David Derek Stewart Boyd v Rozel Trustees (Channel Islands) Ltd and Beryl Boyd and Jersey Blind Society

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	04 March 2014
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Text

[2014] JRC 56

ROYAL COURT

(Samedi)

Before:

W. J. Bailhache, **Q.C., Deputy**Bailiff, **and**Jurats Fisher**and**Nicolle.

IN THE MATTER OF THE REPRESENTATION OF DAVID DEREK STEWART BOYD

AND IN THE MATTER OF THE STRATHMULLAN TRUST

AND IN THE MATTER OF THE TRUSTS (JERSEY) LAW 1984 AS AMENDED.

Between
David Derek Stewart Boyd
Representor

and
Rozel Trustees (Channel Islands) Limited
First Respondent

and

Beryl Boyd
Second Respondent

and

Jersey Blind Society
Third Respondent

Advocate R. O. B. Gardner **for the Representor**.

Advocate A. Kistler **for the (First Respondent) Trustee**.

Authorities

Inheritance Tax Act 1984.

Trusts (Jersey) Law 1984 as amended.

Trusts (Amendment No. 6)(Jersey) Law 2013.

S Settlement [2011] JRC 117 .

Pitt v Holt and *Futter v Futter* [2011] EWCA Civ. 197.

In the matter of the A Trust [2009] JLR 447 .

B Life Interest Settlement [2012] JRC 229 .

Pitt v Holt [2013] UKSC 26 .

In the matter of Lochmore Trust [2010] JRC 068 .

In the matter of the Onorati Settlement [2013] JRC 182 .

Bertrand des Pallières v JP Morgan Chase & Co [2013] JCA 146 .

Royal Court Rules 2004.

Re Buckton [1907] 2 CH 406 .

Trust — request that the trust be set aside and declared void.

Bailiff

THE DEPUTY

Introduction

1 On 10 th January, 2014, the representation of the Representor was presented to the Royal Court. In it, the Representor requested a number of orders, the most relevant of which is that the Strathmullan Trust (the "Trust") be set aside for mistake and declared void. The Representor also claimed an order that the Trustee hold the trust fund of the Trust as bare trustee for the Representor and that all the trust assets, including all profit derived from such assets should be declared at all times to have been held on bare trust for the Representor.

2 The Court convened the First Respondent (the "Trustee"), and the Second and Third Respondents as beneficiaries or potential beneficiaries of the Trust, as parties to the proceedings. The Second Respondent is the wife of the Representor. The Court also ordered that both HM Revenue & Customs ("HMRC") and HM Attorney General in Jersey should be notified of the proceedings and provided with a copy of the Act of Court. The Court ordered that further consideration of the representation would take place on 13 th February, 2014. This judgment reflects the decision of the Court on the matters put to it in the representation which were considered on that date.

Setting up the trust

3 The Representor was resident and domiciled in the United Kingdom until 12 th March, 1997, when he moved to the Isle of Man. It is asserted that he acquired a domicile of choice in the Isle of Man on that date. He was married in 1970, and he and his wife have two daughters who are resident in the United Kingdom.

4 For 20 years until 1997, the Representor was a shareholder in and managing director of a family quarrying business in the UK. Following family discussions, he sold his shares for £2.1 million in April 1997 some four or five weeks after his move to the Isle of Man. The proceeds of sale were paid to Clarendon Trust Company Limited in Jersey, and placed on a three month deposit. On 4 th July, 1997, a company was registered in Jersey under the name of Strathmullan Limited ("the Company") and the Court has been shown documentation which confirms that the Company's two issued shares were held on trust for the Representor personally.

5 It appears that in July 1996 the Representor had consulted Messrs Grant Thornton UK about the sale of shares in the quarry business and a possible move offshore. Through Messrs Grant Thornton, the Representor was put in touch with the Jersey accountancy firm

