

# The Representation of the Grundy Trust

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	Deputy Bailiff, MacRae
<b>Judgment Date:</b>	27 April 2020
<b>Neutral Citation:</b>	[2020] JRC 71
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<b>Court:</b>	Royal Court

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## Text

[2020] JRC 71

ROYAL COURT

( MacRae, Deputy Bailiff and Jurats Olsen and Austin-Vautier):

In the Matter of the Representation of the Grundy Trust

A. Kistler for the representor.

### Cases cited:

- (1) *B Trust, In re*, [\[2019\]JRC035](#); 2019 (1) JLR N [4], followed.
- (2) *BBB, In re*, [\[2011\]JRC240](#); Royal Ct., December 28th, 2011, unreported, considered.
- (3) *BNP Paribas Jersey Trust Corp. Ltd. v. Crociani*, 2018 (2) JLR 175, followed.
- (4) *De la Bere's Marriage Settlement Trusts, In re*, [\[1941\] Ch. 443](#), applied.

(5) *HSBC Intl. Trustee Ltd. v. Poon*, [\[2014\]JRC254A](#); 2015 (1) JLR N [7], considered.

### Legislation construed:

Trusts (Jersey) Law 1984 (Revised Edition, ch.13.875, 2019 ed.), art. 47G: The relevant terms of this article are set out at [para. 29](#).

art. 47H: The relevant terms of this article are set out at [para. 29](#).

Trusts — powers of court — setting aside exercise of fiduciary powers — exclusion of settlor's wife as beneficiary (to avoid UK inheritance tax issues) set aside under Trusts (Jersey) Law 1984, art. 47H — court declared exclusion should have effect as if wife excluded irrevocably during husband's lifetime but not thereafter

The court was asked to set aside wholly or in part the exclusion of a beneficiary of a trust.

The trust was a Jersey law discretionary trust established between the settlor, Mr. S, and the original trustee in 1986. The current trustee was appointed in 2019 on the retirement of the former trustee. The trust held shares in a number of companies, one of which owned a property in the United Kingdom valued at approximately £1.8m. The beneficiaries had been the persons specified in the third schedule to the trust who were not excluded, namely Mr. S, his wife (Mrs. S), the children and remoter issue of the settlor and any person or persons the trustee added to the class of beneficiaries. Clause 4 of the trust conferred on the trustees the power to remove from the class of beneficiaries such person or class of persons as they in their absolute discretion should determine. Clause 5 conferred on the trustees the power to declare that any person or class of persons would be an excluded person. Clause 8.8 provided that no part of the capital or income of the trust fund should be paid or applied to or for the benefit of an excluded person and cl. 23 provided that no excluded person should be capable of taking directly or indirectly any benefit from the settlement.

In February 2017, it came to the attention of the former trustee that certain changes were to be made to the UK inheritance tax regime which would have the effect that all UK residential property would be within the scope of UK inheritance tax, regardless of whether the property was owned by a non-UK resident company or trust. That gave rise to a potential difficulty for the trust because Mr. S, as settlor, was also a beneficiary and, because he could still benefit under the trust, the gift with reservation of benefit rules would apply to him so that the value of any UK residential property owned by the trust would be included in his estate on his death for UK inheritance tax purposes at the rate of 40%.

The former trustee drew the matter to the attention of Mr. S, recommending that UK tax advice be sought. The former trustee received tax advice suggesting two options to avoid the charge to inheritance tax: (i) that Mr. and Mrs. S be excluded from benefit under the trust, although, as the trust comprised significant assets in addition to the UK property, that might not be a desirable outcome; alternatively (ii) that the company holding the UK

property and the property be transferred to a new trust from which Mr. and Mrs. S would be excluded from benefiting, but they would remain beneficiaries of the trust. The former trustee only informed Mr. S of the first option. The former trustee executed the exclusion by which Mr. and Mrs. S were declared to be excluded persons in respect of the entirety of the trust.

Mr. S stated that he had not been aware prior to the exclusion that Mrs. S would also be excluded and that Mrs. S was not consulted about the proposed exclusion and had no contact with the former trustee in relation to it. Neither Mr. nor Mrs. S made a written request for Mrs. S to be excluded.

There had been another avenue available to the former trustee, which was not contained in the advice received at the time, namely that the former trustee could have excluded Mr. S for life and Mrs. S irrevocably during the lifetime of Mr. S but not thereafter.

Mr. and Mrs. S were subsequently advised that they were excluded from benefit under the trust and could no longer use the property rent free. They were concerned that there was no possibility of Mrs. S being made a beneficiary of the trust again in the event of the death of Mr. S. In the event of the death of Mr. S, Mrs. S would wish to reside in the property, at least in the short term, and it was important that she should be able to benefit from the trust funds. An application was made under art. 47G of the Trusts (Jersey) Law 1984 and, alternatively, art. 47H to set aside the instrument of exclusion wholly or in part. Article 47G provided:

**“ 47G Power to set aside the exercise of powers in relation to a trust or trust property due to mistake**

...

