

E v EFG Trust Company Ltd

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	02 April 2019
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Text

[2019] JRC 55

ROYAL COURT

(Samedi)

Before:

Sir William Bailhache, Bailiff, **and** Jurats Blampied **and** Averty.

IN THE MATTER OF THE D TRUST

Between
E
Representor
and
EFG Trust Company Limited
First Respondent

And

Advocate M. P. Cushing, Guardian ad Litem of F and seven others
Second Respondent

Advocate O. J. Passmore for the Representor and the First Respondent

Advocate M. P. Cushing appeared in person.

Authorities

Trusts (Jersey) Law 1984.

BNP Paribas Trust Corporation Limited and others v Crociani and others [\[2018\] JCA 136A](#).

In the matter of the Robinson Annuity Investment Trust [\[2014\] JRC 133](#).

In the matter of the S Trust and In the matter of the T Trust [\[2015\] JRC 259](#).

In the matter of the Z Trust [\[2016\] JRC 048](#).

Pitt v Holt [2013] UK SC 26.

In the Matter of the [G] Trust [\[2019\] JRC 056](#)

Trust — application by the Representor to set aside two transfers into trust. Reasons the Court granted the application.

Bailiff

THE

- 1 On 11th March, 2019, the Court sat to hear an application by the Representor to set aside two transfers into trust, details of which appear below. The Court granted the application and reserved its reasons. This judgment contains those reasons. Although the hearing took place in private, the judgment has been anonymised and is being published.
- 2 The Representor is a co-settlor of a trust, established by a settlement deed dated 14th April, 2008, (“the Trust”). EFG Trust Company Limited was appointed as trustee (“the Trustee”). Additional assets were settled into the Trust not only by the Settlers or some of them but also by others. The Trust was originally constituted with an initial fund of US\$100, and is governed by the proper law of Jersey. No settlor has been domiciled, ordinarily resident or resident in the United Kingdom at any material time.
- 3 The Trust was established for the purposes of asset protection and to enable the settlors to

invest in assets outside their home country. The intention was always for those assets to be invested in a tax efficient manner. The beneficiaries of the Trust are the Settlers and their issue and remoter issue. Advocate Cushing represents the minor issue and those who are as yet unborn.

- 4 Unfortunately two payments into trust by the Representor in May 2011 were derived from a UK bank account ("the Relevant UK Source Transfers"). The total of these transfers was £1.075M. The money was invested by the Trustee directly or through companies wholly owned by the Trust in various investments which in fact generated some profit. Since then, a number of distributions have been made by the Trustee to one or more of the beneficiaries. The result of the Relevant UK Source Transfers is that the Representor faces substantial tax liabilities and if he does not pay them, the Trustee will also face substantial liabilities. For reasons not relevant to this judgment, the potential liability of the Representor is £225,060 and the potential liability of the Trustee is £180,048. These liabilities arise solely because the bank account from which the transfers were made was a UK bank account.
- 5 The Representor asserts that making the transfers from the UK bank account was a mistake and therefore under Article 47E of the Trusts (Jersey) Law 1984, he applies for orders that those transfers be set aside.
- 6 The evidence from the Representor is that had he been aware at the time of making the Relevant UK Source Transfers that by doing so he would incur an adverse tax liability, he would not have structured the payments in that way. He would simply have instructed the Trustee to ensure through its banking arm that the funds which made their way into trust would come from a non-UK source. He goes on to say that he relied upon EFG private bank in London ("the Bank"), with which his family had a longstanding relationship, to advise him to make transfers in an appropriate manner. Whether he was or was not justified in expecting either the Bank or the Trustee to inform him if he needed to obtain tax advice or to give him tax advice, the fact is that he did not do so and he assumed that there would be no adverse tax consequences in making the Relevant UK Source Transfers.
- 7 Knowledge of the potential tax liability came to the attention of the Representor following F meeting with the Trustee in May 2018. Thereafter, the Representor took advice, including specialist advice from tax counsel and as a result has brought this application to the Royal Court for relief.
- 8 On first presentation the Court ordered the representation to be served on the Respondent, the co-settlers and the Trustee; and further directed that Her Majesty's Revenue and Customs should be given notice of the hearing of the representation and likewise Her Majesty's Attorney General representing the charitable interest. The Court has seen communications from HMRC and the Attorney General to the effect that there are no representations which they wish to make in this respect. The co-settlers and the Trustee have indicated that they support the present application.

