

# The Representation of JTC Trust Company Ltd as Trustee of the L Trusts

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	Bailiff
<b>Judgment Date:</b>	12 March 2021
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## Text

[2021] JRC 68

ROYAL COURT

(Samedi)

Before:

T. J. Le Cocq, Esq., Bailiff, and Jurats Ramsden and Austin-Vautier

In the Matter of the Representation of JTC Trust Company Limited as Trustee of the L Trusts

In the Matter of the Trust (Jersey) Law 1984

**Advocate H. E. Brown for the Representor**

**Advocate D. P. Le Maistre for the minor beneficiaries**

## Authorities

Trust (Jersey) Law 1984

UK [Income Tax Act 2007](#).

UK Income Tax (Trading and Other Income) Act 2005.

[Taxation of Chargeable Gains Act 1992](#).

Trusts.

Bailiff

## THE

- 1 This is an application by JTC Trust Company Limited in its capacity as Trustee of a number of Trusts relating to the L Family. The Trusts are as follows:
  - The B Trust ("B")
  - The C Trust ("C")
  - The D Trust ("D Trust")
  - The E Trust ("E Trust")
  - and The F Trust ("F Trust")
- 2 The Settlor of the D Trust, the E Trust and the F Trust are one of three brothers. The Settlor of the B Trust is their mother and the Settlor of C Trust is their uncle, both of who are now deceased.
- 3 The D Trust, the E Trust and F Trust and the brothers' Trust are all drafted in similar terms. The Beneficiaries of each of these are defined in Clause 1(c) of the respective Trust instruments to include:
  - (a) The children and remoter issue of the Settlor;
  - (b) The children and remoter issue of the brothers and sisters of the Settlor;
  - (c) The spouses, widows, and widowers of those within (a) and (b);
  - (d) Other persons that are designated as a Beneficiary pursuant to Clause 6;

(e) Such charitable purposes as the Trustees may appoint. There are no such appointed charitable purposes.

- 4 By deeds executed on 23<sup>rd</sup> March 1984, 2<sup>nd</sup> May 1984 and 8<sup>th</sup> March 1985, the Trustees excluded each of the brothers from benefit under their respective trusts. These clauses, referred to as “the Prohibition”, were in the following terms:

***“PROVIDED ALWAYS that the Trust Fund and the income thereof shall be possessed and enjoyed to the entire exclusion of the Settlor and of any spouse of the Settlor to the intent that:-***

***(a) No part of the capital or income of the Trust Fund shall be paid or lent or applied for the benefit either directly or indirectly of the Settlor or of any spouse of the Settlor in any manner whatsoever and***

***(b) No power or discretion hereby or by any appointment made hereunder or by law conferred upon the Trustees or any of them shall be capable of being exercised in such manner that the Settlor or any spouse of the Settlor shall or may become entitled either directly or indirectly to any benefit whatsoever;”***

- 5 In summary, therefore, the brothers and their spouses were excluded from the Trusts which they themselves settled. Whilst none of the brothers is among the class of beneficiaries of the Settlement created by his siblings, at all material times each brother was amongst the class of persons who could lawfully be added as beneficiaries to those settlements. The brothers are beneficiaries expressly of the B and C Trusts.
- 6 For a number of years, the Trusts have made loans between them either directly from Trust to Trust or from or to wholly owned companies within the Trusts. The loans continued after the execution of the Prohibition and they were all made on interest free terms. For these purposes, we will refer to the Trusts making the loans as “the Lending Trusts” and those receiving the loans as “the Recipient Trust”. The Trustee was the Lending Trustee and the Recipient Trustee in each case.
- 7 In 2018, the Trustee sought advice from tax counsel, Mr Rory Mullan, who advised that the various inter-trust loans, by reason of the fact that they were interest free, were transfers in breach of the terms of the Prohibition and accordingly made in breach of trust. He also advised that those transfers gave rise to potential charges for United Kingdom tax about which we will say more hereunder.
- 8 In the light of this advice, the family and Trustee entered into an arrangement on 28<sup>th</sup> March 2018 (“the Arrangement”) to rectify the situation by reconstituting all of the loans as fully commercial and interest bearing in accordance with a rate that has been accepted by HMRC. From that date there was no breach of trust and the loans would not give rise to a

charge to UK tax.