(2) The court may on the application of any person specified in Article 47I(2), and in the circumstances set out in paragraph (3), declare that the exercise of a power by a trustee or a person exercising a power over, or in relation to a trust, or trust property, is voidable and—

(a) has such effect as the court may determine; or

(b) is of no effect from the time of its exercise.

(3) The circumstances are where the trustee or person exercising a power—

(a) made a mistake in relation to the exercise of his or her power; and

(b) would not have exercised the power, or would not have exercised the power in the way it was so exercised, 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.”

Article 47H provided:

**“ 47H Power to set aside the exercise of fiduciary powers in relation to a**

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**trust or trust property**

...

(2) The court may on the application of any person specified in Article 47I(2), and in the circumstances set out in paragraph (3), declare that the exercise of a power by a trustee or a person exercising a power over, or in relation to a trust, or trust property, is voidable and—

(a) has such effect as the court may determine; or

(b) is of no effect from the time of its exercise.

(3) The circumstances are where, in relation to the exercise of his or her power, the trustee or person exercising a power—

(a) failed to take into account any relevant considerations or took into account irrelevant considerations; and

(a) would not have exercised the power, or would not have exercised the power in the way it was so exercised, but for that failure to take into account relevant considerations, or that taking into account of irrelevant considerations.”

**Held**, ruling as follows:

(1) The court would declare that the exercise by the former trustee of its powers whereby it declared Mrs. S to be an excluded person was voidable and should be set aside on the basis that the former trustee failed to take into account one or more relevant considerations and/or took into account one or more irrelevant considerations, and would not have exercised the power in the way that it did but for its failure. The court would declare that the exclusion of Mrs. S from benefit under the trust should have effect as if the former trustee had instead declared that Mrs. S should from the date of the exclusion but only during the lifetime of Mr. S be an excluded person so that in the event of the death of Mr. S, she would automatically cease to be an excluded person ( para. 44).

(2) In applying the relevant provisions of the Trusts (Jersey) Law 1984, the present case was principally an instance of the former trustee, pursuant to art. 47H, failing to take into account relevant considerations, and had such relevant considerations been taken into account the former trustee would not have exercised the power which it did or would not have exercised the power in the way it was exercised but for the failure. The relevant considerations that were not taken into account were: (i) the wishes of Mrs. S; (ii) the needs of Mrs. S; (iii) the alternative solution proposed in the tax advice, which was not even discussed with Mr. S and would have resulted in only a partial exclusion from benefiting from the assets of the trust; (iv) the alternative of excluding Mr. S irrevocably for life and excluding Mrs. S irrevocably for Mr. S's lifetime but not thereafter; (v) the effect of exclusion on Mr. and Mrs. S; and (vi) the exclusion itself incorrectly recited that Mr. and Mrs. S had requested the exclusion. Furthermore, the former trustee also took into account an

irrelevant consideration, namely that Mr. and Mrs. S could still benefit via their children, whereas that was prohibited by the trust. Accordingly, the court's jurisdiction to set aside the exclusion was plainly engaged. The court had power under art. 47H(2)(a) to declare that the former trustee's exercise of a power had "such effect as the court may determine" (paras. 30–31).

(3) The court had a discretion to determine what effects, if any, of the exercise of the trustees' fiduciary powers were to be retained. That was not to say that the court was entitled to rewrite history or to make a new decision which the trustee wished it had made at the time. In the present case, the former trustee had intended to exclude Mrs. S and did so. The decision was, however, flawed and was liable to be set aside *ab initio*. The former trustee had a duty to consider the exclusion of Mrs. S very carefully, to take into account the relevant considerations and not to take into account irrelevant considerations. Had the former trustee acted in accordance with its duty there could be no doubt that it would have excluded Mrs. S during Mr. S's lifetime only. That would have been the obvious course. Accordingly, for the court to order the exclusion of Mrs. S as a beneficiary to take effect only for the duration of Mr. S's life was not to substitute a different transaction for that which was undertaken. To make such an order was squarely within the court's power to declare that the former trustee's exercise of its fiduciary power should have such effect as the court might determine. Furthermore, the court was satisfied that to make such an order was within the powers of the former trustee. There was no principle of trust law that would prevent a settlor conferring such a power on the trustee. Turning to the terms of the trust, a power to exclude permanently would generally encompass a power to exclude for a lesser time unless expressly excluded. Furthermore, it was not uncommon for persons to be excluded persons for limited periods under trusts. It was permissible for a trust to exclude a person by reference to a description and that a person might fall within or without that description from time to time. The trust in the present case also provided for exclusion by reference to a description and it was accepted that the former trustee had the power to exclude Mrs. S during her lifetime by describing her as "the settlor's wife, during his lifetime" (paras. 33–40; para. 43).

Deputy Bailiff

1 MacRae,

## Introduction

On April 1st, 2020 we heard argument in this case. We now give our decision.

