A v C

Jurisdiction:	Jersey
Judge:	Sir William Bailhache, Jurats Crill, Hughes
Judgment Date:	13 June 2019
Neutral Citation:	[2019] JRC 111
Date:	13 June 2019
Court:	Royal Court

Text

[2019] JRC 111

Royal Court

(Samedi)

Before:

Sir William Bailhache, **Bailiff, and** Jurats Crill **and** Hughes

Between
A
Representors
B
and
C
First Respondent
D
Second Respondent
E
Third Respondent

Advocate D. James **for the Representors**.

The Respondents did not appear.

Authorities

Trusts (Jersey) Law 1984 as amended

Finance Bill 2017.

Income Taxes Act 2007.

Companies (Jersey) Law 1991.

In the matter of the B Trust (Link Trustee Services) [2018] JRC 043.

Re Onorati Settlement [2013] (2) JLR 324.

Re B Life Interest Settlement [2013] (1) JLR 1.

A and B v C and Ors [2018] JRC 174A.

Tait v Apex Trustees Limited [2012] JRC 148.

Trusts — application by the Representors for a number of resolutions to be declared voidable on the grounds of mistake.

THE BAILIFF:

1 The Court sat on 22 nd May to receive an application by the Representors pursuant to Article 47G and alternatively Article 47H of the Trusts (Jersey) Law 1984 as amended ("the Law") for a number of resolutions adopted by the First Representor ("the trustee") as trustee of the J Settlement dated 16 th May, 2014 ("the Trust") to be declared voidable on the grounds of mistake. The Respondents did not appear, having indicated their agreement to the Court making the necessary orders. F ("Mr F") was not convened but the Court has seen correspondence which confirms that he agrees with the representation and would like the Court to grant the relief sought. When the convening order was made on 22 nd March, the Court directed that notice of the proceedings should be provided to Her Majesty's Revenue and Customs. This was duly effected. The Court has noted correspondence with HMRC and we note from their letter of 17 th May, 2019 that they were aware of the hearing date. They have not made any application to join the proceedings. Following the hearing, judgment was reserved, and it is now delivered.

2 The Trust was created by an instrument executed by the trustee, operating under its former

name of G. The economic settlor of the Trust was Mr F. The Trust is a full discretionary trust, and the beneficial class comprises Mr F, his children and remoter issue and the spouses of such children and remoter issue as well as any other person the trustee may in the exercise of its discretion add to that class. Mr F has two adult children and one minor child and there are presently no other living beneficiaries. The University of Buckingham, which was a discretionary beneficiary was removed as such by deed dated 12 th March 2019. Mr F is the principal beneficiary of the Trust and his status as economic settlor is attributable to a number of loans which he has made interest free, unsecured and repayable on demand. At the start of 2017, the assets of the Trust comprised two ordinary shares in the Second Respondent, with each share held by a nominee for the trustee, the Second Representor and the First Respondent respectively. A further trust asset was the share capital of another Jersey registered company which held an investment portfolio for the Trust. The remaining asset of the Trust was an interest free loan receivable from the Second Respondent and repayable on demand. As at 22 nd March 2017 that loan was in the sum of approximately £18.258 million. The loan due to Mr F as at the middle of November 2016 stood at £41.651 million approximately. The Third Respondent received two ordinary shares in the Second Respondent on 4 th April 2017 as part of the re-structuring proposal detailed below.

3 Both the trustee and Mr F personally engaged a leading firm of accountants in the United Kingdom to advise on the tax affairs relevant to the Trust and to Mr F. In particular, advice was given in relation to changes to UK tax law introduced by the Finance Bill 2017 as a result of which Mr F was to become deemed UK domiciled for all tax purposes with effect from 6 th April 2017. The accountants consulted with tax counsel and a written restructuring proposal was provided to Mr F and to the trustee, first in March 2016, but developments of the proposal emerged over the next twelve months until March 2017. In essence, the restructuring which the proposal contained was designed to bring the investment structure onshore, and rebase the offshore investment gains included within the Trust by reinvesting them onshore in UK resident companies. The advice included a recommendation that Mr F's loan to the Trust must be repaid, or adjusted to commercial terms, by 6 th April 2017, failing which the Trust would be tainted and Mr F would then be charged UK income tax on any non-UK income received by the Trustee in addition to capital gains, both UK and non-UK, realised within the Trust.

