

## B v D

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	J. A. Clyde-Smith OBE., Jurats Blampied, Thomas, Clyde-Smith
<b>Judgment Date:</b>	20 August 2020
<b>Neutral Citation:</b>	[2020] JRC 169
<b>Reported In:</b>	2020 (2) JLR 304
<b>Date:</b>	20 August 2020
<b>Court:</b>	Royal Court

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### Text

[2020] JRC 169

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith OBE., **Commissioner and** Jurats Blampied **and** Thomas

In the Matter of the Representation of B and C Née Kemp

and

In the Matter of the H Foundation and the Declaration of Trust Dated 7<sup>th</sup> November 2012.

Between

B

First Representor

and

C

Second Representor

and

D

First Respondent

E

Second Respondent

and

F

Third Respondent

and

Edge Tax Consultancy Limited (in liquidation)

Fourth Respondent

Anton Lane

Fifth Respondent

Her Majesty's Revenue and Customs

Sixth Respondent

The H Foundation

Seventh Respondent

**Advocate N. M. C. Santos-Costa for the Representors and for the Seventh Respondent.**

**Advocate E. Moran for the First, Second and Third Respondents.**

**Advocate H. Sharp for the Fifth Respondent.**

## **Authorities**

Foundations (Jersey) Law 2009.

Trusts (Jersey) Law 1983.

*Representation of Langlois* [1985–1986] JLR 388.

*Re Lochmore Trust* [\[2010\] JRC 068](#).

*In re A Limited* [\[2013\] \(1\) JLR 305](#).

*Rebours v Jersey Electricity Company* [\[1978\] JJ 217](#).

Companies (Jersey) Law 1981.

*In the matter of the A Trust* [\[2009\] JLR 447](#).

*In the matter of the Lochmore Trust* [\[2010\] JRC 068](#).

Trust — Grounds of mistake.

## THE COMMISSIONER:

- 1 On 6<sup>th</sup> July, 2020, the Court set aside a number of endowments made by the Representors to the H Foundation (“the Foundation”), but reserved its decision on the primary relief sought, namely the setting aside of the Foundation itself on the grounds of mistake.

## Background

- 2 In 2009, the First Representor was introduced to the Fifth Respondent, Mr Anton Lane, of Edge Tax Consultancy Limited (“Edge”), a firm of chartered tax advisers and business advisers, through his bankers, Fairbairn Private Bank (now Nedbank Private Wealth) in order to discuss estate planning for the benefit of the family's financial affairs. Various actions in relation to estate planning and mechanisms were discussed and Mr Lane advised of the advantages and availability of a foundation under Jersey law.
- 3 Edge had obtained generic advice from Mr Giles Goodfellow QC, at a conference held on 29<sup>th</sup> March 2011, on the UK tax consequences of the use of Jersey foundations, a note of which had been prepared by Edge and which was shown to the Representors. Edge then produced a UK Tax Report for the Representors dated 21<sup>st</sup> May, 2012, under which it was proposed that:
  - (i) The Representors would establish the Foundation from which they would be excluded from benefit, but under which they reserved the right to demand repayment of the whole of any capital contributed by them, but with no right to capital growth or income (“the Founders' Rights”).
  - (ii) The Representors would transfer assets to the Foundation.
  - (iii) The Founders' Rights would be an asset in the estates of the Representors, which could be assigned to their children in future and which would not be subject to Inheritance Tax, Capital Gains Tax or Income Tax.
  - (iv) The Tax Report noted that there was a risk that HMRC might argue that the Foundation was a settlement for the purposes of [section 43 of the Inheritance Tax Act 1984](#) but to prevent such a challenge being successful, the Representors would retain the Founders' Rights, which would have a value equal to the assets transferred by them, and so there would be no reduction in

the value of their estates. The Representors could then give those rights away to their children and there would be no IHT liability provided they survived by seven years.

4 Following this advice:

(i) The Foundation was established by the Representors as the founders on 2<sup>nd</sup> October, 2012, under the Foundations (Jersey) Law 2009 ("the Foundations Law") and £12,000 endowed by them on 16<sup>th</sup> October, 2012.