- 2 The current trustee is trustee of the Grundy Trust, a Jersey law discretionary trust ("the trust") established on April 9th, 1986 between Mr. S as settlor and the original trustee.
- 3 The current trustee was appointed pursuant to a deed of retirement and appointment dated May 29th, 2019, made between Mr. S, the former trustee, which had become trustee of the

trust pursuant to a deed of retirement and appointment dated September 3rd, 2003, and the current trustee, in which Mr. S exercised his power as appointor to appoint the current trustee in place of the former trustee.

- 4 The beneficiaries are set out at cl. 2.1 of the trust as being the persons specified in the third schedule to the trust who are not excluded, namely Mr. S, the wife of the settlor ("Mrs. S"), the children and remoter issue of the settlor whether now or thereafter born during the trust period and any person or persons the trustee shall add to the class of beneficiaries under the powers given to them in cl. 3 of the trust.
- 5 Clause 4 of the trust confers upon the trustees of the trust the power to remove from the class of beneficiaries such person or class of persons as they shall in their absolute discretion determine. Clause 5 confers on the trustees of the trust the power to declare that any person or class of persons shall forthwith be an excluded person. It is necessary to set out the terms of cll. 5.1, 5.2 and 8.8:

"5. Power of exclusion

5.1 The Trustees may at any time or times during the Trust Period declare that any person (or class of persons) shall forthwith be an Excluded Person in addition to any person named in the Eighth Schedule hereto.

5.2 Any such declaration shall be in writing and signed by the Trustees and:

5.2.1 name or describe the person to be thereby made an Excluded Person and

5.2.2 specify the date (not being earlier than the date of the declaration or later than the end of the Trust Period) from which such person shall be an Excluded Person or Excluded Persons."

"8.8 Notwithstanding the foregoing provisions of this Clause no part of the capital or income of the Trust Fund shall be paid or applied to or for the benefit of an Excluded Person and any appointment in favour of an Excluded Person shall take effect as if he were dead and so that any share or interest whether in the income or the capital of the Trust Fund to which he would or might have been entitled (not being a fixed share or interest otherwise assigned or disposed of by the Beneficiary) shall go and be held upon trust for the other Beneficiaries from time to time living in such shares as the Trustees shall think fit."

- 6 The effect of being an excluded person is further considered in cl. 23 of the trust, which provides:

"23. Excluded Persons

No Excluded Person shall be capable of taking directly or indirectly any benefit

of any kind by virtue or in consequence of this Settlement and without affecting the generality of the foregoing restriction no part of the capital or income of the Trust Fund shall be paid or lent to or applied for the benefit of an Excluded Person and no power or discretion conferred upon the Trustees shall be capable of being exercised for the benefit of an Excluded Person.”

- 7 This is an application to set aside wholly or in part an instrument of exclusion dated April 5th, 2017 (“the exclusion”) made by the former trustee under cl. 5.1 of the trust pursuant to which the former trustee irrevocably declared that Mr. S and his wife shall each from the date of the exclusion be an excluded person in respect of the entirety of the trust fund.
- 8 Accordingly the current beneficiaries of the trust are the children and remoter issue of Mr. S, of whom there are now seven—the settlor's daughter and her three children and the settlor's son and his two children.

### **Background to the exclusion**

- 9 In February 2017, it came to the attention of the former trustee that certain changes were to be made to the United Kingdom inheritance tax regime. These would have the effect that all UK residential property would be within the scope of UK inheritance tax (“UK IHT”), regardless of whether the property was owned by a non-UK resident company or trust and that interests in foreign companies were to be made transparent for UK IHT purposes insofar as their value was attributable to UK residential property.
- 10 This gave rise to a potential difficulty for the trust because Mr. S, as settlor, was also a beneficiary and, because he could still benefit under the trust, the gift with reservation of benefit rules would apply to him so that the value of any UK residential property owned by the trust would be included in his estate on his death for UK IHT purposes at the rate of 40%.
- 11 The trust at the time held and continues to hold shares in a number of companies. One of those companies owns a UK residential property in London now valued at approximately £1.8m. By email dated February 21st, 2017, the former trustee drew the matter to the attention of Mr. S, recommending that UK tax advice was sought. They also said,

“one might have to consider amending the trust deed to ensure that you are excluded from benefitting (and from occupying the property) prior to 5th April 2017 in order to ensure the property does not form part of your estate for UK inheritance tax purposes ...”
- 12 Mr. S replied asking the former trustee to seek UK tax advice and to resolve the situation urgently.



