P v Aqua Trust Ltd

Jurisdiction:	Jersey
Judge:	Sir William Bailhache, Jurats Olsen, Austin-Vautier
Judgment Date:	27 May 2021
Neutral Citation:	[2021] JRC 157
Court:	Royal Court

Text

[2021] JRC 157

ROYAL COURT

(Samedi)

Before:

Sir William Bailhache, Commissioner, and Jurats Olsen and Austin-Vautier

In the Matter of the Representation of P and Others

And in the Matter of the NAD QNUP & The NAD2 QNUP Trusts

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

Between
P
R
S
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U

V
W
Together the Representors
and
Aqua Trust Limited
Respondent

Advocate N. M. Sanders **for the Representors**.

Advocate D. R. Wilson **for the Respondent**.

Authorities

Tait v Apex Trustees Limited [2012] JRC 148.

CC Limited v Apex Trust Limited [2012] 1 JLR 314.

Representation of the Robinson Annuity Investment Trust [2014] JRC 133.

BNP Paribas Jersey Trust Corporation Limited and Others v Crociani and Others [2018] (2) JLR 175.

Trusts.

THE COMMISSIONER:

Introduction

1 This was an application by the Representors for an order that two trusts made in two materially identical Declarations of Trust dated 2 nd August 2017 (the "Trusts") executed by the Respondent (the "Trustees") as trustee are invalid and of no effect on the grounds of mistake, or alternatively that the transfers into those trusts are void of no effect as of the date they were made, and for ancillary relief. The application was heard on 9 th March in private. Decisions were made substantially in accordance with the prayer of the Representation with reasons reserved. This judgment contains those reasons.

The facts

2 As is so often the case in applications of this kind, the Trusts were declared and the transfers of property made to the Trusts with a view to creating a tax-efficient structure for the benefit of the Representors and their wider family. As will be seen, the Trusts have not had the effect which was intended, and indeed there are very adverse tax consequences from what has been done. These tax consequences will be reversed as a result of the

orders which the Court has made, and we say at the outset that Her Majesty's Revenue and Customs ("HMRC") was given notice of the Representation such that they could apply to join the proceedings if desired. The Court has been shown a letter from Advocate Sanders to HMRC setting out the background of the matter, and a reply from HMRC confirming that it did not wish to be joined as a party to the proceedings or make any comment on the application.

3 The Trusts established were constituted by the payment of two sums of £10 each by the First Representor to the Trustees by way of initial contribution to NAD QNUP and NAD2 QNUP. However, it is clear from the evidence submitted that the purpose in establishing the Trusts was to put in place a structure for holding real estate which would at least beneficially be transferred to the Trustees, and any key problem in relation to such transfers of property would be relevant to the need for the existence of the structures in the first place.

4 Some interests in four London properties were transferred into the Trusts on 2 nd August 2019. The mechanism for those transfers was not entirely straightforward in the case of some of those properties. The First Representor was at the heart of all the transfers, however. In relation to a property called Property 1, she owned the leasehold title to that property herself and, on 2 nd August 2019, she executed a declaration of trust that she held that property as nominee and bare trustee for the Trusts absolutely. Property 2 and Property 3 were held by the Second, Third, Fourth and Fifth Representors on the basis that they would hold the legal title as bare trustees for themselves and also for the Sixth and Seventh Representors in equal shares. On 2 nd August 2019 some of those beneficial interests were transferred to the First Representor as an initial step so that she could then transfer them on to the Trustees, which she did by a Declaration of Trust made that same day. As a result, the Trustees held beneficial but not legal title for the Trusts to the interests in these properties previously held by the Second, Third, Fourth and Fifth Representors but not the interests of the Sixth and Seventh Representors. Finally, Property 4 was purchased on 9 th February 2017 by the Second Representor, who on 2 nd August 2019 declared that she held the legal and beneficial interest in that property for the First Representor. The same day, the First Representor executed a declaration of trust in respect of the interests so transferred to her by which she acknowledged holding those interests for the Trustees to hold on behalf of the Trusts.

5 In summary, as a result of various deeds of declaration of transfer and contribution, the respective family interests in four properties were contributed to the Trusts in order to establish them substantively as an effective tax-planning mechanism. For UK tax purposes, the transfer declarations were likely to be considered as a conduit through which, in effect, the family members could contribute their beneficial interests in the properties to the Trusts albeit that the legal titles remained with the respective family members.