- 9 That leaves however, a potential liability for the years prior to the Arrangement. The Arrangement in part provides as follows:

***“2.1 In order to provide the Trustee with a degree of comfort when deciding as to whether or not to carry out the Loan Proposal which action the Family Members wish the Trustee to take, the Family Members for themselves and their respective heirs, assigns, personal representatives and estates hereby release and jointly and severally covenant to indemnify the Trustee its successors and assigns and its officers and employees and their respective heirs assigns personal representatives and estates against all actions, claims, costs, demands, loss or damage of any kind whatsoever and wheresoever arising directly or indirectly out of or in connection with the Loan Proposal or the Loans more generally whether the same shall be enforceable in law or not and in particular (but without prejudice to the generality of the foregoing) any claim for breach of trust that could be brought by any beneficiary of the Trust by virtue of the Loans having infringed the Prohibitions.”***

Naturally the existence of a waiver or indemnity does not cure any breach of trust.

- 10 Pursuant to an Act of this Court dated 13<sup>th</sup> March 2020, HMRC was convened to these proceedings but has taken no active part. It has rehearsed certain arguments in correspondence but did not appear before us. This has resulted in the application before us in effect proceeding unopposed without contrary argument although we have had regard to HMRC's argument set out in correspondence.
- 11 The Trustee, as Recipient Trustee, seeks an order that it holds certain proceeds of loans made from each Lending Trust as constructive trustee for the Lending Trust both as to the original sum transferred up until the date of the Arrangement and any profits or advantages flowing therefrom during that period. In the alternative, it was argued that if there are no constructive trusts, then the matter should be approached on the basis of a mistake.
- 12 It is clear that the transfers were made in breach of trust by reason of the Prohibition and the fact that prohibited persons were capable of being added as beneficiaries of the Recipient Trusts and therefore potentially able to take a benefit.
- 13 This, according to the advice of Mr Mullan, has created significant potential tax liabilities on the settlors in the form of:

(i) Charges under the transfer of assets abroad code in the UK [Income Tax Act 2007](#), Part 13, paragraph 714 *et seq*;

- (ii) Charges arising under the UK Income Tax (Trading and Other Income) Act 2005;
- (iii) Charges arising under the [Taxation of Chargeable Gains Act 1992](#);
- (iv) The risk of “tainting” so that the various provisions conferring “protection” from charges on certain trusts is lost.

14 Mr Mullan further advised that:

- (a) If there had been no breach of Trust there would have been “*no question*” of the Settlers being exposed to income tax charges;
- (b) If the effect of the breach of trust was that there was a claim against each Recipient Trust in respect of interest and/or the advantage occasioned by the breach of trust, then the position would seem to be no different to that which would apply if the loans had been agreed on arm's length terms, so there would be no tax liability on the Settlers; however
- (c) If the correct analysis is that the loans have been on beneficial terms and have provided a benefit to the Recipient Trust, then it follows that the Settlers were liable to tax on income arising to the Recipient Trusts to the extent that such income can be traced back to the beneficial loans provided by the Lending Trusts (and this appears to be the position that HMRC adopts). The financial consequences are potentially substantial.

15 This application by the Representor is brought under Article 51 of the [Trust \(Jersey\) Law 1984](#) (“the Law”) for a declaration that the Recipient Trustee holds both the sums transferred until the date of the Arrangement and the benefit and advantages from that sum as constructive trustee for each Lender Trust. On the information before us we accept that the transfers and loans were clearly made in breach of trust in as much as they were in breach of the Prohibition. It is also the case that we accept that the Trustees may not have realised that transfers to a trust on an interest free basis by way of loan where a prohibited person might potentially benefit would be in breach of the Prohibition. We accept that the Trustee only became aware of that when Mr Mullan advised on the matter in 2018.