(ii) Under its charter, the Foundation shall continue until twenty years after the death of the last surviving Representor. Under its regulations, the beneficiaries of the Foundation are the children of the Representors living at the date of its incorporation, or thereafter born during the existence of the Foundation conditional upon attaining eighteen years. The Representors have three adult children, namely the first to third Respondents, all of whom have attained the age of eighteen years. Unborn children of the Representors were represented by the Second Representor. The Foundation is administered in Jersey by its sole council member, Nedgroup Trust (Jersey) Limited.

(iii) On 7<sup>th</sup> November, 2012, the Representors executed a simple Declaration of Trust prepared for them by Edge in which they declared that they held the Founders' Rights upon trust for such of their three children as shall attain the age of 30 years, and if more than one, in equal shares absolutely. The Declaration of Trust is silent as to its governing law.

(iv) During the year 2013 endowments totalling some £11.4 million were made by the Representors to the Foundation.

5 The structure was reviewed in early 2019, in particular because the Representors' eldest child is due to turn 30 on 16<sup>th</sup> August, 2020. This led to legal advice being taken from Wedlake Bell LLP, Mr Robert Ham QC and Mr Rupert Baldry QC. Without going into the detail of that advice, it was apparent to the Representors that the advice provided by Edge in respect of Inheritance Tax was mistaken in at least three fundamental regards:

(i) The Declaration of Trust was not a potentially exempt transfer and accordingly was subject to an immediate charge to Inheritance Tax.

(ii) The use of the Founders' Rights mechanism did not prevent the occurrence of an event immediately chargeable to Inheritance Tax at the rate of 20% (an entry charge).

(iii) The endowment of the Foundation did in fact constitute chargeable transfers for the purposes of Inheritance Tax, contrary to the advice provided by Edge.

6 The Representors' liability to HMRC regarding Inheritance Tax alone is currently estimated at between £4.7 million and £6.2 million. This amount encompasses the unpaid taxes,

interest thereon, penalties for late payment and an additional penalty of up to 200% of the unpaid tax under HMRC's Failure to Correct Regime by virtue of there being an "*offshore element*" to the structure.

- 7 Advocate Sharp, representing Mr Lane, accepted that the Representors must have been operating under a mistake when they made the endowments in 2013, but on a more narrow basis. He said that, stripped to its essentials, the proposals in the advice given by Edge were that there would be no chargeable transfer of value for Inheritance Tax purposes as a result of the endowments, because there would be no reduction of value in their estate, whilst they retained the Founders' Rights. The Representors could then give away those rights at an appropriate time, being an exempt transfer for Inheritance Tax purposes if they survived for seven years. The advice envisaged two stages in the tax planning. The endowments to the Foundation would occur at stage 1 when the Representors would retain the Founders' Rights. The transfer of the Founders' Rights should only have occurred at stage 2. The fact that the Representors transferred the Founders' Rights before making the endowments showed that they must have been acting under a serious misapprehension.
- 8 Although the Tax Report refers to the Founders' Rights being assigned "*in the future*", the Court could see no reference in it to the importance of the two stage process and the Declaration of Trust was, as we understand it, produced by Edge for the Representors to execute before the material contributions were made in 2013.
- 9 The Court has been informed that the Representors are pursuing negligence proceedings against Edge in the United Kingdom, although it is unclear what relief can be obtained bearing in mind it is in liquidation. Even so, it is not appropriate for the Court to comment further, other than to say that we are satisfied on the evidence before us that in establishing the Foundation and in making the endowments, the Representors were acting under a serious mistake as to the tax consequences.