- 13 In none of the communications prior to the exclusion was the possibility of Mrs. S also being excluded referred to.
- 14 The former trustee instructed Smith & Williamson for the purpose of seeking tax advice. Their advice was received on April 3rd, 2017. Smith & Williamson advised that as Mr. S was both settlor and a beneficiary, the gift with reservation of benefit rules needed to be considered. Previously the fact that the property held by the trust was held by an offshore company sheltered it from UK IHT. However, from April 6th, 2017 this would cease to be the case and, *inter alia*, the value of such property would be included in a settlor's estate for UK IHT purposes, chargeable at 40%. Smith & Williamson advised that it would be possible to rectify this position by both Mr. and Mrs. S being excluded from benefit, thereby releasing the gift with reservation of benefit. If this was to occur after April 6th, 2017, it would be a potentially exempt transfer for UK IHT [purposes], that is to say, not immediately chargeable to tax, though if Mr. S were to die within seven years of the exclusion there would be a reducing charge to UK IHT on his death on a sliding scale.
- 15 The two options suggested by Smith & Williamson to avoid the charge to tax were as follows:
- (i) Mr. S could exclude himself and his spouse from benefit under the trust. (In fact the power of exclusion lay in the hands of the trustee.) Smith & Williamson warned that once they had been excluded they would be unable to be added back in as beneficiaries in the future. Smith & Williamson noted that: "As the Trust comprises significant assets, in addition to the UK residential property, this may not be a desirable outcome."
  - (ii) Alternatively the company holding the UK property and the property could be transferred to a new trust from which Mr. and Mrs. S would be excluded from benefiting—they would remain beneficiaries of the trust and be capable of benefiting from the rest of the trust assets. Most of the trust assets are outside this company. Such a step would eliminate the potential 40% UK IHT charge and would allow Mr. and Mrs. S to benefit from the other assets of the trust.

Either step needed to be taken prior to April 6th, 2017.

- 16 It is clear from the contemporaneous documentation that in-house counsel at the former trustee fully understood that there were these two options available, both of which would need to be implemented before the following evening. An internal email sent on April 4th, 2017, the morning after the tax advice was received, contained the following passage:

"Option 1—exclude [Mr. and Mrs. S] from Grundy Trust [and] Option 2—transfer [the company] to a new trust from which [Mr. and Mrs. S] are excluded. The advantage of this is that [Mr. and Mrs. S] could remain as beneficiaries of the Grundy Trust. When I spoke to [Mr. S] I only presented Option 1 and he was ok with this. Option 2 would require some hard work to implement before tomorrow night, but should be achievable."



- 17 Accordingly, Mr. S was never told of Option 2. This is consistent with his recollection. He swore an affidavit to support this application, as has the director of the current trustee. Mr. S also says that he never became aware prior to the exclusion that Mrs. S would also be excluded and that Mrs. S was not herself consulted about the proposed exclusion at all and had no contact with the former trustee in relation to it. Mr. S now has no recollection of the telephone call on April 4th, 2017 referred to in the former trustee's note referred to above.
- 18 The former trustee was invited to swear an affidavit, but has not done so. However the same in-house counsel who advised in 2017 has sent an email to the advocate for the trustee in which he accepts he did not make a file note of the call with Mr. S on April 4th, 2017, but does claim that he did explain to Mr. S that both he and Mrs. S would need to be irrevocably excluded. However, he also goes on to say:
- “One thing that stuck in my mind is that [Mr. S] commented that he had a strong and close family and if needs be distributions could be made to his children who he trusted to do the right thing.”
- 19 If this was accurate, it hardly helps the former trustee as, on any view, there was no conversation with Mrs. S and, furthermore, if Mr. S had made this comment then the former trustee should have immediately advised Mr. S that what he was suggesting was impossible. To make distributions to one of the settlor's children for the purpose of benefiting the settlor or his wife would be itself a breach of trust and clearly contrary to the provisions of cl. 23 of the trust.
- 20 Furthermore, Mr. S was not told of Option 2, which clearly has significant advantages over Option 1.
- 21 As indicated above, on April 5th, 2017, just two days following receipt of the advice from Smith & Williamson and one day prior to the anticipated change in the UK IHT regime, the former trustee executed the exclusion by which Mr. and Mrs. S were each declared to be an excluded person in respect of the entirety of the trust. The former trustee's resolution also dated April 5th, 2017 says that Mr. and Mrs. S had “requested that the exclusion be in relation to the whole of the income and capital of the trust fund.” Mr. S denies making such a request.
- 22 In fact, the proposed UK IHT changes were not brought into force at the time (we were told that they were introduced subsequently and backdated to April 6th, 2017), and on June 7th, 2017, the former trustee advised Mr. S that this was a consequence of the timing of a general election in the United Kingdom and that it was likely that the changes would be legislated for and possibly backdated to April 6th, 2017. It was clear from the note dated June 7th, 2017 that Mr. S was then advised that he and Mrs. S were now excluded from benefit under the trust and could no longer use the property rent free and would need to pay rent if they occupied it. Mr. and Mrs. S are concerned that there is now, as matters currently

stand, no possibility of Mrs. S being added back in as a beneficiary of the trust in the event of the death of Mr. S. In the event of Mr. S's death Mrs. S would wish to reside in the property if it was still owned by the trust at that time, at least in the short term, and in any event it is important that she should be able to benefit from the trust funds in order to buy a property for herself elsewhere and if necessary to provide for her living expenses.