The Law

9 The law is well settled. The Court asks itself three questions:-

- (i) Was there a mistake on the part of the Representor in relation to the Relevant UK Source Transfers?
- (ii) Would the Representor not have made the Relevant UK Source Transfers but for the mistake?
- (iii) Was the mistake of so serious a character as to render it just for the Court to make a declaration?

- 10 These are well established tests — see the authorities set out at paragraph 89 of the Court of Appeal decision in *BNP Paribas Trust Corporation Limited and others v Crociani and others* [\[2018\] JCA 136A](#) at paragraph 89, *In the matter of the Robinson Annuity Investment Trust* [\[2014\] JRC 133](#), *In the matter of the S Trust* and *In the matter of the T Trust* [\[2015\] JRC 259](#), *In the matter of the Z Trust* [\[2016\] JRC 048](#) and many others. Addressing ourselves to these questions, we are satisfied that there was a mistake. It was open to the Representor to make transfers equivalent to the sums transferred but from a different account and in those circumstances the transfers would not have attracted adverse tax consequences.
- 11 We are satisfied that the Representor would not have made the Relevant UK Source Transfers but for the mistake.
- 12 Given the amount of tax involved, which is considerable having regard to the value of the monies transferred, we think that the mistake was of a serious character and we have taken that into account in the context of exercising our discretion as to what the justice of the case requires. We take into account that the evidence discloses there were other sources of funds to make the transfers which would not have attracted the adverse tax consequences which the Relevant UK Source Transfers have attracted. There is no unfairness to any others in making the declaration pursuant to Article 47E of the Law and we accordingly declare that the Relevant UK Source Transfers into the Trust are voidable and are in fact avoided and of no effect from the time of their being made.
- 13 The skeleton argument put before us in this case continued an exhaustive set of submissions in relation to the Supreme Court decision *Pitt v Holt* [\[2013\] UK SC 26](#) and the difference between incorrect conscious beliefs, incorrect tacit assumptions and mere causative ignorance. We do not intend to repeat what is set out in our judgment of even date in relation to *In the Matter of the G Trust* [\[2019\] JRC 056](#) where we confirmed for the reasons set out there in that it was inappropriate in Jersey law to make the distinctions as to

incorrect conscious beliefs, incorrect tacit assumptions or mere causative ignorance.

- 14 As a consequence of setting the Relevant UK Source Transfers aside with effect from the dates on which they were made respectively, the sums so transferred have been held on bare trust by the Trustee for the Representor — see *Crociani* at paragraph 94.
- 15 In this case, the proceeds of those transfers were applied in various investments made by the Trustee. Those investments have subsequently been sold and the proceeds of sale have been applied in part to repay loans taken out to complete the purchases in the first place and in part to make distributions to the beneficiaries. It was suggested by Advocate Passmore that it might be necessary to unwind all of the subsequent transactions which were made by the Trustee. It does not seem to us that it is necessary to do so. The Representor has confirmed that it does not wish to make any claim against the Trustee in respect of the profits from the investment made by the Trustee and he also seeks an order that the Trustee be relieved from personal liability in that regard pursuant to Article 45 of the Law. Indeed he does not seek any consequential orders which would be relevant in that respect.
- 16 It was suggested at one point that the steps carried out by the Trustee with the benefit of the Relevant UK Source Transfers were unauthorised. We do not think that was the position. The Trustee made some legitimate transactions in the genuine belief that it had the funds available to do so. It seems to us to be unnecessary to unwind those transactions and to conduct a detailed tracing exercise into how much of the profits deriving from those transactions ought to be credited for the benefit of the Representor and how much to other persons, given the approach which the representor himself takes in his representation and the current value of the Trust Fund. It would be an expensive and cumbersome exercise for no beneficial purpose.
- 17 Accordingly, we have made the orders sought and declare the Relevant UK Source Transfers are set aside on the grounds of mistake and are declared void, confirming that they have been held on bare trust on behalf of the Representor at all times since they were made. We also make the ancillary order referred to in paragraph 15 above, noting the confirmation of the Representor that he makes no claim against the Trustee in respect of the profits derived from the monies held on bare trust for him by the Trustee.