itself the following questions:–***
>
> ***(i) Was there a mistake on the part of the settlor?***
>
> ***(ii) Would the settlor not have entered into the transaction "but for" the mistake?***
>
> ***(iii) Was the mistake of so serious a character as to render it unjust on the part of the donee to retain the property?"***

The only difference between the test thus enunciated and the statutory test set out in paragraph (3) of Article 47E is that the wording concerning the seriousness of the mistake is inverted. Thus in (iii) above the Court decides whether a mistake is so serious as to render it unjust for the donee to retain the property whereas in paragraph (3), the question is whether the mistake is so serious as to render it just to set the transfer aside. This appears to us to be a distinction without a difference.

29 The cases had also made clear that it did not matter whether the mistake was of fact, law, effect or consequences. Thus a mistake as to the tax consequences of a trust or a transfer to a trust was a mistake for these purposes (see *Re S Trust* [2011] JLR 375). It seems clear that the definition of ***'mistake'*** in Article 47B(2) is to like effect.

30 It follows that the outcome (in terms of whether the application succeeds) will not be affected by whether the application is considered under the case law or under Article 47E(3).

31 Nevertheless, for the reasons set out by the Deputy Bailiff in *Boyd*, (at paras 12–19) the structure of the legislation (as amended) is that Article 11 is separate from the provisions introduced by the Amending Law and accordingly, however theoretical or illogical it may be, the provisions of Article 11 fall to be considered separately from the application of the Court's powers under the Amending Law. Under Article 11, the case law applies and under

Article 47E, the statutory test in paragraph (3) of that Article applies (albeit the substance of the two tests is identical).

32 Given that the application in this case seeks to have the Trust itself declared invalid, we approach this application under Article 11 and we apply the well-established case law summarised above.

Conclusion

33 When the matter was first presented to the Court, it was ordered that notice should be given, *inter alia*, to HMRC. This was done but HMRC has not sought to intervene in the proceedings.

34 In our judgment, the mistakes in this case satisfy all the requirements described above.

35 Taking the first question, we are quite satisfied that there were two mistakes on the part of the settlor as described at paras 21 and 22 above. First, he was advised and believed that entering into these arrangements and establishing the Trust would avoid inheritance tax on those assets which were put into the Trust. This was quite clearly wrong for the reasons given earlier. Secondly, he entered into the arrangements under the mistaken belief that, whilst continuing to live in his home, he would receive an annuity at the level set out in the EAPDs. This was quite clearly impossible.

36 As to the second question, we are satisfied that he would not have entered the transaction *'but for'* the mistakes. He told his daughter a few years ago that entering the scheme was the biggest mistake of his life and he wished he had never done it. There would have been no purpose in entering the scheme had he not understood that he would be avoiding inheritance tax and be receiving a deferred annuity.

37 As to the third question, we are satisfied that the mistake was of so serious a character as to render it unjust on the part of the donee to retain the property. There are no beneficiaries of the Trust who will suffer by setting it aside. The settlor has incurred fees over the years (including to Baxendale-Walker) of over £100,000 for no benefit, and such fees will continue to accrue should the Trust be left in place, with no benefit accruing as a result. The consequences to the settlor have been considerable and we consider it just that the Trust should be set aside. It is fully accepted by the settlor that the assets will thereby be deemed always to have been his and he (or his estate) will have to pay such taxes (including inheritance tax) as may arise as a consequence.

38 For these reasons, we declare that the Trust and the two EAPDs are invalid. It follows that the trust assets are held by Apex on bare trust for the settlor and have been so held (whether by Apex or its predecessors as trustee) at all times.