of Messrs Le Sueur Ireson & Co., which was associated at that time with Grant Thornton. There was a discussion about the use of trusts as a means of preserving a family's wealth and saving taxes that apply on death. The Representor had a meeting in Jersey with Messrs Le Sueur Ireson & Co., and the Grant Thornton partner with whom he had had an enduring and beneficial professional relationship over many years. The purpose of the visit was to discuss and agree the establishment of a trust structure to hold the proceeds of sale of the shares. It is clear that a draft trust instrument was prepared by Clarendon Trust Company Limited, the trust company of Messrs Le Sueur Ireson & Co., and was sent to Grant Thornton and to the Representor for consideration. The Trust was established on 10th October, 1997. It is governed by the law of Jersey. It is a discretionary settlement naming the Representor as settlor and Clarendon Trust Company Limited as trustee. The beneficiaries are named as the settlor and his wife, and the initial trust fund was the entire issued share capital of the Company. The trust deed provided a power in the trustees to add beneficiaries at their absolute discretion and also a power to declare in writing revocably or irrevocably that a beneficiary should cease to be a beneficiary. There are long stop trusts for charitable purposes, which is why the Attorney General was given notice of the proceedings.

Inheritance tax

6 The Representor was clearly concerned about tax exposure at the time of the sale of his shares in the quarry company and of making the Trust. His affidavit discloses that he moved to the Isle of Man and established the Trust with tax reasons firmly in mind. He was well aware of the existence of UK inheritance tax ("IHT"). He was assured by Messrs Grant Thornton and by the accountants in Jersey and the Isle of Man that there was no inheritance tax in the Channel Islands or the Isle of Man. The written documentation concerning advice given at the time may not now be complete, but from what we have seen, it is apparent that consideration was certainly given to the absence of inheritance tax in those Islands, and to capital gains tax considerations. It is equally apparent that no one gave thought to the deemed domicile provisions in the UK tax legislation which, we are told, have the following consequences in this case:–

(i) It does not matter whether the Representor had acquired a domicile of choice in the Isle of Man before he created the Trust because under Section 267(1) of the Inheritance Tax Act 1984, he continued to be treated as domiciled in the UK for inheritance tax purposes for three years after his move to the Isle of Man and any acquisition of a Manx domicile of choice.

(ii) As a result, both the initial transfers into trust and/or subsequent transfers give rise to chargeable transfers under that legislation.

(iii) In addition there will have been a 10 year charge — on each 10 year anniversary of the commencement of the Trust, tax is charged at 30% of the effective rate of tax on a hypothetical transfer of value of the relevant property. This equates to some 6%.

(iv) Were the property to leave the Trust, there would be an exit charge.

(v) The settled property continues to be treated as remaining in the settlor's estate and would be subject to IHT on his death.

7 The total value of the Trust at today's date is something in the order of £4 million. We have had before us an affidavit sworn by Mr Dominic Preston, a partner in Grant Thornton UK LLP, who is currently responsible for advising the Representor on UK tax matters, to the effect that his estimate of IHT currently due stands at £775,159, to which should be added the 10 year charge which could reasonably be estimated at £234,000. Interest and penalties would increase the amount due by a further £40,000. Furthermore, the Trust property will be taxed on the death of the Representor as if he still owned it, and there will be further IHT due as an exit charge if the Trust were to be wound up. Accordingly, some 25% of the trust fund would be lost in tax, and far from protecting the assets of the settlor for the benefit of his family, the making of the trust will in fact have depleted those assets very considerably if things remain as they are at present.

8 In 2010, it became apparent to the settlor from advice received at that point from Messrs Grant Thornton in London that there was this serious IHT problem. Various efforts were made to identify what mitigation of the position could be achieved. In fact it was resolved that nothing could be done to ameliorate the position. The Representor deposes in an affidavit put before us that he was completely unaware that there would be any of these IHT consequences at the time he established the Trust, and that had he been aware of them, he would not have established the trust at all, or alternatively would have waited to establish the trust until he had been resident in the Isle of Man for more than the requisite three year period, so as to be able to avoid all IHT charges. This would have occurred on or after 5 th April, 2000, but he was never advised of this at the time.

The current application

9 The application is therefore made to have the Trust set aside on the grounds of mistake. The application is supported by the Second Respondent. There is some doubt as to whether she remains a beneficiary, but it is unnecessary to resolve that question. If she is no longer a beneficiary, her views are of no legal consequence for the purposes of the present application. If she remains a beneficiary, then we note that she supports the application. The Third Respondent was added as a beneficiary on 12 th May, 2006. It has therefore been convened as a party, and has indicated that it rests upon the wisdom of the Court, no doubt recognising that the primary purpose of this trust was for the benefit of the Representor and his family. Although the Attorney General has been given notice of the proceedings given the general charitable interest, he has decided not to participate in the proceedings and makes no observations on the content of the representation. He does so because the only named beneficiaries are the Representor and possibly his wife, and the Third Respondent, and all those beneficiaries have been convened. In those circumstances, he no doubt considered, rightly, that the residual general charitable interest referred to in the Trust did not justify any participation by him in his capacity as representing

that interest.