4 The detail of the proposal included a number of steps described in three phases. The first phase was for a bonus issue of redeemable preference shares by the Second Respondent to the trustee, representing the investment gains of approximately £2 million on the Second Respondent's investment portfolio, and the subsequent transfer to Mr F of those shares by way of partial repayment of his loan. The Second Respondent would then convert the shareholder's loan granted by the trustee to the Second Respondent into a second class of redeemable preference shares by way of repayment of the loan made to the Second Respondent. These shares would carry a value of approximately £18 million and would be subsequently transferred to Mr F by way of partial repayment of his loan to the Trust. The ordinary shares in the Second Respondent would then be appointed to Mr F and transferred from him to a UK corporate entity. The payment of the remaining Trust assets would be made to Mr F by way of repayment of his loan and a capital appointment, and the

Trust would eventually then be wound up.

5 The accounting advice was that the repayment of the loan was a separate issue to the restructuring and could be achieved without the restructuring going ahead. There were alternative methods of arranging repayment for example through the liquidation of investments or through the transfer of the ordinary shares in the Second Respondent, capitalised to reflect the gain on investments.

6 The trustee decided on 27 th March, 2017, to accept the advice of the accountants and at a meeting of directors that day the resolutions giving effect to the proposals which we have described were adopted. Two days later on 29 th March, 2017, the Second Representor and the First Respondent adopted a shareholders' resolution in the Second Respondent creating the two different classes of preference shares (the A and B preference shares) and authorising their issue to the nominee shareholder. A new memorandum of association was adopted, providing for the revised share capital, and new articles of association were also adopted to refer to the redeemable preference shares and to include provisions governing the rights of the holders of those shares.

7 Subsequently, on 29 th March 2017, the A and B preference shares were transferred to Mr F and the balance of the share capital of the Second Respondent was appointed out of the Trust to Mr F as well. On 4 th April 2017, Mr F transferred the two ordinary shares in the Second Respondent to the Third Respondent.

8 The Trust is governed by Jersey law and the companies mentioned are all incorporated and resident in Jersey.

9 These various tax arrangements were the subject of extensive correspondence between the accountants and HMRC. On 10 th March, 2017, i.e. before any of the relevant steps were taken, the accountants wrote to HMRC to seek formal clearance under Section 701 of the Income Taxes Act 2007 in respect of the different transactions. However, that formal clearance was not forthcoming. Although the proposal had not been implemented in full, the steps which we have described above were taken in March and April 2017.

10 It is apparent from the correspondence with HMRC firstly that there was complete transparency as far as the accountants were concerned in the arrangements which were proposed and secondly that, despite the absence of agreement from HMRC that the proposals had the tax consequences which the accountants considered correct, part of the scheme was implemented. This was indeed necessary from a tax perspective because of the impending arrival of 6 th April, 2017 when the Trust would become tainted for UK tax purposes.

The Law

11 Article 47G of the Law is in these terms:-

> ***"Power to set aside the exercise of powers in relation to a trust or trust property due to mistake***
>
> > ***(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."***

12 Article 47H of the Law is in these terms:-

> ***"Power to set aside the exercise of fiduciary powers in relation to a trust or trust property***
>
> > ***(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 and who owes a fiduciary duty to a beneficiary in relation to the exercise of that power*** .
> >
> > ***(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, in relation to the exercise of his or her power, the trustee or person exercising a power –

(a) failed to take into account any relevant considerations or took into account irrelevant considerations; and

(a) would not have exercised the power, or would not have exercised the power in the way it was so exercised, but for that failure to take into account relevant considerations, or that taking into account of irrelevant considerations .

(4) It does not matter whether or not the circumstances set out in paragraph (3) occurred as a result of any lack of care or other fault on the part of the trustee or person exercising a power, or on the part of any person giving advice in relation to the exercise of the power."

13 Article 47I provides as follows:-

"Applications and orders under Articles 47E to 47H

(1) An application under Article 47E(2) or 47F(2) may be made by any settlor or any of his or her personal representatives or successors in title .

