

Vivienne Harper v Apex Trust Company Ltd; Campbell Malcolm Reith; Advocate Michael P. Cushing (as the representative of the beneficiaries appointed under RCR4/4)

Jurisdiction:	Jersey
Judge:	Bailiff
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Text

[2014] JRC 253

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, Kt., Bailiff, **and** Jurats Fisher**and** Kerley

IN THE MATTER OF THE ANDREWS SETTLEMENT AND THE ANGUSFIELD
SETTLEMENT

Between
Vivienne Harper
Representor
and

Apex Trust Company Limited

First Respondent

Campbell Malcolm Reith

Second Respondent

Advocate Michael P. Cushing (as the representative of the beneficiaries appointed under RCR4/4)

Third Respondent

Advocate E. Moran for the Representor.

Mr D Petit, **Director of the First Respondent.**

The Second Respondent did not appear and was not represented.

Advocate M. P. Cushing appeared in person.

Authorities

Inheritance Tax 1984.

Re Exeter Settlement [\[2010\] JLR 169](#) .

Trusts (Jersey) Law 1984.

Trust — reasons for declaring the two trusts void.

Bailiff

THE

- 1 This application relates to two trusts. On 30th October, the Court declared the trusts to be void for uncertainty. We now give our reasons.

Factual background

- 2 Over the years Mr Harper and his wife the Representor (“the settlor”) built up a property business in Scotland. They carried on this business through a number of companies. The two which we are concerned with are Andrew’s Homes (Aberdeen) Limited (“Andrew’s Homes”) and Angusfield Property Company Limited (“Angusfield”). Mr Harper and the settlor were the majority shareholders but some shares were owned by their children. In 2006 Mr Harper suffered a heart attack and thereafter one of their children Jonathan Harper (“Jonathan”) took on responsibility for managing the business in his place. The Court has received affidavits from the settlor, from Jonathan and from Sophia Purkis, a solicitor with

the firm which has been advising the settlor in connection with this representation. We have also received an affidavit from Mr Petit, a director of Apex Trust Company Limited ("Apex"), a company carrying on trust business in Jersey. From all the information before us, we find the facts to be as follows.

- 3 Mr Harper and the settlor had been concerned for some time about the level of UK inheritance tax which would be suffered on their deaths. In 2011, Jonathan sought professional advice for them as to suitable inheritance tax planning. He asked the Second Respondent ("Mr Reith"), who was the corporate tax adviser to Andrew's Homes, to identify an appropriate person to provide his parents and Andrew's Homes with advice.
- 4 Mr Reith proposed Mr Julian Paulley ("Mr Paulley"), a sole practitioner solicitor trading as Paulley and Co in England. He was duly instructed in May 2012.
- 5 By letter dated 3rd July, 2012, Mr Paulley recommended that Mr Harper and the settlor should set up a Jersey based trust for the benefit of the employees of Andrew's Homes to which they would transfer their shares. Mr Paulley proposed a settlement which he said would comply with Section 28 and Section 86 of the Inheritance Tax 1984 and thus ensure that Mr Harper and the settlor would not be liable for any inheritance tax and/capital gains tax upon the transfers of their shares into it or thereafter. Mr Paulley later proposed that the same form of settlement should be used for the shares in Angusfield.
- 6 Mr Harper died on 8th August, 2012. He left his shares in the two companies to the settlor and they were in due course transferred into her name.
- 7 On 21st November, 2012, Mr Paulley sent Apex a draft of the two proposed settlements. Each settlement consisted of the main body of the settlement and then a separate document which contained five schedules. It appears that Apex had been recommended by Mr Paulley. There followed some exchanges between Mr Petit of Apex and Mr Paulley on some of the drafting. On the whole they were minor points, but of note is that whereas Mr Paulley's draft contained the execution page for signatures at the end of the main body of the settlement (i.e. before the schedules), Mr Petit's draft put the signature page after the schedules so that everything was in one document.
- 8 On 30th November, 2012, Mr Paulley e-mailed Mr Reith the two trust deeds to be executed in order to constitute the settlements. Each was in fact the version of the main body of the settlement which he had sent to Apex on 21st November. There were no schedules attached to the two trust deeds which he sent to Mr Reith. In each case, the settlor was named as the settlor and Apex and Mr Reith were named as the original trustees.
- 9 On 4th December the settlor and Jonathan attended at Mr Reith's office in order to execute the two settlements. It is clear that they were not taken through the documents and the

settlor was simply asked to sign the relevant signature page, which she did. Mr Reith also signed the same page. Following this, Mr Reith e-mailed Mr Paulley at 12.07 stating:–

“Currently have Mrs Harper in the office. Please check attached to make sure you're happy with the paperwork.”

- 10 What was attached to the e-mail was the first page and execution page of each settlement together with the forms of share transfer so as to transfer the shares in the two companies into the name of the trustees. The shares in Andrew's Homes were transferred to the Andrews Settlement and the shares in Angusfield were transferred to the Angusfield Settlement.
- 11 Later that day, Mr Reith e-mailed Apex with the signed trust deeds and share transfer forms stating that he would arrange for hard copies of the deeds to be posted to Apex. Again, it is clear that the version of each settlement which was e-mailed to Apex did not contain the schedules. These two documents were executed by Apex upon receipt.
- 12 Some months later on 14th August, 2013, Mr Reith e-mailed Mr Paulley stating that he had been reviewing the copy trust deeds held for the two settlements but that he did not appear to hold copies of the schedules referred to in the documents. He asked Mr Paulley to provide them. There was no response from Mr Paulley who unfortunately died a few days later on 20th August, 2013.
- 13 Mr Petit has confirmed that the executed trust deeds received by Apex did not have any schedules attached. It appears that at some stage a member of Apex's staff, following an administrative review of the settlements, discovered that the schedules were missing. That member of staff then took the draft schedules from those which Mr Paulley had originally sent on 21st November, 2012, and attached them to the executed settlements.
- 14 The upshot is that the settlor never saw the schedules. They were not attached to the main body of the settlements because they had been prepared by Mr Paulley as separate documents. She executed the settlements by signing the signature page, which was at the end of the main body of the trust deed. That page was also executed by Mr Reith as co-trustee and the versions of the settlements which he sent to Apex for execution similarly contained no schedules. Apex also executed the page at the end of the main body of the trust deed. The version of the schedules which was subsequently attached to the executed trust deeds in Apex's file was the original draft version sent by Mr Paulley on 21st November.
- 15 We have no doubt that on these facts, the schedules cannot be deemed to be part of the trust deeds. The settlements must therefore be considered and construed as documents without the schedules.