HMRC

10 The affidavit evidence before us makes it plain that if the Trust is set aside, the exposure to IHT will be removed. HMRC clearly, therefore, could potentially be said to be adversely affected by the relief sought by the Representor. This was recognised by Advocate Gardner, who wrote to HMRC in December 2013 to give notice of the bare bones of the Representation and the relief that would be sought. The Court recognised the possibility of such an interest by directing on 10 th January, 2014, that HMRC be given notice of the Act of Court convening the parties for 13 th February, 2014; and that Act of Court of course set out the detail of the representation. By a letter dated 8 th January, 2014, but not received until 15 th January, 2014, HMRC advised Advocate Gardner that they would not be attending the hearing on 13 th February, 2014, but that they would be writing to the Court setting out their views on whether they considered an order should be made further to this application. They requested a copy of the representation and any witness evidence upon which the Representor relied. On 17 th January, 2014, Advocate Gardner responded. The Act of Court of 10 th January, 2014, had already been sent to HMRC in accordance with the Court order, but Advocate Gardner sent with this letter a copy of the representation and the supporting affidavits of both the Representor and Mr Preston. The exhibits to the affidavits are lengthy, and were not enclosed with that letter. However we are informed by Advocate Gardner that he has received no further communications from HMRC in connection with this matter. Furthermore, the Court has received no letter requesting particular views to be taken into account. We proceed therefore upon the basis that there is no further material before us for consideration.

11 The Trustee appears by Advocate Kistler to support the application being made.

The Law

12 Advocate Gardner presents his application upon the basis that the Court should set aside the trust for mistake pursuant to Article 11 of the Trusts (Jersey) Law 1984 as amended ("the Law"). He submits, rightly, that there is established case law as to how the Court should approach an application under Article 11. He also contends that if the Court is not minded to proceed under Article 11, then the Court can proceed under Article 47E — Articles 47B to 47J inclusive, adopted by the Trusts (Amendment No. 6)(Jersey) Law 2013 ("the Amending Law"), which came into force on 25 th October, 2013. The Amending Law contains a number of provisions which enable the Court to set aside transfers or dispositions of property to a trust and/or the exercise of fiduciary and other powers in relation to trust or trust property. The question immediately posed is whether Articles 47B to 47H inclusive are intended to be additional provisions to those contained in Article 11 or by contrast are intended to govern the construction of the Article 11 provisions.

13 Article 11 appears under the general heading of ***"Creation, Validity and Duration of Jersey Trusts"***. The Article itself is headed ***"Validity of a Jersey Trust"***. In its material parts for the purposes of this application, it provides as follows:–

> ***"(1) Subject to paragraphs (2) and (3), a trust shall be valid and enforceable in accordance with its terms*** .
>
> ***(2) Subject to Article 12, a trust shall be invalid –***
>
> > ***(a) …***
> >
> > ***(b) to the extent that the court declares that –***
> >
> > > ***(1) the trust was established by duress, fraud, mistake, undue influence or misrepresentation or in breach of fiduciary duty***
>
> ***…"***

14 The interpretation provisions under Article 1(1) of the Law are not particularly helpful for the purposes of the point we now have to decide. ***"Trust"*** includes the trust property and ***"the rights, powers, duties, interests, relationships and obligations under a trust"***.

15 Article 2 provides that a trust exists, *inter alia*, where a trustee holds property for the benefit of a beneficiary whether or not yet ascertained or in existence. It seems to us to follow that where there is no property held by the trustee whether for the benefit of a beneficiary or for the application of a purpose, there is no trust.

16 The powers conferred on the Court by Articles 47E to 47I are introduced by Article 47D in this way:–

> ***"Articles 47E to 47I apply in relation to the transfer or other disposition of property to a trust, or the exercise of any power over or in relation to a trust or trust property that occurs either before or after the coming into force of the Trusts (Amendment No. 6) (Jersey) Law 2013."***

17 These new provisions appear under the heading in the relevant part of the Trust Law of ***"Powers of the Court"***. The Amending Law does not contain any provision that Article 11 no longer applies. Article 47D clearly envisages the application of powers in relation to both an existing trust or a new trust. What is significant is that there must be a trust before these powers of the court can be exercised.