6 In essence, the transfers made by the First to Fifth Representors on 2 nd August 2019, intended to have no adverse tax consequences in the UK, in fact were liable to attract substantial Inheritance Tax consequences because the arrangements, which had been

considered to be Qualifying Non UK Pension Schemes ("QNUPS"), or from a UK perspective "registered pension schemes", in fact would have the result that the properties would form part of the First Representor's estate. The essential problem was that the Trusts, to be acceptable as a QNUPS, were required to meet six tests and unfortunately only met five of them – the unsatisfied test was that the scheme had to be open to persons resident in the country or territory in which it is established and as the scheme in question was only capable of having one beneficiary (the First Representor) without any mechanism to appoint additional beneficiaries, the problem was incapable of remedy. As a consequence, the transfers to the Trusts would be transfers of value which would be lifetime chargeable transfers attracting UK Inheritance Tax. On the basis that the properties had a value of at least £25 million, the potential Inheritance Tax liability would exceed £5 million with periodic or exit charges in addition.

The law

7 The Trusts are governed by Jersey law and are therefore Jersey Trusts. Accordingly, by virtue of Article 9(1) of the Trusts (Jersey) Law 1984 (the "1984 Law") any question concerning 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 – see *Tait v Apex Trustees Limited* [2012] JRC 148, *CC Limited v Apex Trust Limited* [2012] 1 JLR 314 and *Robinson Annuity Investment Trust* [2014] JRC 133. Accordingly, it is Jersey law which applies notwithstanding that the various transfers and trust declarations to which we have referred are expressed to be governed by English law. This applies notwithstanding that the underlying assets are beneficial interests in English real estate – the terms of Article 9 of the 1984 Law are clear, and in any event, what the Court is concerned with in this case is the transfer of beneficial interests into a Jersey trust and whether those should be set aside on the grounds of mistake.

8 The application which the Representors bring is based primarily on Article 11 of the 1984 Law which, at sub-paragraph (2) provides:

> ***"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,…."***

9 To the extent necessary, the Representors rely also on Article 47E of the 1984 Law, which at sub-paragraphs (2) and (3) provides as follows:

> ***"(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."

10 The test to be applied for setting a transfer into trust aside on the grounds of mistake is well settled. The Court has to ask itself the following questions:

(i) Was there a mistake on the part of the transferor?

(ii) Would the transferor 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?

11 We agree with the submission made by Advocate Sanders that the key question for the Court will be the identification of the operative mistake and its effect for the purposes of the transfer into trust.

12 We note also that if the Court resolves that it is correct to set aside the transfer as a matter of principle, the Court can follow one of three courses – declare the transfer to be voided and of no effect from the time it took place; declare the transfer to be voided from the time it took place but nonetheless be deemed to have had such an effect as the Court might determine; or declare the transfer to be voided from a date subsequent to the time it took place. In this connection, see *BNP Paribas Jersey Trust Corporation Limited and Others v Crociani and Others* [2018] (2) JLR 175.

Discussion

13 In our judgment, it is quite clear that there was a mistake on the part of the Representors who would never have made the arrangements they did for the transfer of the beneficial interests in the various properties to the Trusts had they been aware of the tax consequences of doing so in the way they did. The evidence before us is clear that a tax-efficient structure is at the heart of the arrangements which were made. All the beneficiaries are non-British nationals who are neither resident nor domiciled in the United Kingdom, but who have purchased properties in London in order that they might live in those properties when staying in London, or in order that they might create rental income. The first part of the test for mistake is clearly satisfied.

14 In our judgment, it is also equally clear that the Representors would not have entered into the various transactions *'but for'* the mistake as to the tax consequences. There were other ways of structuring the holding of their property in London which would have not have had the same adverse fiscal consequences.

15 In relation to the third limb of the test, the mistake was of a serious character in the sense that it has resulted in a potentially significant tax liability. That significant liability needs to be weighed against any other circumstances which might lead the Court to a conclusion that it was not unjust to direct the transfers to the trustee to stand. In carrying out that exercise, the Court is liable to have regard to the circumstances in which either the formation of the trust or the subsequent transfer of property to the trust came about. In particular, the Court is likely to have regard to the advice which was taken and the experience of the settlors or transferors.

16 The Representors, who are the transferors in the present case, are all members of the same very wealthy family. Undoubtedly the resources with which the properties were acquired were derived in one form or another from the First Representor, who is a senior member of the family and much respected as a result. It is also right to remark that it does not seem to be clear that the family generally had, despite their accumulated wealth, a great experience of trusts. They seem to be a family much reliant on their personal experiences of the advisers with whom they dealt, and we have found it hard to escape the view that the Representors would probably have signed almost anything put before them by the director of the Respondent.

17 In the present case, the scheme in question was a financial services product which was put before the family by the Respondent. It was a product which had worked, or appeared to work, in a previous case with which the Respondent had been connected. It is unnecessary to set out the detail of why this particular scheme failed, but it is right to note that the Respondent suggested in its scoping document that tax accountants and UK tax counsel had considered the structure and agreed it was effective. In that document, the director of the Respondent had written that *'verbal confirmation and written confirmation from BDO that the proposal as laid out is tax effective and will be capable of protecting the client from inheritance tax and capital gains tax.* It is important however that we press on quickly given

the time restrictions and limited opportunity to put the structure in place…. BDO have worked with Aqua and Queen's counsel in relation to this particular structure and it is regarded as robust".