(2) An application under Article 47G(2) or 47H(2) may be made by –

(a) the trustee who exercised the power concerned, or the person exercising a power (as the case may be);

(b) any other trustee;

(c) a beneficiary or enforcer;

(d) the Attorney General in relation to a trust containing charitable trusts, powers or provisions;

(e) any other person with leave of the court .

(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."

14 Article 47G and 47H confer powers on the Court concerning the exercise of powers and fiduciary powers in relation to a trust or trust property. Article 47G relates to the exercise of powers by a person otherwise in the capacity of a trustee who exercises a power over trust property. Article 47H similarly refers to a person exercising a power as being someone other than in the capacity of a trustee. The first question which arises is whether the Court has jurisdiction to set aside decisions of shareholders in relation to a Jersey company upon the basis that the shares are trust property, that is to say whether shareholders exercising their power to vote in a shareholders' meeting of the company are ' *persons exercising a power other than in the capacity of a trustee'* over trust property. In that connection we note that Article 48 of the Companies (Jersey) Law 1991 ("the Companies Law") provides expressly that no notice of any trust, express complied or constructive, shall be receivable by the Registrar or entered on the register of members. The Companies Law therefore provides that whatever the position may be under trust law, a company is to disregard any trust which exists in relation to its shares.

15 The prayer in the representation seeks orders that the trustee's decision to make the different resolutions should be set aside under Article 47G or alternatively Article 47H of the Law. Those decisions started the process which came to fruition later with the decisions of the directors and shareholders of those companies. It is those latter decisions which the Representors really seek to have set aside rather than the decisions of the trustee; and the mechanism for doing so is said to be the use of Article 47I which at paragraph (3) enables the Court to make such consequential orders as it thinks fit as a result of a declaration made under Articles 47G or 47H.

16 It may be thought that the alternative jurisdiction the Court is exercising is at Article 47G(2) or 47H(2) as the case may be – having decided that the exercise of a power by the trustee or by a person exercising a power in relation to trust or trust property is voidable, the Court may then declare that such an exercise of power has no effect. Thus it might be thought that the decision by the companies in question in general meeting can be set aside because the trustee's decision has no effect. With some hesitation, because this has not been a matter fully argued through, we think that is not the position. Article 47G and Article 47H deal with applications in relation to the Trust. A declaration that the trustee has taken a step which has no effect within the Trust does not it seems to us necessarily carry with it a decision about the validity or otherwise of what a separate juridical entity might have done in the meantime. In other words, the decision of the Court to make the relevant declaration might

result in the decision having no effect within the Trust, but it does not necessarily mean that what has been done at company level ceases to have validity. Although it does not appear to be the case in the present circumstances, one can envisage that there may be cases where the rights of others involved with the company are engaged, whether they be creditors, other shareholders or indeed the directors.

17 So as a technical matter we think that if the orders are to be made in relation to the companies which are wholly owned by the Trust, then these are orders which can only be made as consequential under Article 47I(3). It was thus right that the companies should be party to these proceedings. On the facts of this case, we are satisfied that it is right to look at the actions taken by the companies as consequential upon decisions of the trustee, and accordingly, if it is right to grant relief in relation to the alleged mistake of the trustee, it is right to make consequential orders in relation to the steps taken by the companies giving effect to the trustee's decisions.

18 In the present case, the trustee's decision to procure the issue of the A preference shares appears to have led to a liability to a UK income tax charge on the value of those shares. It was only the allotment of the A preference shares which resulted in an unforeseen tax liability. The creation and allotment of the B preference shares by the Second Respondent to the trustee did not have any tax effect on either the Trust or Mr F. The result of the issue and allocation of the A preference shares to the trustee is likely to be an immediate tax liability of £1,016,585 in respect of the trustee, and a tax liability for Mr F personally of £200,115. These liabilities were potentially avoidable. The more recent tax advice has been that if the Royal Court were to set aside the trustee's decision and thereby the bonus issue of A preference shares in the Second Respondent, then the Second Respondent will not have made a distribution to the Trust for tax purposes and therefore the income tax charges in question will not arise.