18 We recognise, of course, that if all transfers of property into a trust are set aside under Article 47E as a result of a relevant mistake made, there may as a consequence be no property in the trust at all. The result of that would be that while there once was apparently a

trust with property in it, there is no longer trust property, and pursuant to Article 2, the trust itself ceases to exist. Nonetheless the structure of the amending legislation is such that in our view the application of the provisions under Article 11 fall to be considered separately from the application of the Court's powers under the Amending Law. We are reinforced by that conclusion by the fact that Article 11 appears under a heading in the Law which is concerned with the creation, validity and duration of Jersey trusts, whereas the provisions of the Amending Law fall under the heading ***"Powers of the Court"***.

19 Accordingly we approach the present application under Article 11 and apply the existing case law which firmly establishes the tests which have to be met before the Court exercises its declaratory powers pursuant to Article 11(2)(b) that the trust was established by mistake.

20 The proper approach to an application to set aside a Jersey trust made by mistake was confirmed in the matter of the *S Settlement* [2011] JRC 117, where the Court considered at length the criticisms made by the English Court of Appeal in *Pitt v Holt* and *Futter v Futter* [2011] EWCA Civ. 197 of the Royal Court's approach in *In the matter of the A Trust* [2009] JLR 447. As we said in the matter of the *B Life Interest Settlement* [2012] JRC 229, we consider the Jersey law on the subject of mistake to be settled in the Royal Court. We are strengthened in that view by the decision of the Supreme Court in *Pitt v Holt* [2013] UKSC 26, which seems to us broadly to align the approach to be taken by the English courts in the future with that adopted by the Royal Court. At paragraph 126 of his judgment in *Pitt v Holt*, Lord Walker said this:–

> ***"The gravity of the mistake must be assessed by a close examination of the facts, whether or not they are tested by cross examination, including the circumstances of the mistake and its consequences for the person who made the vitiated disposition.*** Other findings of fact may also have to be made in relation to change of position or other matters relevant to the exercise of the court's discretion…The injustice (or unfairness or unconscionableness) of leaving a mistaken disposition uncorrected must be evaluated objectively, but with an intense focus (in Lord Steyn's well-known phrase in Re S (a child) (Identification: Restriction on Publication) [2004] UKHL 47 ***at [17]*** , [2004] 4All ER 698***at [17]***, [2005] 1AC 593***at [17] on the facts of the particular case.*** That is***why it is impossible, in my view, to give more than the most tentative answer to the problems posed by Professor Andrew Burrows in his Restatement of the English Law of Unjust Enrichment (2012 OUP) at p66: we simply do not know enough about the facts."***

21 It is clear from Lord Walker's judgment that the Supreme Court has departed from distinctions between effects and consequences, and the mistake can be either a mistake of fact or a mistake of law (see for example the comments at paragraph [109] of Lord Walker's judgment).

22 Accordingly, we have no hesitation in continuing to apply the Jersey case law which requires us for these purposes to address the questions which were summarised in *In the*

matter of Lochmore Trust [2010] JRC 068 where at paragraph 11 the Court said:–

> ***"It follows that the Court has to ask itself the following questions:–***
>
> ***(i) Was there a mistake on the part of the settlor?***
>
> ***(ii) Would the settlor not have entered into the transaction "but for" the mistake?***
>
> ***(iii) Was a mistake of so serious a character as to render it unjust on the part of the donee to retain the property?"***

23 It is well settled in Jersey that a mistake about the tax effects of a particular transaction can be treated as relevant mistakes for the purposes of Article 11 of the Law. We note also that in *Pitt v Holt*, HMRC contended that a mistake which related exclusively to tax could not in any circumstances be relieved. The submission was that Parliament's general intention, in enacting tax statutes, was that tax should be paid on some transactions of a specified type, whether or not the tax payer is aware of the tax liability. This submission was rejected by the Supreme Court as being much too wide and unsupported by principle or authority (see paragraph 132).