18 The proposal from the Respondent was that final confirmation should be obtained from UK tax counsel. A provisional date for a conference was booked, but it subsequently was postponed. The director of the Respondent emailed the family's financial adviser on 30 th May 2017 to say "as you know I postponed tax counsel but I have had a chance to address matters with her on the telephone and she remains comfortable that this is effective notwithstanding the changes after tax year brought about by the general election". As a result of this confirmation, the family considered that the need to meet with tax counsel had fallen away, and the conference never took place.

19 As the Second Representor put it in her evidence before us:

> ***"The documents were arranged so that we were contributing the properties in which we had an interest to two Trusts via [the First Representor].*** As far as I remember, the documents were not explained to me and I did not ask [the Respondent] or [the family's adviser] for an explanation…. I thought this was the standard arrangement or procedure to transfer the properties into Trusts. I also did not ask for a detailed explanation because I felt I would have difficulty understanding how trusts work together with the fact that [the Respondent] appeared to be experienced enough to know the necessary steps to transfer the properties into the Trust. I thought that the planning and the documents had been looked at by professionals, who would ensure tax efficiency – that was our objective and we thought the documents we were signing would achieve that. Also, we had been in discussions with [the Respondent] for some months. We decided to sign the documents only when we felt comfortable with her repeated assurances (and BDO's confirmation) that the suggested structure was tax effective, which I thought was also the view of [tax counsel]."

20 Having looked at the written material surrounding these transfers into Trust, we have no doubt that although there might be arguments to be run as to where the responsibility for taking the relevant tax advice lay, it is not unfair to conclude, on taking a step back and looking at matters in the round, that enough was said by the Respondent for the Representors to draw two conclusions – first, that the structure was tax effective and, second, that although there might have been reference to the need for the Representors to take their own tax advice, in fact that was not necessary in all the circumstances. In summary, in this respect, we are very critical of the approach which the Respondent took. We consider that there was considerable confusion in relation to the original execution of Trust documentation, and that the whole structure was put in place as part of the selling of a product with, as it turned out, false promises as to what the product would deliver in fiscal terms. Those false promises were not made deliberately, but they were nonetheless false. They were made on the strength of inadequately thought-through advice and a willingness

to assume that circumstances which were effective for one client would inevitably be effective for others. They do not demonstrate the quality of service which in our view should be expected from a Jersey-regulated financial services entity.

21 We also have noted that some of the documents which have been put before us by the Trustees were clearly backdated, it appears in some cases either by the Trustees themselves or at least with their acquiescence. This was of concern to us. If a document is to have an effect from an earlier date than that on which it was executed, that can sometimes be achieved but only with transparency that the two dates are different.

22 This is one of those cases where the course of conduct was such that we think that the present judgment should be sent to the Jersey Financial Services Commission – and we direct Advocate Sanders on behalf of the Representors to do so – so that the regulator may, if it thinks fit, conduct its own investigation as to the professional standards exhibited in this case. Given that the regulator may consider whether to open its own investigation, it appears to us to be undesirable to go into more detail in this judgment. For the test we have to apply, it is sufficient to say that, taking a step back and looking at matters in the round, there would be injustice to the Representors if we allowed the transfers to stand. We are absolutely satisfied that the justice of the case is such that the mistake should be put right.

23 For these reasons, we declare that the Trusts known as NAD QNUP and NAD2 QNUP are invalid for mistake pursuant to Article 11(2)(b)(i) of the 1984 Law and thus of no effect. The Trusts and the transfers into trust were inextricably linked and we thus declare that the transfers of property interests by the Representors to be held on the terms of those Trusts are also void. It is further declared that the Respondent, as Trustees of those Trusts, holds, and at all times since the date of each of their respective transfers has held, the property interests thereby transferred for the Representors as transferors of those interests absolutely.

24 The draft order put before us suggests that the Representors will pay to the Respondent its reasonable fees and expenses properly incurred in relation to the establishment and administration of the Trusts, and its costs of these proceedings, the costs to be on the trustee indemnity basis. If the family decides that it is appropriate to ensure that in one form or another the Respondent is paid these fees and costs, that is a matter for the family to arrange. As far as we are concerned, as canvassed with Advocate Wilson on behalf of the Respondent, we were sufficiently unimpressed with the performance of the Respondent that we were not prepared to make any order for its fees or costs in connection with either the establishment or administration of the Trusts or the costs of these proceedings.