- 23 It is clear from the evidence that neither Mr. or Mrs. S at any stage made a written request that Mrs. S be excluded in relation to the whole of income and capital of the trust fund. Further, this possibility was not explained to Mrs. S in the detail with which a trustee ought to afford to a beneficiary affected by such a significant change. As the Royal Court said in (*HSBC Intl. Trustee Ltd. v. Poon* (5) [\[2014\]JRC254A](#), at para. 40):

“The power to exclude a person as a beneficiary is an unusual power. Normally, powers are exercisable in the interests of the object or objects of the power. A power to exclude is different. Save in the case where there may be tax advantages in a person being excluded as a beneficiary, the exercise of the power is likely not to be for the benefit of the person to be excluded, but instead be for the benefit of the remaining beneficiaries. Where a trustee proposes to exercise such a power, it is incumbent upon it to consider the position very carefully, to take into account the position of the person to be excluded and whether therefore it is a reasonable decision in the interests of the other beneficiaries.”

Accordingly, even if, as in this case, there are said to be tax advantages for the exclusion it is still necessary for the trustee proposing to exercise such a power to consider the decision very carefully.

- 24 There was also another avenue available to the former trustee, which is explained in the opinion received from English counsel, Oliver Marre, dated April 5th, 2020. This alternative, not advised upon at the time by Smith & Williamson, was that the former trustee could have executed what has been described as a “more nuanced form of instrument of exclusion.”
- 25 In these circumstances the power under cl. 5 of the trust would have been exercised so as to exclude:
- (i) the settlor irrevocably for life; and
  - (ii) the wife of the settlor irrevocably during the lifetime of the settlor but not thereafter.
- 26 In this scenario, the settlor would not have reserved a benefit in the trust fund. During his own life he could not be said to have reserved a benefit as a consequence of the possible benefit to his wife as she also could not benefit. Therefore there would have been no inheritance tax charged on the death of the settlor.

27 If it is possible for the court to exercise its powers so as to leave the effect of the “exclusion” as limited as suggested in this way, then that would have clearer UK tax consequences than simply setting aside the exclusion insofar as it relates to Mrs. S only. If this was achieved and nothing else was done, there would be a risk that the settlor would be regarded as having retained a benefit in the trust via his wife, particularly if she were to benefit from the trust in a form which provided collateral benefit to the settlor himself. The alternative, if the court is empowered so to order, namely that the exclusion had effect as though it were executed in terms of para. 25 above, would have effect as if executed in those terms in the first place.

### **The position of the other beneficiaries**

28 At the convening hearing on March 6th, 2020, the court ordered that the settlor and Mrs. S's adult daughter, adult son, adult grandson and other minor grandchildren, as represented by their son and daughter, respectively, be convened to the hearing. The three adults have written letters to the court in support of the application, and, where appropriate, on behalf of the minors they represent. Mr. and Mrs. S have also written to the court supporting the application. Mrs. S says that she was not consulted about her exclusion and never agreed to it. Had she been consulted, then she would have said that she anticipated benefiting from the trust in the event of her husband's death.

### **The relevant provisions in the Trusts Law**

29 This application is made under art. 47G and, in the alternative, art. 47H of the Trusts (Jersey) Law 1984 as amended (“the Law”). The relevant provisions of arts. 47G and 47H are as follows:

#### **“ 47G Power to set aside the exercise of powers in relation to a trust or trust property due to mistake**

...

(2) The court may on the application of any person specified in Article 47I(2), and in the circumstances set out in paragraph (3), declare that the exercise of a power by a trustee or a person exercising a power over, or in relation to a trust, or trust property, is voidable and—

(a) has such effect as the court may determine; or

(b) is of no effect from the time of its exercise.

(3) The circumstances are where the trustee or person exercising a power—

(a) made a mistake in relation to the exercise of his or her power; and

(b) would not have exercised the power, or would not have exercised the

power in the way it was so exercised, 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.”

**“ 47H Power to set aside the exercise of fiduciary powers in relation to a trust or trust property**

...

(2) The court may on the application of any person specified in Article 47I(2), and in the circumstances set out in paragraph (3), declare that the exercise of a power by a trustee or a person exercising a power over, or in relation to a trust, or trust property, is voidable and—

(a) has such effect as the court may determine; or

(b) is of no effect from the time of its exercise.

(3) The circumstances are where, in relation to the exercise of his or her power, the trustee or person exercising a power—

(a) failed to take into account any relevant considerations or took into account irrelevant considerations; and

(a) would not have exercised the power, or would not have exercised the power in the way it was so exercised, but for that failure to take into account relevant considerations, or that taking into account of irrelevant considerations.”

30 In applying the relevant provisions of the Law to the facts of this case, it is accepted that in certain circumstances the same facts might engage the court's jurisdiction under both art. 47G and art. 47H. However, in the view of the court, this case was principally an instance of the former trustee, pursuant to art. 47H, failing to take into account relevant considerations and had such relevant considerations been taken into account, the former trustee would not have exercised the power which it did or would not have exercised the power in the way it was so exercised but for that failure. The relevant considerations that were not taken into account were:

(i) The wishes of the settlor's wife;

(ii) The needs of the settlor's wife;

(iii) The alternative solution suggested by Smith & Williamson, which was not even discussed with the settlor and would have resulted in a partial exclusion from benefiting from the assets of the trust only;

(iv) The second alternative considered by English counsel, referred to at paras. 25 and 26 herein;

(v) The effect of exclusion upon the settlor and his wife. This was a matter that needed to be considered very carefully and was not;

(vi) The exclusion itself recited that Mr. and Mrs. S had “requested” the exclusion when they had not—there was simply, at most, one telephone call between the former trustee and the settlor.