19 The possibility that the bonus issue of redeemable A preference shares to the trustee would be deemed to be an income distribution or dividend paid to the trustee leaving the trustee and/or Mr F with a significant charge to UK income tax was not one which had been anticipated by either the trustee or its professional advisors. This was therefore a mistake about the tax consequences of the trustee's decision. It is contended before us that tax consequences are a relevant consideration for the purposes of Article 47G or 47H and reference in that respect is made to *In the matter of the B Trust (Link Trustee Services)* [2018] JRC 043. We agree that a mistake as to the tax consequences of a decision has been held by the Royal Court on a number of occasions in the past to be a relevant mistake for the purposes of applications under the Law.

20 Next it is said that but for the mistake, the trustee would not have made the decision in question. Instead it would have sought some alternative means by which to repay that part of Mr F's loan which was repaid through the A preference shares. We accept that this is so. It is clear that the whole restructuring was based on the tax changes introduced by the relevant UK tax legislation. Tax liabilities or potential liabilities were the driver for what was done on this occasion and there is no doubt in our minds that but for the mistake in question

the A preference shares would not have been created and allocated.

21 The next question is whether the trustee's mistake was of so serious a character that it would be just for the Court to grant relief. It is contended by Advocate James that the size of the potential loss due to the mistake is a relevant factor in assessing its seriousness and he relies on *In the matter of the B Trust* [2019] JRC 035, where the UK tax liability was potentially also serious. We accept that submission.

22 No question arises in the instant case about the delay in seeking to set aside the exercise of the power. The trustee was first formally notified of the tax consequences of its decision in August 2018 and since that time it has acted timeously, without protracted or deliberate delay, having filed its representation seven months later in March 2018. We accept the submission that a period of seven months in the instant case is not an undue delay. This is not only because the whole of the tax position needed to be further analysed to identify whether the tax liability ought to be challenged; but also because there are numbers of other relevant structures connected to Mr F which needed to be considered with potentially complicated tax implications for those other structures as well, depending upon what happened with the A preference shares. A reasonable amount of time was required in the circumstances to consider what was the best course of action and then to bring together the evidence which might be needed to support it.

23 We are however driven back again to the question of the justice of involving the Royal Court in helping trustees and individual beneficiaries out of a tax problem which has been created by the mistaken advice they have received. If a trust were not involved, one would expect the tax payer to bring proceedings against his or her adviser to recover the loss which had been sustained and which, on this analysis, could have been avoided. In some respects, it might be said that that was the desirable approach to take with trusts as well. It is not obvious that the Courts should come to the rescue of a trustee or his professional advisers for a mistake that one or other might have made in circumstances where, had there been no trust, the trustee as client would have sued the professional adviser for the loss in question. It might be said that if trustees were aware that this was a step which they might be required to take, they would be more careful is setting the terms of reference under their contract with the tax adviser in question. Similarly, the non-availability of relief of the kind contemplated by Article 47G or Article 47H of the Law might be thought to help focus the minds of the tax adviser.

24 In *Re Onorati Settlement* [2013] (2) JLR 324, the Royal Court considered whether such litigation should be the outcome, rather than the grant of relief under the doctrine of mistake. The issue was also considered in *Re B Life Interest Settlement* [2013] (1) JLR 1. In *Re Onorati*, the trustee took no professional advice on the tax consequences of the appointment which was ultimately set aside. It was informed by one of the beneficiaries that she had taken advice but the trustee never asked to see it. In that case therefore the trustee was in very clear breach of its fiduciary duty, and that is some way away from the position we face here, where the trustee has taken full advice and cannot be said – any more than

Mr F can be said – to bear responsibility for the outcome.

25 In circumstances where the Court might have been thought to have little sympathy for a defaulting trustee, the Court in *Onorati* said this at paragraph 44:-

> ***"In our judgment, our discretion in this case should be exercised in favour of setting the appointment aside.*** It is clear that the Representors did not take their own tax advice and they bear no responsibility for what has occurred. They have incurred a substantial unnecessary tax burden amounting to some 35% of the sum appointed to them. It may be that they could bring an action against the Trustee but it would not necessarily be entirely straightforward given the involvement of the daughter. The Trustee might well seek to join the daughter to any proceedings brought against it or to rely on an exemption clause. More generally, we are not attracted by the proposition that beneficiaries should be left to a remedy of bringing litigation against trustees or professional advisers. The beneficiaries are usually not at fault and have already incurred loss by reason of unnecessary tax charges. To force them to incur further expense in what may be uncertain litigation when the law allows for the avoidance of a decision made in breach of the trustees' duties seems unnecessary, undesirable and unjust."

