C; D v Minerva Trust Company Ltd; Advocate Michael Christopher Goulborn representing minor and unborn beneficiaries

Jurisdiction:	Jersey
Judge:	Bailiff
Judgment Date:	13 May 2014
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Text

[2014] JRC 107

ROYAL COURT

(Samedi)

Before:

W. J. Bailhache, **Esq, Q.C., Deputy**Bailiff**and**Jurats Marett-Crosby**and**Crill

IN THE MATTER OF THE E TRUST AND THE F TRUST

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

Between
C
First Representor

D
Second Representor
and
Minerva Trust Company Limited
First Respondent
Advocate Michael Christopher Goulborn representing minor and unborn beneficiaries
Second Respondent

Advocate A. Kistler **for the Representors.**

Advocate J. P. Speck **for the First Respondent.**

Advocate M. C. Goulborn **in person.**

Authorities

Trusts (Jersey) Law 1984, as amended.

Re The Strathmullan Trust [2014] JRC 056 .

In the matter of the S Trust [2011] JLR 375 .

Civil-Trust-application to set aside transfer of asset.

Bailiff

THE DEPUTY

1 The Court sat on 25 th February, 2014 to receive an application by the Representors to set aside the establishment of the E Trust, and the transfers of the shares in G Limited ("G") from the First Representor to the Second Representor, from the Second Representor to the original trustees of the E Trust ("the Initial Share Transfers") and subsequently from the trustees of the E Trust to the trustees of the F Trust ("the Subsequent Share Transfer"). The application is made on the grounds of mistake pursuant to Article 11(2)(b)(i) of the Trusts (Jersey) Law 1984 as amended ("the Trust Law"), and to Article 47E as a fall back statutory provision should that be necessary. All the adult beneficiaries of the E Trust have agreed that the relief sought by the Representors should be granted.

2 The application was first presented to the Royal Court on 31 st January, 2014 when it was adjourned for further consideration until 25 th February, 2014. The Court convened the First Respondent as former trustee of the E Trust and as trustees of the F Trust, Ms H, wife of the First Representor, and a beneficiary of both trusts, and the minor beneficiaries of the F Trust. The Court also directed that HMRC be notified of the proceedings and be provided

with a copy of the representation and the Act of Court from the convening hearing. On 25 th February, 2014, the Court was provided with copies of the relevant correspondence and is satisfied that HMRC have had the opportunity of attending in Court to seek to join the proceedings or of writing to the Court to make their views known to the Court. In fact, no such correspondence has been received, and we take it therefore that HMRC considers that it has no particular interest in these proceedings which requires to be presented to the Court.

3 The E Trust was established pursuant to an instrument dated 1 st August 2001, made between the Second Representor and Warrant Trustees Limited, now known as Minerva Trust Company Limited, the First Respondent. The E Trust is expressed to be governed by Jersey Law and the trustees are to stand possessed of the trust fund on general discretionary trusts for the benefit of such of the beneficiaries as the trustees in their absolute discretion from time to time think fit. The initial trust fund was in the sum of £1,000 which was provided by the Second Representor, the Representor's mother, and the beneficiaries are listed as the First Representor, his lawful children and remoter issue, whether alive at the date of the settlement or born thereafter, and his two sisters. In 2005, H, wife of the First Representor was added as an additional beneficiary. In July 2007 the terms of the trust were varied by the introduction of protector provisions, the first protector being the Second Representor.

4 Shortly after the E Trust was constituted, the First Representor transferred to his mother the Second Representor some shares in G, with the intention that she would then settle those shares into the E Trust. His mother accepted the shares on that basis and did indeed so settle the shares. G is a profitable property investment company which has increased in value over the years.

5 In April 2009, the First Representor decided to establish a new estate agency company. Having taken advice, he concluded that the right step was to establish a new Jersey trust to receive the shares in J Limited (“J”), previously known as K. The First Representor wanted his assets to be held in different trusts to minimise the risks in the event of the insolvency of one of the businesses. Prior to the F Trust being established however the First Representor received advice that it would be better from a tax perspective if the shares in G were transferred from the E Trust to the F Trust, which was to be established by a Mr L as settlor. Indeed Mr L settled initial funds in the sum of £2,500 and the J shares were duly transferred into the F Trust. On 15 th December 2010 the First Respondent, as trustee of the E Trust, exercised its powers to appoint that the entire issued share capital of G would be held upon and subject to the trusts, powers and provisions of the F Trust, the beneficiaries of which are the First Representor, his wife Mrs H and the children of the First Representor, who (together with the unborn beneficiaries of the E Trust) are represented in these proceedings by Advocate Goulborn as guardian ad-litem.

6 The arrangements for setting up the E Trust, the transfer of shares in G and the setting up of the F Trust were all motivated by the hope of tax advantages in the United Kingdom where

the First Representor has at all material times been domiciled and resident.