24 We also note that at paragraph 135 of his judgment Lord Walker said this:–

> ***"… Had mistake been raised in*** *Futter* ***there would have been an issue of some importance as to whether the Court should assist in extricating claimants from a tax-avoidance scheme which had gone wrong.*** The scheme adopted by Mr Futter would by no means at the extreme of artificiality ***(compare for instance, that in*** *Abacus Trust Co (Isle of Man) Ltd -v- NSPCC* [2001] STC 1344 , (2001) 3 ITELR 846***but it was hardly an exercise in good citizenship.*** In some cases of artificial tax avoidance the Court might think it right to refuse relief, either on the ground that such claimants, acting on supposedly expert advice, must be taken to have accepted the risk that the scheme would prove ineffective, or on the ground that discretionary relief should be refused on grounds of public policy. Since the seminal decision of the House of Lords in *WT Ramsay Ltd -v- IRC*, *Eilbeck (Inspector of Taxes) -v- Rawling* [1981] STC 174, [1982] AC 300***there has been an increasingly strong and general recognition that artificial tax avoidance is a social evil which puts an unfair burden on the shoulders of those that do not adopt such measures.*** But it is unnecessary to consider that further on these appeals."

25 There is clearly more than one approach that one could take to what Lord Walker describes as an issue of some importance in the United Kingdom, and the arguments would be further complicated in this jurisdiction by a recognition that the social evil of artificial tax avoidance which puts an unnecessary burden on the shoulders of those who do not adopt such measures might receive a different emphasis where it is not our domestic taxation system which is being avoided. The complexity of such arguments, including the

difficulties in establishing what amounts to a social evil where the relevant jurisdiction's legislature can be assumed to have taxed everything that it intended to tax (which makes avoidance, on one analysis, entirely legitimate) emphasises that in the absence of any contentions to the contrary, it is unnecessary to consider such an issue further in this case.

26 We therefore apply the three *Lochmore* questions to the facts of this case. On the evidence before us, it is clear that the Representor made the Trust unaware of the deemed domicile provisions which affected him notwithstanding that he had by then acquired, under the general law, a domicile of choice in the Isle of Man. The tax consequences of this mistake were clearly serious. The effect of the mistake was that the trust would not achieve that which it was intended to achieve, because IHT would still be due by his estate on his death in relation to the assets transferred, and, aggravating that position, there was a charge to IHT on the transfers into trust and a periodic charge thereafter, coupled with an exit charge if any monies were paid away. We have no doubt that he would not have entered the transaction *"but for"* his mistake in failing to appreciate the effect of the deemed domicile provisions.

27 We are then left with the third question as to whether the mistake is of so serious a character as to render it unjust on the part of the Trustee to retain the trust property. The beneficiaries of the trust property are the Representor, possibly his wife, and the Third Respondent. There is no doubt from the material put before us that the intended recipients of the exercise of Trustee discretion would be the Representor and his immediate family. Even if we were to take the view that the Third Respondent was likely to receive a benefit, it appears to us that it would be seriously unjust to require the Representor to account for IHT to this degree simply to protect such benefit, if any, as it might receive. In the circumstances that the only other beneficiaries of the Trust request that the Trust be set aside on the basis of the mistake made, it is much easier to reach the conclusion that it would be unjust on the part of the donee/Trustee to retain the trust property causing this substantial tax loss to the Representor. Furthermore, we accept that he would in practice be required to accept such a loss or be driven to litigate against his former tax advisers who appear to have overlooked this rather obvious problem of making a trust at a time when, by the relevant UK legislation, the deemed domicile provisions continued to apply to him. If the Court were approaching this case upon the basis that the loss should lie where equitably appears to be appropriate, one could take the view that the tax advisers should bear the loss, and that the Trust should remain undisturbed. However, that would require the present Trustee, who had no contractual relationship with the tax advisers in question to take the necessary litigation steps. Indeed it is not obvious that the Trust itself will have sustained an enforceable loss. The enforceable loss has been sustained by the Representor and by his estate. In those circumstances, the focus of the Royal Court is on protecting the settlor/beneficiary because to do otherwise would require him to pursue litigation against his former advisers. We accept that the Representor was not at fault, and may have already incurred some losses. In that context, it would therefore be seriously unjust to require him to bring litigation against his former professional advisers, the outcome of which, whether on limitation or other grounds, might be uncertain.