26 So the question is whether the same approach should be taken here where the potential plaintiffs in a negligence action would be the trustee and/or Mr F. Advocate James submitted that it would be very undesirable for the Court to consider whether, as he put it, there was a "slam dunk" claim in negligence. For the Court to go down that road would require it to make its decision on the basis of information from one party alone, namely the trustee as potential plaintiff, and even assuming that trustees would be prepared to make the fullest disclosure of the strengths and weaknesses of their potential case against the adviser, there might be other information which had been overlooked and which would have an impact on the possible outcome of the claim. The practical difficulties of assessing on what is likely to be an *ex parte* application (in the sense that the advisers would not be present) would be capable of being intense.

27 In the present case, the Trust is currently without substantial assets. It was put to Advocate James that Mr F is clearly a man of substantial wealth and that he would be able to fund the action against both his and the Trust's advisers. That will not always be the case, and we accept that trust and negligence litigation can be very expensive. It is not obvious that it will be in the interests of beneficiaries to drive trustees down a route of seeking funding for litigation purposes, or alternatively risking trust monies for such a venture. One can contemplate that presumably trustees in these circumstances would take out a Beddoe application asking for the Court's approval to commence such proceedings. Is the Court then to ask why the trustee did not approach a different division of the Royal Court to ask for the exercise of discretion under Article 47G or Article 47H of the Law as a cheaper route which was more in the interests of the beneficiaries?

28 We have reached the conclusion that the decision in *Onorati* – which was concerned with whether the Court should leave beneficiaries to the remedy of bringing litigation against trustees or professional advisers – should be extended to trustees and for the reasons given we are not attracted to the proposition that the trustees should be left to bring proceedings in negligence against the tax adviser in circumstances such as these. Accordingly, we think it is just to grant relief in respect of the trustee's mistake.

29 The next question which arises in this case relates to the fact that the loans from Mr F to the Trust and the redemption arrangements made on 29 th March 2017 are governed by English law. Any matter, claim or dispute in connection with the letter of 29 th March is to be governed by and decided in accordance with English law, according to paragraph 6 of that letter, and the courts of England have exclusive jurisdiction to settle any matter, claim or dispute arising out of or in connection with the letter.

30 In *A and B v C and Ors* [2018] JRC 174A, the Court was presented with an application to set aside a decision to transfer assets out of a Jersey trust into an English trust, and consequential orders were needed as there had been distributions out of the new trust and the old trust had been terminated. At paragraph 17, the Court said this:-

> ***"A curiosity of the present application is that the Court is asked to make a number of orders under the Trust Law in relation to the activities of the trustees of the 2001 Trust which is governed by the law of England and Wales.*** Nonetheless, Jersey law governs the 1973 Trust, and it therefore will also govern any disposition from that Trust, including the transfer or disposition into the 2001 Trust. If it should turn out that that transfer or disposition is set aside, the 2001 Trust will not have the assets in question and there is nothing against which English law would apply. The Court is thus left with a number of administrative decisions taken by trustees of an English trust were the trust in question had no assets. In our judgment it is right to apply Jersey law to all the events which happened after the date of the transfer set aside for mistake because the sub-stratum of the English trust has disappeared. The Court is exercising powers conferred upon it under Article 47H, giving effect or not as the case may be to events which post-dated the transfer which has been set aside."

31 In *Tait v Apex Trustees Limited* [2012] JRC 148, the Court faced an application to set aside a transfer into trust under one of the Baxendale Walker schemes. The consequence of setting aside the gift into trust would also be to effect certain deeds executed under the laws of England and Wales. The Court said this:-

> ***"The first question is which law we should apply to the different documents which have been put before us.*** The Tait Annuity Investment Trust is expressed to be governed by Jersey law. The various estate annuity purchase deeds are expressed to be governed by English law and there is a stipulation to the non-exclusive jurisdiction of the English courts in relation to those agreements. The tenancy agreement was made between the original

trustee, whose principal place of business was in Jersey, and the representors, who are English domiciled and resident, and relates to real estate in England. Although the document is silent as to the governing law, it is marked with appropriate stamp duty, payable under the relevant English fiscal provisions, and we think in the normal course of events that it would be governed by English law .