7 The evidence before us was that the Second Representor made the arrangements she did at the request of her son the First Representor, and she relied entirely upon him in entering these various transactions. The evidence also was clear that as far as the First Representor was concerned, he acted consistently on the advice of a financial services adviser in the UK and indeed that he had known this financial services adviser for many years and indeed treated him as a mentor. Unfortunately the tax advice given to the First Representor was in all material respects quite wrong. Instead of providing a structure which would enable the First Representor to save tax in the United Kingdom, the structure would have potentially colossal disadvantages. As a result of the various arrangements, the First Representor would be treated as the settlor in respect of the G Estates shares and the shares in J. He would be treated as having made a transfer of value at the time of each settlement and thereby incurred an immediate liability to inheritance tax. Furthermore, the settled property is subject to the regime of exit and ten year charges. To make matters worse, the First Representor has reserved a benefit in the settled property, and accordingly all such property that derives from him will be treated as forming part of his individual estate for inheritance tax purposes on his death. There are also capital gains tax implications, with the probability that the transfer of the G shares from the E Trust to the F Trust in 2010 would have given rise to a deemed disposal for capital gains tax purposes, and assuming that those shares had increased in value between the date of acquisition by the E Trust in 2001 to the date of disposal in 2010, a chargeable gain would have accrued upon the transfer. Although prima facie the deemed gain accrues to the First Respondent as trustee, and as a non-UK resident it is not chargeable for that gain, the fact that the First Representor retained an interest under the trust — that is to say the trust is settlor interested — means that the gain can be attributed to him. The initial cash payments provided as the settled funds would be free of tax liabilities, but all the rest of the trust funds in both the M Trust and the F Trust would form part of the chargeable estate for tax purposes.

8 In summary, the arrangement has not only not achieved its purpose but even worse what was done has created tax liabilities where none previously existed. In those circumstances, the First Representor not unnaturally contends that he would never have made these arrangements had he been properly advised of what the fiscal consequences would be, and as he put it in his affidavit, the offshore structure which he had adopted “as a result of the flawed tax advice has resulted in the accrual of significant tax charges which threaten my livelihood and that of my family.”

9 Against that background, we assess the application for the E Trust and the transfer of the G shares to be set aside.

10 Advocate Kistler, acting for the Representors, presented the application under Article 11 of the Trust Law, which we think was the correct approach. The alternative basis of Article 47E of the Trust Law was considered in *Re The Strathmullan Trust* [2014] JRC 056. The Representors' contention was that the E Trust itself should be set aside as having been made by mistake.

11 The proper approach to that application is well settled — see *In the matter of the S Trust* [2011] JLR 375. 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 the mistake of so serious a character as to render it unjust on the part of the donee to retain the property?

12 It is also well settled that a mistake about the tax effects of a particular transaction can be treated as a relevant mistake for the purposes of Article 11 of the Trust Law.

13 The evidence before us is clear that the transfer of shares in G from the First Representor to the Second Representor, and the subsequent transfer of shares to the trustees were essentially one transaction with the making of the E itself. The evidence is equally clear that the First Representor acted at all times on the advice of tax advisers whom he had trusted for very many years. Addressing the three questions we have to consider, we are completely satisfied that the Settlor made a mistake in the context of the arrangements to set out the E Trust. The purpose was primarily the achieving of tax advantages. In fact no such tax advantages were gained — quite the opposite as the arrangement, if it stands, would cause a very substantial loss to the First Representor who we treat as the real Settlor.

14 The second question therefore is whether the First Representor would have entered into the transaction anyway. In our view it is transparently clear that he would never have made the transaction had he known the true position. It is obvious that if transactions are entered into upon the basis that there would be tax gains as a result, and for no other substantial purpose, the First Representor would not have entered into the transaction had the true position been known.

15 We come to the third question which is whether this was a mistake of so serious a character as to render it unjust on the part of the trustee to retain the property. Here, there is no doubt that the trustee holds the trust property on behalf of the First Representor and his wife and children. No-one contends that it would be just for the trustee to retain the property. The trustee recognises that it is not in the interest of any of the beneficiaries that it does so — there would be substantial taxation losses for the First Representor and these would undoubtedly affect both his wife and his children and remoter issue. His sisters agree the application should succeed. So too does Advocate Goulborn on behalf of the minor beneficiaries of the E Trust and the F Trust and unborn beneficiaries of the E. In those circumstances there is no factor which arises for our consideration which would suggest that it would be just for the trustee to retain the property in trust.

16 In the circumstances, we conclude that Advocate Kistler has established that the E Trust was made by mistake and should be set aside. It follows that the transfer of shares in G from the First Representor to the Second Representor and thereafter to the trustees of the E Trust, which we consider to be one transaction for the reasons we have given, should also be set aside for mistake, and as the trustees of the E Trust never had these shares properly in their hands, the subsequent share transfer to the trustees of the F Trust also falls to be set aside. The order is made accordingly, and as a consequence, the First Respondent holds the shares in G on bare trust for the First Representor.