### Setting aside the Foundation

- 10 The principal relief sought by the Representors, supported by their children, was that the Foundation should be set aside *ab initio* on the grounds of mistake.
- 11 There is no express power in the Foundation Law equivalent to Article 11 of the Trusts (Jersey) Law 1983 ("the Trusts Law") which provides that a trust shall be invalid to the extent that the Court declares that it was established by inter alia mistake, and where a trust is declared invalid, property subject to the trust will be held by the trustee in trust for the settlor absolutely.
- 12 Both Advocate Santos-Costa and Advocate Moran submitted that a power to declare a foundation invalid on the grounds of mistake could be implied into the Foundations Law. They relied on Article 32(1) and (2) which is in the following terms:

***“The application of laws to a foundation******32 Jersey law to prevail in respect of foundations******(1) A question that arises in respect of –******(a) a foundation; or******(b) the endowment of a foundation ,******must be determined in accordance with the law of Jersey without reference to the law of a jurisdiction outside Jersey .******(2) The question may be ( without limiting the generality of paragraph (1)) a question as to –******(a) the capacity of the founder of a foundation to seek the incorporation of the foundation or the capacity of a person to endow it;******(b) the validity, interpretation or effect of the charter or regulations of a foundation or of an amendment of them;******(c) the administration of the foundation, whether it is conducted in Jersey or elsewhere, including questions as to the functions, appointment and removal of a person appointed under the regulations of a foundation; or******(d) the existence and extent of functions in respect of a foundation, including (without limiting the generality of this provision) powers of amendment, revocation and appointment, and the validity of the exercise of such a function.”*** (their emphasis)

13 In their view Article 32(2)(a) expressly states that a foundation can be set aside on the grounds of lack of mental capacity and it leaves open the possibility of the Court setting aside a foundation for undue influence, duress or mistake. If a foundation, despite being a body corporate, can be set aside on the grounds of lack of mental capacity, there was no reason why the foundation cannot be set aside for mistake. They pointed to Article 33, which expressly states the customary law doctrine of *donner et retenir ne vaut* shall not apply, but there is no express exclusion of the customary law doctrine of mistake.

14 They referred the Court to the case of *Representation of Langlois* [1985–1986] JLR 388, where the Court considered that it had the jurisdiction to set aside a deed poll on the grounds of mistake. The Court made the following observation at page 398:

***“If a man, taking reasonable care, has nevertheless been induced by the machinations of some other person to execute a deed under a substantial***

***mistake (not merely as to the legal effect of known contents of the deed) so that he believed it to be fundamentally different in substance or in kind from what it was, so that when he executed it his mind did not accompany his outward act, he may plead for this reason that the deed is not his deed, and if this plea is established by the evidence, the deed will be altogether void from the beginning.”***

- 15 The key point, they said, is that the transaction in question should be unilateral and not an *inter partes* transaction such as a contract, when the rules of *erreur* would apply. Albeit a foundation needs to be registered with the registry, its establishment is a unilateral act in that the qualifying member makes the application on behalf of the founder.
- 16 If the Court had the power to set aside a foundation on the grounds of mistake, the next question that arises would be the applicable test and they submitted there was no need to depart from the three stage test that applies to Article 11 of the Trusts Law, namely those summarised in *Re Lochmore Trust* [\[2010\] JRC 068](#) to which we refer later.
- 17 Advocate Sharp referred us to the case of *In re A Limited* [\[2013\] \(1\) JLR 305](#) in which the Court reviewed the nature of a foundation established under the Foundations Law, from which we extract the following:
- (i) A foundation is a legal entity incorporated under the Foundations Law with no shareholders or capital.
  - (ii) The Foundations Law is the only source of law that provides for its formation and governance thereafter.
  - (iii) Assets endowed upon it are owned by it both beneficially and legally.
  - (iv) A person designated a beneficiary has no interest in the foundation's assets, unless he or she becomes entitled thereto under its regulations and is not owed by the foundation and by a person appointed under the regulations of the foundation a duty that is or is analogous to a fiduciary duty.
- 18 It follows that if the Court has the power to set aside a foundation on the grounds of mistake, it must look to the Foundations Law for the source of that power. No such express power is contained in the Foundations Law, in particular under Part 5 which is headed “**Powers of the Royal Court**” where such a power might be expected to be found.
- 19 As a matter of statutory construction, a court can imply a power into legislation where there is a clear necessity to do so (see, for example, *Rebours v Jersey Electricity Company* [\[1978\] JJ 217](#)). Advocates Santos-Costa and Moran do not seek to imply such a power under Part 5 of the Foundations Law, but under Articles 32 and 33 which come under the heading “**The application of laws to a foundation**” and which, as the heading suggests,



are concerned with the laws that should apply to a variety of issues that may arise. We accept that Article 32(1) is widely framed and extends to any question that arises in respect of a foundation and in theory, it is therefore wide enough to extend to questions as to undue influence, duress or mistake on the part of those establishing the foundation. However, these Articles seek to determine the law that should apply to such questions should they arise, namely Jersey law, not the powers vested in the Court to determine them.