Furthermore the former trustee also took into account an irrelevant consideration namely, on the former trustee's evidence, that Mr. and Mrs. S could still benefit via their children, when that was prohibited by the trust itself. A further irrelevant consideration taken into account was the recording in the exclusion that Mrs. S had requested that she be excluded when she had made no such request.

31 Accordingly the court's jurisdiction to set aside the exclusion is plainly engaged. The court has the power under art. 47H(2)(a) to declare that the former trustee's exercise of a power in this case has “such effect as the court may determine.” Is this wide enough to encompass the principal relief which the trustee seeks today, namely that the exclusion of Mrs. S shall have effect, but to a more limited extent, namely that Mrs. S is to be an excluded person only during the lifetime of the settlor—at which stage she will automatically cease to be an excluded person and would return to the class of beneficiaries of the trust?

32 Two questions arise. First, is the court empowered to make such an order under art. 47H? Secondly, does the trust permit such an order to be made?

33 First, dealing with the terms of the statute, the court has been assisted by the decision of the Court of Appeal in *BNP Paribas Jersey Trust Corp. Ltd. v. Crociani* (3). The relevant part of the judgment concerned the court's power to set aside a transfer or disposition of property to a trust due to mistake pursuant to art. 47E of the Law, but the same approach applies to setting aside the exercise of powers in relation to a trust or trust property owing to mistake or the setting aside the exercise of fiduciary powers in relation to a trust or trust property under art. 47H. The key paragraphs are as follows, with our emphasis where appropriate ( 2018 (2) JLR 175, at paras. 87, 93–94 and 97):

“87 In our judgment this construction of art. 47E(2) is consistent with the general approach of the Trusts Law in establishing overall principles and allowing them to be developed flexibly by the Royal Court. In essence, the legislature has conferred upon the court a discretion to determine which of the three courses it would follow if satisfied that the mistake was of so serious a character as to render it just for the court to make any declaration at all under that article.”

“93 From this examination it can be seen that art. 47E, in almost every salient operational aspect, follows the settled approach of the Royal Court. The nature of a relevant mistake may be of almost any character (save that the doctrine of *erreur* is not to be used): see arts. 47B and 47C. The result of the mistake is that the transfer is voidable at the instance of the settlor: see art. 47E read with art. 47I. It is voidable not void and therefore has legal effect until declared avoided.

The effect of avoiding the transfer may bear upon donees and third parties: compare the power to identify that a transfer may have had some effect. We therefore find that, upon a proper interpretation, art. 47E is the statutory embodiment of an existing equitable jurisdiction, the purpose of which is to enable a mistaken transferor to recover his or her property, with the appropriate remedial declaration and consequential orders being at the discretion of the court. *The innovation of the article lies in confirming that the court has alternate powers (a) to allow some effect to the transfer, or (b) to declare that it has been of no effect.* That provision, however, may be little more than a reflection of a need to give consideration to the interests of donees and third parties and of the possible availability of change of position defences (as compared with the position of the bona fide purchaser for value and without notice whose protection is maintained under art. 47I(4)).

94 Turning to guiding principles in the exercise of this jurisdiction, the court must first identify, as the Royal Court did below, that the application has been made by an appropriate person and that there has been a mistake bearing the characteristics required by the statute. The court then has a discretion as to whether to declare the transfer voidable and, the jurisdiction being equitable, it may be that, even with the required characteristics, the whole circumstances militate against a declaration. Having determined to make such a declaration the court will bear in mind for its consequent orders that the transfer or disposition will have had legal effect until the point of the declaration. It is only upon the making of the declaration that the trustee will become a bare trustee of the transferred funds or property: declaring the transfer to be of no effect will not result in the relationship of trust never having existed. In considering the effect of the declaration upon donees and third parties (and in this respect the trustee is entitled to be considered as a potentially affected third party) the court may require to adjudicate upon change of position defences. Accordingly, in exercising its discretion as to the appropriate remedies and consequential orders to authorize, the court will have to take into account all factors relevant to those issues.”

“97 *Given that we construe art. 47E to be providing a flexible framework, we do not think that it is appropriate to attempt an exclusive list of factors which will be relevant from case to case, but in our judgment potentially many factors could be relevant considerations in the process of identifying the appropriate declaration.* In some instances, the parties may be indifferent as to the date as at which the transfer is avoided: an example is the simple mistake, with no taxation consequences and no distributions in the intervening period. On the other hand, a mistaken transfer may well have unattractive taxation consequences and the court must be persuaded that a declaration that the transfer has had no effect is a proper declaration to make. *Equally, there may be competing factors to be taken into consideration in identifying which, if any, of the effects of a transfer are to be declared to be retained.* Where, as here, the transferee is no longer in possession of the assets transferred, the exercise will be more complex.”  
[Emphasis added.]



