Representation of DSL (R) Ltd

Jurisdiction:	Jersey
Judge:	F. C. Hamon, O.B.E., Jurats Le Breton, King
Judgment Date:	20 December 2007
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Text

[2007] JRC 251

ROYAL COURT

(Samedi Division)

Before:

F. C. Hamon, **Esq.**, O.B.E., **Commissioner, and** Jurats Le Breton **and** King.

Representation of DSL (R) Limited.
In the Matter of the DSL Remuneration Trust.

Advocate L. K. A. Richardson **for the Representor**.

Advocate R. J. MacRae **for the Trustee**.

Authorities

In the matter of the A Trust Company Limited [2007] JRC 184.

Sieff v Fox [2005] 1 WLR 3811.

Gibbon v Mitchell [1960] 1 WLR 1304.

THE COMMISSIONER:

1 The Representor in this case is a limited liability company under Scots law. Its principal place of business is at Dundee. Advocate Richardson, for the Representor and the principal shareholders of the Representor, Mr and Mrs L, has requested that their names be made anonymous. We accede to that request.

2 The Trustee, A Trust Company (Jersey) Limited, is the trustee of an English law trust known as the DSL Remuneration Trust (the "Trust") which is a remuneration trust established by the Representor on 25 th April, 2000. The founder of the Trust was the Representor. On 18 th May 2000, the Representor entered into two deeds of assignment and transferred two retail shops in Scotland and all their goodwill, fixtures, fittings and equipment in each shop free of all liens and charges to the Trust. The business (although not the two retail shops) was sold in June 2000, and the proceeds of sale were transferred to the Trust in July 2000.

3 The terms of the Trust prevent any outright distribution being made or indeed any benefits being provided to Mr and Mrs L, each of whom is an equal sharing "participator" in the Representor as founder of the Trust, or to their two sons, who are "persons connected with" Mr and Mrs L as participators in the Representor as founder. All of these persons fall into the definition of Excluded Persons under the terms of the Trust. The Trustee is advised that the provision of an interest free loan to any Excluded Person would constitute a benefit which is prohibited by the terms of the Trust. We have had careful regard to the recent case of *In the matter of the A Trust Company Limited* [2007] JRC 184 which involved a similar form of trust and similar circumstances, and indicates that there is no way that Mr and Mrs L or their two sons could ever derive any benefit from the assets of the Trust. This is not what Mr and Mrs L were told when the Trust was set up. They were told specifically that they would be able to receive loans from the trust fund, interest free, and without having to provide security. As Chancery counsel (advising the Trustee) said as recently as 10 th December, 2007:-

> ***"The terms of the settlement clearly provide that employees of the company are beneficiaries and yet Miss Shortt of Baxendale Walker advised Mr L that they would not receive any benefit.*** Yet there is apparently a duty on the trustees to exhaust the capital and income of the trust fund under Clause 4 of the settlement. It is hard" (we would say impossible) ***"to reconcile the terms of the settlement with what Mr and Mrs L were told"***.

4 We have been provided with a very full and detailed bundle of documents by Advocate

Richardson. We have heard from Advocate MacRae for the Trustee and we heard from Mr Coleman, a former long-standing employee of the Representor who was convened by the Royal Court to represent the beneficiaries of the Trust namely the present past and future employees of the Representor and the wives, husbands, widows, widowers, children, step-children and remoter issue of such employees, and the spouses and former spouses (whether or not remarried) of such children and remoter issue. His statement and his evidence leave us in no doubt that his words are correct when he says:-

> *"I can guarantee to the Court that neither myself nor any other previous employee have any intention of ever making a claim from or against the trust"*.

5 The goodwill of the business of the Representor was sold on 9 th June, 2000, but the Representor remains in the ownership and control of Mr and Mrs L. The current assets of the Trust are valued at approximately £1.8 million and comprise (as we have said) the two retail properties in Scotland, together with the accumulated rental income derived from those properties and cash.

6 Loans of some £280,000 were in fact made to a company connected with the Trustee, which in turn entered into further finance agreements with Mr L. The terms of the loan were that they were interest bearing but unsecured. Those loans have been repaid with interest.

7 It appears that, as in the case of the A Trust referred to above, the Trust was established and the transactions entered into on the basis of tax and legal advice received from a then firm of English solicitors, Messrs Baxendale Walker. The Trustee was informed by Paul Baxendale Walker that he had obtained English Counsel's advice in connection with the efficacy of the Trust. Neither the Trustee nor Mr and Mrs L (or through them, the Representor) ever saw that advice from English Counsel but relied throughout on the advice obtained from Baxendale Walker.

8 As to the advice given to Mr L by Messrs Baxendale Walker, we have the handwritten notes of Mr L, and in fact Mr L followed this up with a telephone call some days later. The advice that he received was, it now appears, wrong, for the reasons set out at paragraph 3 above. Mr L says in his affidavit that he spoke to Miss Sharon Shortt of Baxendale Walker:-

> *"I then specifically asked her about point 4.6.3 in the Trust Deed which states: "controlling shareholders are excluded from benefit under the Trust".* She confirmed that this was the essence of the structure and was the reason that: a) we would have to access our funds by way of loan and b) this method of withdrawal would therefore exempt us from liability to UK taxation as there is no liability to income tax or any other tax.
>
> *This was also not a benefit as it was to be done on a loan basis, albeit a deep discounted loan basis, which would give further benefit to my family at the time of my death.* At this point, I asked if we were using a loophole in the law and could this be closed retrospectively. She replied that this was not a loophole,

and was constructed by Paul Baxendale Walker using case law and Inland Revenue manuals. In order to change the law retrospectively, this would mean repealing the relevant laws and would be impossible as it was based on case law going back hundreds of years.