20 In our view there are substantial arguments against implying such a power into the Foundations Law or in not exercising such a power even if it can be implied.

21 Firstly, as with companies incorporated under the Companies (Jersey) Law 1981 (“the Companies Law”), there is a strong public interest in third parties being able to rely on the relevant public register for the existence of an incorporated entity. Article 9(5) of the Companies Law provides that a certificate of incorporation is “**conclusive evidence**” that the company is incorporated under the Companies Law and that the requirements of the Companies Law have been complied with in respect of the registration of the company, all matters precedent to its registration and all matters incidental to its registration.

22 In the same way, Article 29(3) of the Foundations Law provides:

**“(3) An entry in the register of the name of a foundation is conclusive evidence –**

**(a) That, on the date mentioned in paragraph (1), the foundation was incorporated under this Law; and**

**(b) That the requirements of this Law were complied with in respect of all matters precedent or incidental to the incorporation of the foundation.”**

23 The need for third parties to be able to rely upon the register as to the existence of a foundation as an incorporated body and that all the requirements of the Foundations Law precedent or incidental to its incorporation have been complied with, in our view militates against the argument that there is a clear necessity for the Court to imply a power to set aside the incorporation of a foundation *ab initio* on the grounds of mistake. It is one thing to strike a foundation off the register for, by way of example, failing to pay its annual fee or to dissolve it following its winding up and quite another for the Court to declare that a foundation never existed at all notwithstanding that according to the register it did exist in the period before the declaration.

24 The Foundations (Winding up) (Jersey) Regulations 2009 makes provision for the winding up of foundations analogous to those contained within the Companies Law, including solvent and insolvent windings up, dissolution for non-payment of the annual fee, winding up by the Court on just and equitable grounds and reinstatement of foundations that have been dissolved under these Regulations. The fact that the Court has the power to wind up a



foundation on just and equitable grounds undermines the suggestion that there is a clear necessity to imply a power to set aside a foundation on the grounds of mistake.

- 25 A winding up, of course, necessitates the foundation remaining in existence as a legal entity until its assets have been distributed and it is dissolved. A foundation that has been set aside *ab initio* no longer exists in order to be wound up.
- 26 We note that by way of analogy to companies incorporated under the Companies Law, there is no express power vested in the Court under that law enabling the Court to set aside the incorporation of companies on the grounds of mistake on the part of those applying for incorporation and we were not shown any authority for the proposition that such a power can be implied into that law. The case of *Re Langlois* is of no assistance in that although executing the deed poll constituted a unilateral act on the part of Mrs Langlois, it was not an act which gave rise to the existence of an incorporated entity.
- 27 Secondly, where a trust is declared invalid by the Court under Article 11 of the Trusts Law, no issue arises as to the application of the trust property held by the trustee. A trust is not a legal entity and the assets remain in the legal ownership of the trustee, to be held on trust for the settlor of those assets.
- 28 A foundation is in a different position. It is a legal entity and owns its assets both beneficially and legally. The Foundation in this case has assets of some £16 million, held directly by it. If the Court were to set aside the Foundation *ab initio*, as if it never existed, then there is no entity able to transfer those assets back to the Representors.
- 29 The Court has a letter from Nedbank Trust (Jersey) Limited as sole member of the Foundation's council dated 30<sup>th</sup> June, 2020, supporting the relief sought by the Representors and confirming that the assets are held in the name of the Foundation and that the council would be in a position within 30 days of an order of the Court to transfer them back to the Representors. This letter overlooks the fact that if the Foundation is set aside *ab initio*, there will be no council with a function to perform and no power vested in the council to deal with the assets. It is arguable that the assets of the Foundation might in those circumstances revert to the Crown as *bona vacantia*. For this reason alone the Court should not set aside a foundation, at least a foundation with assets, *ab initio* even if it has the power to do so; such a foundation should be wound up and its assets distributed in an orderly way before it is dissolved.
- 30 Even if all the endowments to a foundation are set aside as has happened here, if the Court sets the foundation aside *ab initio* there is no legal entity in existence to return those endowments or to comply with any consequential orders of the Court in relation to their return.
- 31 For these reasons, the Court declines to set aside the Foundation *ab initio*.