14. On the other hand, Article 9(1) of the Trusts (Jersey) Law 1984 makes it plain that where one is dealing with non-Jersey domiciled settlors – and in this case the founder, otherwise to be known as the settlor, was a BVI incorporated company – any question concerning the validity or interpretation of a trust or the validity or effect of any transfer or other disposition of property to a trust is to be determined in accordance with the law of Jersey, and no rule of foreign law shall affect such a question. Furthermore, the Jersey Law of Conflicts will not be applied in these cases. It seems to us as a matter of Jersey law therefore that if the estate annuity purchase deeds are sufficiently linked to the trust deed, it follows that the fall to be construed according to Jersey law in so far as one is looking at their validity or effect, notwithstanding the express choice of English law and the election of the non-exclusive jurisdiction of the English courts."

32 In the circumstances of that case, the Court concluded that the estate annuity purchase deeds were linked to the Tait Annuity Investment Trust because without that trust it was extremely improbable that the representors would have made the estate annuity purchase deeds at all. In other words, the documents had to be looked at in the round.

33 The same approach was taken by this Court in *The Matter of the Z Trust* and was adopted in *The Matter of the B Trust (Link Trustees Services)* (supra) where at paragraph 30 the Court said this:-

" *In the matter of the Z Trust*, ***the Court utilised its jurisdiction under Article 47I(3) to set aside 'as a necessary consequence' of setting aside a power of appointment of UK resident trustees***:

(i) the transfer of the retired trustee's shareholding in a company to a UK nominee director;

(ii) the appointment of the UK nominee director; and

(iii) the resignation of the retired trust company's officers as directors and officers of the company .

This was on the basis that the Court considered there to be a 'sufficient link' between the aforementioned transactions such that they could be treated as 'one related transaction' (see paragraph 41 – 46 of the judgment)."

34 In the present case we are satisfied that there is a sufficient link between the Jersey trust documents and the English law governed documents to which we have referred and in those circumstances we can exercise a jurisdiction to make consequential orders in relation to those English law documents as well.

35 For all those reasons we declare that the following decisions of the trustee are voidable and of no effect and consequentially we set aside as invalid and of no effect:-

(i) The special resolution passed by the Second Representor and the First Respondent on 29 th March, 2017 as members of the Second Respondent, having been made *ultra vires* without the trustee's instructions or authority, and that no new memorandum and articles of association were adopted and no A or B preference shares were created.

(ii) The decisions of the directors of the Second Respondent to issue and allot the A and B preference shares to the trustee, recorded in the minutes of 24 th March 2017.

36 We further declare:

(i) That the Trust's liability to Mr F to the extent of £20,926,306 and the Second Respondent's liability to the Trust to the extent of £18,258,102 remain outstanding, the repayment letter and the settlement and subscription agreement being of no effect; and

(ii) The Second Respondent's articles of association adopted on 19th December 2017 are valid and effective with the exception of Article 3 and any reference to the A Redeemable Preference shares and B Redeemable Preference share, which are of no effect.

37 We further make an order pursuant to Article 47(1) of the Companies Law rectifying the share register of the Second Respondent so that references to the A and B preference shares are struck out and the Second Representor's name be removed from the register to the extent that it is registered as a holder of the A and B preference shares.

38 We would not wish to leave this case without making two additional comments:-

(i) In this case there has been active disclosure to and communication with HMRC. We do not have any evidence to suggest that this case falls within the class of what has sometimes been called aggressive tax avoidance schemes. If any external tax authority were to bring such a contention before the Court in future, that is potentially a matter which might go to the exercise of the Court's discretion in such a case. We expressly do not say that even if it were to be an aggressive tax avoidance scheme,

the discretion would not be exercised. We have not heard argument and we reserve it, noting only the potential for such a point to be taken.

(ii) There is in our judgment an important distinction to be made in relation to consequential orders under Article 47I between those orders which are directly consequential and those which amount to fresh steps designed to achieve the same tax benefits which, but for the mistake, would have been achieved if the transaction had not been declared voidable. In the latter case, the Court will scrutinise with great care exactly what it is asked to do bearing in mind that it is no part of the Court's function to facilitate foreign tax avoidance.