Effect of there being no schedules

- 16 The two settlements are in identical form. They purport to be non-charitable purpose trusts. We shall for convenience simply refer to the terms of the Andrews settlement.
- 17 Clause 1 is the interpretation clause. Its relevant definitions for our purposes are as follows:–

“Word and Expression Meaning

Enforcer The person named in the Second Schedule or the person appointed as the Enforcer from time to time in accordance with the provisions hereof.

Excluded Person Any person specified in or who falls within a class of person specified in the Fourth Schedule and each other person who may be declared to be an Excluded Person in accordance with the power contained in clause 6.

Purpose Each of the purposes set out in the First Schedule and “Purposes” shall be construed accordingly.

Trust Asset Manager The person specified in the Fifth Schedule or the person appointed as the Trust Asset Manager from time to time in accordance with the provisions hereof.”

- 18 Clause 4 contains the trusts of income and capital as follows:–

“The Trustees shall stand possessed of the Trust Fund and the income thereof upon the trusts following, that is to say:–

(a) Upon trust during the Trust Period at their discretion to pay appropriate or apply the whole or such part of the income and capital of the Trust Fund as the Trustees may in their absolute discretion think fit from time to time to or for any one or more of the Purposes in such shares and proportions generally in such manner as the Trustees shall in their absolute discretion think fit and for the avoidance of any doubt, the Trustees may undertake all and any acts and things as they consider in their absolute discretion to be in the furtherance of or towards the attainment of any Purpose.

(b) Subject to the foregoing the Trustees shall during the Trust Period accumulate the income of the Trust Fund and add the accumulations to the capital of the Trust Fund.

(c) At the expiration of the Trust Period upon trust as to both capital and income of the Trust Fund to pay or apply the same to or towards such of the Purposes and in such shares and proportions if more than one and generally in such manner as the Trustees shall prior to or on the date of such expiration in their absolute discretion determine.”

- 19 Clause 5 contains conventional powers of appointment and advancement. Clause 5(a)(i) enables the trustees to declare new or other trusts powers and provisions provided that they are "... for the furtherance or attainment of any one or more of the Purposes...". Clause 5(a)(ii) enables the trustees to pay capital out of the trust fund "... to or for any one or more of the Purposes..." and Clause 5(a)(iii) enables the trustees to pay or transfer the whole or any parts of the capital to any other trust provided that such trust is established "... for any one or more of the Purposes".
- 20 Clause 6 provides that the trustees may not exercise any trusts or powers in any manner so as to result in an Excluded Person benefitting.
- 21 Clause 16(a) states that the first Enforcer is the person named in the Second Schedule and Clause 17 provides that such powers and discretions as are specified in the Third Schedule should only be exercisable with the written consent of the Enforcer.
- 22 Clause 29(a) provides that the first Trust Asset Manager is the person named in the Fifth Schedule.
- 23 In the absence of any schedules, none of these provisions is capable of sensible interpretation. However, the deficiencies in respect of the Enforcer and the first Trust Asset Manager could probably be overcome by the trustees making an appointment under the terms of the trust deed and the absence of the fourth schedule containing the list of Excluded Persons would presumably simply mean that there was no Excluded Person. On the face of it, the absence of the schedules dealing with the identity of these persons would not be fatal to the validity of the trust deed.
- 24 However, in the absence of a definition of 'Purpose', it seems to us that the settlements must be void for uncertainty. As the Court said in *Re Exeter Settlement* [\[2010\] JLR 169](#) at para 16:—
- "It is trite law that, in order for a trust to be valid, there must be certainty of words, certainty of subject matter and certainty of objects."***
- 25 This was of course an observation made in the context of an ordinary trust as opposed to a purpose trust. Nevertheless there must still be sufficient certainty such that the trustees (and the Court in the event of dispute) can ascertain what the purpose is. Thus Article 11(2)(b) of the Trusts (Jersey) Law 1984 provides:—

"Subject to Article 12, a trust shall be invalid:—

(b) to the extent that the court declares that:—

(iii) the terms of the trust are so uncertain that its performance is

rendered impossible.”

- 26 In the absence of the First Schedule defining the Purposes of the two settlements, performance is indeed rendered impossible. The trustees cannot have the first notion of what they are meant to do with the assets of which they are trustee and for what purpose they are holding the trust fund. In the circumstances, we have no hesitation in holding that the terms of the two settlements are so uncertain that the performance of each is rendered impossible and the two settlements are therefore void for uncertainty. It follows that the assets in the trust fund of each Settlement have at all times been held by Apex and Mr Reith on resulting trust for the settlor absolutely.
- 27 Given our finding, it is not necessary to consider the settlor's alternative claim that the two settlements should be set aside on the grounds of mistakes.