## Setting aside the endowments

- 32 At the hearing on 6th July, 2020, there was some urgency in the Court at least granting the alternative relief of setting aside the endowments made by the Representors to the Foundation on the grounds of mistake. The urgency arose because as we have said the eldest child will be 30 this August.
- 33 The children had taken advice about their own tax position if the Foundation and the Declaration of Trust remain intact with the full endowments. It is not necessary to go into the detail of that advice, but suffice it to say that in the worst case scenario, the eldest child will potentially face a tax bill of circa £600,000 in August of this year. These tax issues did not operate upon the minds of the Representors when they established and endowed the Foundation.
- 34 The law in Jersey as to the ability of the Court to set aside voluntary dispositions on the grounds of mistake is well established. Although the case law is concerned in the main with voluntary dispositions into trusts, the law is of general application to other dispositions and would apply to dispositions by the Representors to the Foundation.
- 35 The test was set out in the case of *In the matter of the A Trust* [\[2009\] JLR 447](#) and then reformulated into a three stage test in the case of *In the matter of the Lochmore Trust* [\[2010\] JRC 068](#), which has been applied in numerous subsequent cases. The test requires the Court to ask itself the following questions:-
- (i) Was there a mistake on the part of the donor?
  - (ii) Would the donor not have entered into the transaction **“but for”** the mistake?
  - (iii) as the mistake of so serious a character as to render it unjust on the part of the donee to retain the property?
- 36 The Court was satisfied that the test was met in this case. There clearly was a mistake on the part of the Representors which operated on their minds in relation not only to the mechanism put forward by Edge, but in respect of each endowment they made to the Foundation. They had understood the mechanism as being a tax efficient and a lawful way to pass assets to their children later in their lives and was established planning used by other individuals with similar objectives. They have now been advised that the endowments triggered an immediate IHT liability estimated at between £4.7 million and £6.2 million.
- 37 The Representors would certainly not have entered into these arrangements and made the

endowments if they had known such a liability would arise and it is a mistake of so serious a character as to render it unjust for the Foundation to retain it. The children, who are the beneficiaries under the Foundation, support the setting aside of the endowments to the Representors. HMRC had been convened to the hearing and had not sought to be heard in opposition.

- 38 In the circumstances, and for these reasons, the Court set aside as void each of the endowments. The Representors will now have to pay English Income Tax and Capital Gains Tax for the period in which their assets were held in the Foundation, an exposure estimated at some £750,000. This is of course in contrast to their potential liability of between £4.7 million and £6.2 million if the endowments are not set aside.

### **Declaration of Trust**

- 39 The position now reached is that the Foundation will return all of the assets it holds to the Representors, but still exists as a legal entity. Under the Charter, the Foundation will continue until 20 years after the death of the survivor of the Representors, but they have the power to amend the Charter and the Regulations to allow for its earlier winding up and dissolution, both under Clause C.5.1 of the Regulations and Article 10 of the Foundations Law. Once the winding up of the Foundation is complete and it is dissolved, the Declaration of Trust will cease to have any trust property.
- 40 The Representors asked for the Declaration of Trust to be set aside under Article 11 of the Trusts Law, but as it will terminate in any event for lack of any trust property with the dissolution of the Foundation, we see no need for such an order to be made.

### **Postscript**

Following the hearing the Court was informed by Advocate Santos-Costa and evidence was supplied that, in error, the list of endowments supplied to the Court was incomplete. The Court accepted that these additional endowments were made in the same manner and were subject to the same mistake on the part of the representors and that the tax advice received would equally have applied to them. In the circumstances the Court agreed to set aside these additional endowments on the same basis.