- 34 The court takes the view that similar principles apply to the exercise of the court's powers under art. 47H. The court has a discretion as to determining what effects, if any, of the exercise of the trustees' fiduciary powers are to be retained.
- 35 That is not to say that the court is entitled to re-write history, or to make a new decision which the trustee wished it had made at the time. That is clear from the statute and from case law. In *In re B Trust (1)*, the court agreed with the representor that transfers into trust could be voided on the grounds of mistake under art. 47E. However, the representor went further and asked the court to give effect to certain intentions that the representor had at the time of making the transfers into trust. Merely voiding the transfers into trust meant that the assets would fall back into the representor's estate and this would not be as tax efficient as he had intended. The court was asked to make a declaration that the transfers were not merely voidable but should take effect as gifts to the representor's wife. The court refused and said ([\[2019\]JRC035](#), at paras. 41–42):
- “41. ... This Court will not be drawn into such schemes. It is one thing to make orders as to the validity of transactions where those orders might have tax consequences, and it is quite another thing to select for one of the parties which order to make so as to achieve the best taxation outcome. That is no part of the business of this Court.
42. The second submission which Advocate Brown made in this connection was that Article 47E contains innovative powers as described in the *Crociani* case and there is no reason why the Court should not therefore direct the repayment of money not to the Representor but to his wife. For similar reasons as described above, we are not prepared to do this. It requires the Court to take a positive step to improve the taxation outcome for the Representor as though that were the objective itself. It may be the Representor's objective, but it is not the objective of the Court.”
- 36 In this case, the former trustee intended to exclude Mrs. S and did so. However, that decision was flawed and is liable to be set aside *ab initio*. The former trustee had a duty to consider the exclusion of Mrs. S very carefully and take into account the relevant considerations listed above and not take into account irrelevant considerations. Had the former trustee acted in accordance with its duty there can be no doubt that it would have excluded Mrs. S during the settlor's lifetime only. It would have been the obvious course. Accordingly, for the court to order the exclusion of the settlor's wife as a beneficiary to take effect only for the duration of the settlor's life is not to substitute a different transaction for that which was undertaken. To make such an order is squarely within the court's power to declare that the former trustee's exercise of its fiduciary power shall have such effect as the court may determine.
- 37 Further, we needed to be satisfied that to make such an order was within the powers of the former trustee under the trust. Clause 5 does not expressly provide for a person to be excluded temporarily and the effects of exclusion under cl. 23 are radical.



38 The court can see no reason in principle against exclusion for a limited period only, by which we mean that there is no principle of trust law that would prevent a settlor conferring such a power on the trustees. Turning to the terms of the trust, cl. 5 says nothing about a time-limited exercise. Clauses 8.8 and 23, as referred to above, contain emphatic provisions against benefiting an excluded person. However, if a time-limited exercise excluding or purporting to exclude a person who would otherwise be a beneficiary is possible, then at the end of the period of exclusion such a person might benefit under the trust. It could be said that that is inconsistent with cll. 8.8 and 23 but those provisions can equally well be read as meaning that no benefit can be taken by someone who is an excluded person at the time when the benefit would otherwise accrue.

39 The general proposition is that the greater includes the less; that is to say that a power to exclude permanently would generally encompass a power to exclude for a lesser time unless expressly excluded. In *In re De la Bere's Marriage Settlement Trusts* (4), the court held ([1941] Ch. at 448):

“... [I]f I look at the substance of [the settlement] I find a power, unqualified and unlimited in its language, which is intended to give to the trustees exercising it the power to make the trust fund the property of any one or more of the daughters or their issue. It has been held that, where there is a power of that kind, it is competent for the donee to exercise it in such a way as to qualify the interest which may be given so that a power to appoint the whole of the fund must include the power to appoint a part of it. The power to appoint an absolute interest must include the power to appoint a limited interest, whether a life interest or a reversionary interest, and includes the power to hedge about the creation of an absolute interest with such restrictions as the donor of the power himself might have imposed.”

40 Furthermore, it is not uncommon for persons to be excluded persons for limited periods under trusts, one common example being “for such time as the person is subject to bankruptcy or equivalent proceedings.” A further common example is the listing of trustees and/or a protector as excluded persons with the effect that such an individual is no longer excluded when they cease to be a trustee or protector, as the case may be. Neither the researches of the court nor the advocate for the representor have found a case on all fours, but our attention was drawn to the decision in *In re BBB* (2), where the trust instrument named as excluded persons ([\[2011\]JRC240](#), at para. 5):

“1. The Founder

2. Any person connected with the Founder

3. Any Participator in the Founder

4. Any person connected with any such Participator.

For the purposes of this Deed, the words 'Participator' and 'connected with' shall have the meanings ascribed to them by the [Income and Corporation Taxes Act 1988](#) (of the English Parliament)."