28 In the circumstances, we are satisfied that the Trust should be set aside on the grounds of mistake and be declared to have been invalid pursuant to Article 11 of the Law. The effect of this, as was set out by Sir Michael Birt, Bailiff, in *In the matter of the Onorati Settlement* [2013] JRC 182 is that under the proper law which governs the trust, the trust now having been avoided, it is as if it never existed.

29 In the premises, we declare that the Trust is invalid and is set aside on the grounds of mistake. As a consequence, the Trustee holds the trust fund as bare trustee for the Representor and all the assets of the trust, including all profit derived from such assets are declared at all times to have been held on bare trust for the Representor.

Costs

30 The Representor's prayer in the representation is that there should be no order for costs. The Trustee in its skeleton argument proposes that if the trust is set aside, Clause 13 of the trust instrument which provides for the Trustee's entitlement to pay itself remuneration will also fall away. The Trustee therefore seeks an order that it may pay itself, or retain to the extent already paid, its costs of administration of the Trust during the period it held the trust fund, and its costs of the Representor's application out of the trust assets if not otherwise paid. The Representor does not object to an order permitting the Trustee to pay itself its costs of administration of the Trust during the period it has held the trust fund, nor to an order that it may retain monies already paid in respect of these costs — and we accordingly make those orders — but Advocate Gardner contends that the Court should not make an order for the costs of the present application to be paid out of the trust fund if not otherwise paid.

31 The expression *"if not otherwise paid"* arises because the Court has been shown an email exchange over the period July to October 2013 the conclusion of which appears to be a commitment on the part of Messrs Grant Thornton to meet the charges which have been incurred both by Advocate Gardner and his firm and by Advocate Kistler and his firm in relation to the present application. The last email contains this passage from Messrs Grant Thornton:–

> *"Based on the estimates you have provided, we confirm that your charges and the charges of Carey Olsen in connection with the preparation and making of the set aside application will be met by this firm.* Please address these bills to the normal addressee to whom you direct your invoices in respect of matters relating to the trust in providing that confirmation, and copy them to us. This confirmation does not of course affect any right that arises in the normal way in law or contract, or as a matter of professional standards, for the client or payer of the bill to challenge your firm's fees or those of Carey Olsen."

32 Advocate Gardner submits that it is unnecessary to have any order made in favour of the Trustee in respect of the costs of and incidental to this application because the Trustee has

the benefit of this indemnity from Messrs Grant Thornton. However, if the Court is minded to make the order requested, it will presumably be because some difficulty may arise in respect of the quantum of costs to be paid by Grant Thornton, and in his submission the problem ought not to be that of the Representor. Accordingly, he contends that if an order is made in favour of the Trustee, then it should only take effect on the Court being satisfied, on the Trustee's application, that the Trustee can justify the costs which Messrs Grant Thornton have refused to pay.

33 In reply, Advocate Kistler submits that his client should not be out of pocket. The Trustee has acted in good faith and the Alhamrami rule applies.

34 The decision having been reserved, Advocate Kistler subsequently drew to the Court's attention the case of *Bertrand des Pallières v JP Morgan Chase & Co* [2013] JCA 146. Both he and Advocate Gardner have said that they are at the Court's disposal to make further submissions if so requested. The Court is grateful for those offers, but will deal with the matter on the material which has been provided to it.

35 The starting point is that the Trustee is a neutral trustee, acting in that capacity, and not defending or advancing its own personal interests. Accordingly it is entitled to an indemnity from the trust fund in relation to all costs and expenses reasonably incurred. It has in some cases been said that this principle arises as a matter of statute, contract and the inherent jurisdiction of the Court, and an express order to this effect is unnecessary. If one regards the trust deed for this purpose as a form of contract, in the sense that it sets out the terms upon which the Trust was originally made, which has now been set aside, the Trustee cannot rely for its claim to an indemnity from the Trust fund in relation to all costs and expenses reasonably incurred upon the deed itself, but it can still rely upon Article 26 of the Law and upon the inherent jurisdiction of the Court.