## The Law

16 Article 51 of the Law provides as follows:

***“(1) A trustee may apply to the court for direction concerning the manner in which the trustee may or should act in connection with any matter concerning the trust and the court may make such order, if any, as it thinks fit .***

***(2) The court may if it thinks fit –***

***(a) make an order concerning –***

***(i) the execution or the administration of any trust ,***

***(ii) the trustee of any trust, including an order relating to the exercise of any power, discretion or duty of the trustee, the appointment or removal of a trustee, the remuneration of a trustee, the submission of accounts, the conduct of the trustee and payments, whether payments into court or otherwise ,***

***(iii) a beneficiary or any person having a connection with the trust, or***

***(iv) the appointment or removal of an enforcer in relation to any non-charitable purposes of the trust;***

***(b) make a declaration as to the validity or the enforceability of a trust;***

***(c) rescind or vary any order or declaration made under this Law or make any new or further order or declaration .***

***(3) An application to the court for an order or declaration under paragraph (2) may be made by the Attorney General or by the trustee, the enforcer or a beneficiary or, with leave of the court, by any other person .***

***(4) Where the court makes an order for the appointment of a trustee it may impose such conditions as it thinks fit, including conditions as to the vesting of the trust property .***

***(5) Subject to any order of the court, a trustee appointed under this Article shall have the same powers, discretions and duties and may act as if the trustee had been originally appointed as trustee.”***

17 The argument as to constructive trusteeship is based primarily on Article 33 of the Law and failing which the general law on constructive trusteeship. As an alternative, as we have said above, the Representor proceeds on the basis of a mistake.

18 Article 33 of the Law is in the following terms:

“Constructive trustee

***(1) Subject to paragraph (2), where a person (in this Article referred to as a constructive trustee) makes or receives any profit, gain or advantage from a breach of trust the person shall be deemed to be a trustee of that profit, gain or advantage .***

***(2) Paragraph (1) shall not apply to a bona fide purchaser of property for value and without notice of a breach of trust .***

***(3) A person who is or becomes a constructive trustee shall deliver up the property of which the person is a constructive trustee to the person properly entitled to it .***

***(4) This Article shall not be construed as excluding any other circumstances under which a person may be or become a constructive trustee.”***

- 19 In our judgment, the transfer of a sum of money interest free even if it is to be repaid is a ‘gain’ or ‘advantage’. Furthermore, there is no question of the Recipient Trust being a bona fide purchaser as the loan was interest free. In any event, the Recipient Trustee had notice of the breach of trust.

## Discussion

- 20 In our view the meaning of Article 33 of the Law is clear. We are aware that an argument has been advanced in correspondence by HMRC that Article 33 deals with the consequences of a constructive trusteeship but does not impose a constructive trusteeship on its terms. If we have understood that argument correctly, we reject it.
- 21 It is clear that Article 33 creates a species of constructive trusteeship. It is not exclusive and there are other circumstances in which a constructive trusteeship can arise. However, it seems to us to be clear that where Article 33 applies then there is a constructive trusteeship as a matter of operation of the Law.
- 22 In essence Article 33 simply deems a constructive trust to be created of any profit, gain or advantage from a breach of trust in the hands of the person who has gained that profit, gain or advantage. It is clear that there is no beneficial entitlement of the Recipient Trustee to that profit, gain or advantage and therefore in the circumstances it would appear that the Trustee holds any profit, gain or advantage that it has made to itself and received in breach of trust on constructive trustee for the Lending Trust.
- 23 In our judgment, therefore, Article 33 applies and a constructive trusteeship has been created. The trustee holds any of the proceeds transferred to it and which it received in breach of trust as constructive trustees both as to the capital until the Arrangement and as to any interest or income derived from it until the date of the Arrangement on constructive trust for the Lending Trust.
- 24 Having made that determination, it is not necessary for us to go on to consider whether a constructive trust might have arisen outside the parameters of Article 33 of the Law nor the

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question of mistake.

- 25 We heard from Advocate Le Maistre who was appointed to represent the interests of the minor beneficiaries. He observes that, should there be a tax liability that attaches to the trusts, then those persons whose interests he represents would potentially be disadvantaged. He sees no reason to argue against the conclusions set out by the Trustee and accordingly supports them.
- 26 Accordingly, we conclude that under Article 33 a constructive trust exists in respect of proceeds arising before the Arrangement converted the loans to 'interest bearing'.