41 The court had to consider whether a person who at one time had been a participator in the founder remained at all times an excluded person or whether their exclusion could cease at the point when they ceased to be a participator, as defined under the relevant English legislation. The facts of the case were that the founder had since been dissolved, and that "N," who had held the only issued share in the founder, had died. The further question was whether, even if N remained a participator after the dissolution of the founder, the close family of N would remain "connected with" the participator after his death.

42 The court received opinions from two leading counsel that, as a matter of English law, N would cease to be a participator in the founder after its dissolution and that in any event N's family would cease to be "connected with" him after his death. The court analysed the question of whether they remained excluded persons as follows ( [\[2011\]JRC240](#), at paras. 19–23):

"19. For all that there has been a lengthy exposition of the terms of the Trust Deed and the relevant facts as set out above, the issue in question is really a short point of construction. Either the class of Excluded Persons is a class which is capable of change, or it is not. If it is incapable of change, then once a person qualifies as an Excluded Person, he or she is excluded for all time. The practical consequences of such a construction would be that N's family, the Third to Ninth Respondents to this application, could not benefit, and that the wealth which he transferred to the Trustee through the estate annuity purchase deed, which we understand to be the vast majority of his estate, could never accrue to any members of that family. This would be a surprising conclusion given the definition of the Beneficiaries as set out in Clause 1.1 of the Trust Deed.

20. In our view it is perfectly clear that the Trust Deed contemplates a change in class of Beneficiaries and Excluded Persons. The language used for the definition of the Beneficiaries extends to present, past and future employees from time to time. That language contemplates the addition of new beneficiaries, as indeed does the provision that remoter issue and spouses and former spouses of issue and remoter issue are also to be included.

21. Given that it is clear from the definition of the Beneficiaries that this extends to future employees and directors from time to time, it would be surprising if the definition of Excluded Persons could not also be subject to change. If that is right, it would follow that an approach to Schedule 2, which sets out the list of Excluded Persons, should envisage that that list be liable to change at some future date.

22. If that is the way in which Schedule 2 should prima facie be approached, then a detailed examination of that Schedule makes the matter even clearer.

The Schedule is to be construed in accordance with the meanings ascribed to those words by the [Income and Corporation Taxes Act 1988](#) which itself envisages that persons might be participators or connected with participators at one point, and not be participators or so connected at a later date. It seems to us to be clear that the nature of Schedule 2 and the definitions which are to be found there show that the class of Excluded Persons is a potentially changing class from time to time.

23. If a person can fit within the definition of an Excluded Person at one point in time, and subsequently not be an Excluded Person at a later date, there is no basis in our judgment for finding that the Excluded Person would in fact still be excluded from benefit even if not by definition at that later stage an Excluded Person. That makes no sense to us. We have noted that Clause 14.4 of the Trust Deed provides that ‘no Excluded Person shall be *or be capable of being* an object of the beneficiary trusts.’ (emphasis added) The underlined section of that Clause could lead to a construction that Excluded Persons were excluded for all time; but we reject that conclusion because it would require us to find that an excluded person was excluded even if he or she did not fit within the class of Excluded Persons. We are fortified in that conclusion because it would be wholly artificial to take the grounds for exclusion as those linked for fiscal purposes to the [Income and Corporation Taxes Act 1988](#), and hold that those grounds of exclusion continued even when the fiscal consequences ceased—and we find that to be so, without making any assessment as to whether there were or were not fiscal consequences by reason of the use of this language.” [Emphasis in original.]

- 43 The court's reasoning in *In re BBB* (2) demonstrates that it is permissible for a trust to exclude a person by reference to a description and that a person may fall within or without that description from time to time. The trust in this case also provides for exclusion by reference to a description at cl. 5.2.1 and it is accepted that the former trustee had the power to exclude Mrs. S during her lifetime by describing her as “the settlor's wife, during his lifetime.”

## Our decision

- 44 Accordingly, the court declares that the exercise of the former trustee of its powers on April 5th, 2017, whereby it declared the wife of the settlor to be an excluded person, is voidable and shall be set aside on the basis that the former trustee failed to take into account one or more relevant considerations and/or took into account one or more irrelevant considerations, and would have not exercised the said power, or would not have exercised it in the way that it was so exercised but for its failure to take into account such relevant considerations and/or its having taken into account irrelevant considerations and:

- (i) That the said exclusion of the settlor's wife from benefit under the trust shall have effect as if the former trustee had instead declared that the settlor's wife

shall from the date of the said exclusion but only during the lifetime of the settlor be an excluded person to the intent that in the event of the death of the settlor, she will automatically cease to be an excluded person.

(ii) That the costs of the trustee of and incidental to the representation be paid out of the assets of the trust on the trustee basis.

(iii) That the question of any costs order against the former trustee be left over for a period of six months, if the trustee wishes to pursue the matter; and

(iv) That there be liberty to apply.

*Order accordingly.*