36 In *Bertrand des Pallières v JP Morgan Chase & Co* there were issues as to any potential distinction between the rights of a trustee and the rights of a fiduciary, but at first instance, Clyde-Smith Commissioner held that:–

> ***"The underlying principle, in my view, is that a person exercising fiduciary powers in the interests of beneficiaries cannot, absent a finding of misconduct, be expected to meet the costs reasonably incurred by him or her in the exercise of those powers out of his or her personal assets.*** The fiduciary's implied right of indemnity is to be equated therefore to a trustee's right to be reimbursed in full and not to be subject to taxation under Rule 12/3 of the Royal Court Rules 1984."

37 There was a typographical error in that judgment in the sense that the reference should have been to the Royal Court Rules 2004, but the Court of Appeal accepted that this extract from his judgment was a correct statement of principle.

38 In many arguments over costs in trust cases, consideration is given by the Court to whether the case should be regarded as falling within the second or third categories described by Kekewich J in *Re Buckton* [1907] 2 CH 406. We do not think this problem arises in this case. This is clearly not a case of a beneficiary making a claim adverse to the other beneficiaries even though it is the beneficiary/settlor seeking to set aside the trust in its entirety. In a sense, this particular application does not fall into either of the first two categories, namely cases where the Court is asked to construe the instrument of trust by way of guidance, or in order to ascertain the interests of the beneficiaries or to have dealt with some question which has arisen in the administration of the trusts. Sometimes we see applications under Article 11 for the setting aside of a trust or a deed of appointment on the grounds of mistake, made by the trustee, even though as is now clear the natural applicant ought to be the settlor who has made the mistake in transferring the assets to the trust and/or setting up the trust in the first place. Unless there has been some misconduct on the part of the trustee, it would seem as a matter of principle that if there are costs which have arisen from a settlor's mistake, he should bear those costs — or even if he is to be successful and gain relief in equity pursuant to Article 11, there has not on this hypothesis been any fault on the part of the trustee, and there is no equity in leaving the trustee out of pocket as a result.

39 A consequence of setting aside the trust is that the trustee holds the trust fund as bare trustee for the Representor as settlor. It is therefore academic as to whether the Court makes an order in favour of the Trustee against the Representor, or for payment out of the trust fund. In the latter case, the Trustee is in control of the fund and can arrange to pay the expenses which it has incurred. If the order were made against the Representor, the Trustee holds the trust fund as bare trustee for him, and in accounting to him for the fund, can set off any monies which he may owe the Trustee in respect of expenses so incurred. To the extent, however, that there might be any arguments over the question of set-off, it seems to us to be preferable to order that the Trustee is entitled to reimburse itself out of the Trust for all expenses and liabilities reasonably incurred in connection with the Trust fund, which includes costs and expenses reasonably incurred in connection with these proceedings.

40 However, we do not think we should leave the matter there. The Court has sympathy for the Representor who does not appear to have done anything wrong in connection with the arrangements to set up the Trust or subsequently. He thought he was obtaining advice from all appropriate sources. It turns out that one material factor was overlooked, as a result of which both he and the Trustee have incurred expense in these proceedings. We anticipate that the Trustee's expenses so incurred will be reasonable, and, if so, there is no reason to suppose that Messrs Grant Thornton will not pay those expenses in accordance with the undertaking contained in the email exchange to which we have referred. But if they do not do so, it must be because they assert that the neutral trustee has incurred costs or expenses unreasonably. Yet they are not a party to the present proceedings. It would have to be the Representor making the allegation that the Trustee has incurred expenses unreasonably, which would arise because the Trustee had reimbursed itself in relation to those expenses from the Trust fund in accordance with the Court order, the amount of the reimbursement reflecting costs *“not otherwise paid”*. In our judgment, the equitable and

common sense way of dealing with what is unlikely to be a problem is to require the Trustee to justify its claim to costs which Messrs Grant Thornton have refused to pay. The advantage of requiring the Trustee to make such an application is that the Court could then consider whether it would be appropriate to convene Messrs Grant Thornton to that application upon the basis that we are sure that the firm would pay any amount of costs which the Court found to be justified on the Trustee's application. It may be that the Representor would choose not to participate, because he would thereby only be incurring further costs to lay at the door of Messrs Grant Thornton.

41 Accordingly, we order that the Trustee is entitled to pay itself, or to retain to the extent already paid, its costs of administration of the Trust during the period that it held the trust fund and its costs of the present application out of the trust assets if not otherwise paid, to the extent that the Court authorises such payment as reasonable.