After the call, I asked Mr Walker if I should get another solicitor's opinion. His advice was that there was nothing to stop me, but in his opinion, there was no need as Baxendale Walker was a legal firm of some repute and I had already paid out a considerable sum for their technical advice. This would only lead to more unnecessary cost. I accepted this advice."

(We should point out that the Mr Walker that Mr L spoke to is not connected to the firm of Baxendale Walker).

9 Mr L comes over as a cautious but caring individual. He was given the wrong advice. His handwritten notes, his affidavit and all the attendant documentation lead us ineluctably to the conclusion that there has been a mistake. As he says in the conclusion to his affidavit made on 21 st November, 2007:-

"I have never in my life wanted to do anything illegal and had no intention to do anything which was wrong in this instance. I was told that this was a legal and legitimate scheme and a commonly used tax advantage model. I did raise queries but these were dealt with and I relied on the advice of my accountant and Baxendale Walker as well as the representatives of the trustee. If at any time anyone had told me that I would be signing away my assets, I would not have done so. Having said that, I appreciate that when I said the whole thing was too good to be true, it obviously was".

10 While the Trustee is resident in Jersey, the Trust is governed by English law and it is to English law that we must turn in considering whether the mistake that was made was such as to lead to the Trust and the deeds of assignment being set aside as invalid on the ground of mistake, as sought by the Representor. We have the benefit of the advice of two English Chancery counsel, Miss Penelope Reed for the Representor and Mr D A Hochberg for the Trustee. Both Counsel are in agreement and both recommend that the Trust be set aside by the Court as invalid on the ground of mistake. Mr Hochberg says:-

"Lloyd LJ carried out a comprehensive review of the equitable jurisdiction to set aside voluntary transactions for mistake in Sieff v Fox [2005] 1 WLR 3811. He analysed the cases and said (at p. 3844-5)

'Clearly there is a jurisdiction to set aside a voluntary disposition for mistake (as there is also to rectify such an instrument to accord with the donor's true intentions). The mistake must be as to the effect of the disposition. The discrepancy may arise from a legal defect in the disposition itself .. or from a mistake of fact as to the position under the relevant trusts or as to the effect of the disposition in the hands of the donee. It may arise from a misunderstanding of the nature of the trusts which would affect the property after

the disposition, due to a failure on the part of the advisers to explain the position properly. According to *Gibbon v Mitchell* [1960] 1 WLR 1304, ***the mistake must be as to the effect of the disposition, and a mistake as to its consequences is not sufficient.*** A misunderstanding as to (the fiscal consequences of the transaction) would not justify setting the transaction aside'."

11 On the basis of the evidence of Mr and Mrs L and that of the Trustee, Mr and Mrs L, the two directors and shareholders of the Representor, were under a mistake of fact as to the position under the relevant trusts. Mr and Mrs L were, of course, not the settlors of the Trust. But they were the two directors of the Representor as settlor. In the case of a company which acts through the agency of its directors, the intentions of its directors are the intentions of the company. The evidence of Mr and Mrs L is therefore the primary evidence as to the intention of the Representor as settlor when entering into the transaction. It seems to us that the mistake of fact on the part of Mr and Mrs L as to the position which would obtain after the Representor had transferred the proceeds of sale of the business to the Trustee to hold on the trusts of the Trust was a mistake as to the effect of the transaction. The mistake made by Mr and Mrs L, and, through them, the Representor, was that they thought that they would be able to receive loans from the Trust fund interest free and without having to provide security. The position as it now stands is that the Trustee has now been advised that Mr and Mrs L cannot receive any sums, whether absolutely or by way of loan (and certainly not any loan other than at a commercial rate of interest and made against security), nor can their sons receive any sum from the Trust fund after their deaths. In our view this mistake as to the effect of the transaction entered into falls within *Gibbon v Mitchell*, as that case has in turn been explained in *Sieff v Fox*, and the equitable jurisdiction to set aside the Trust for mistake is engaged.

12 That is not, however, an end of the matter, since the court has a discretion whether to set aside a transaction. *Sieff v Fox* makes clear that the basis for the jurisdiction to be exercised is that it would be unjust for the transaction not to be set aside. The Court has taken two important factors into account when deciding whether to exercise the discretion to set aside the Trust on the grounds of the mistake of the settlor as to its legal effect. First, the question arises whether it would be unjust on the beneficiaries named under the Trust. Mr Coleman by his statement and through the letters that he has received from some of the former employees, has made it pellucid that the former employees of the Representor have received all the contractual remuneration to which they may be or may have been entitled and that they do not regard themselves as having any claim over or interest in the Trust assets. They support the Trust being set aside on the ground of the mistake made by the Representor through Mr and Mrs L. Second, there are no legal commitments outstanding by the Trustee to third parties.

13 We are satisfied on the evidence that we have read and heard that the Representor, through Mr and Mrs L as its directors and shareholders, was under a mistake of fact as to the position under the trusts of the Trust, and we set aside the Trust and the deeds of assignment on that basis.