

Mr and Mrs A v C and D and E and B (The Trustee) and Advocate Nicholas Ward, appointed to represent the interests of the minor and unborn beneficiaries

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Grime, Liston
Judgment Date:	17 January 2017
Neutral Citation:	[2017] JRC 14
Reported In:	[2017] JRC 14, [2017] JRC 014
Court:	Royal Court
Date:	17 January 2017

vLex Document Id: VLEX-792610269

Link: <https://justis.vlex.com/vid/mr-and-mrs-v-792610269>

Text

[2017] JRC 014

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, Esq., Commissioner and Jurats Grime and Liston

IN THE MATTER OF THE REPRESENTATION OF MR AND MRS A AND THE A FAMILY TRUST

AND IN THE MATTER OF ARTICLE 47E OF THE TRUSTS (JERSEY) LAW 1984, AS AMENDED

Between

Mr and Mrs A
Representor
and
C
First Respondent

and

D
Second Respondent

and

E
Third Respondent

and

B (The Trustee)
Fourth Respondent

and

Advocate Nicholas Ward, appointed to represent the interests of the minor and unborn
beneficiaries.
Fifth Respondent

Advocate E. Moran for the Representors.

Advocate N. J. Ward appeared on behalf of the unborn and minor beneficiaries.

Authorities

Trusts (Jersey) law 1984.

Robinson Annuity Investment Trust [2014] (2) JLR Note 6 .

Futter and another (Appellants) v The Commissioners for Her Majesty's Revenue and Customs (Respondent) and *Pitt and another (Appellants) v The Commissioners for her Majesty's Revenue and Customs (Respondent)* [\[2013\] UKSC 26](#).

Trust — reasons for certain transfers of UK situs assets being set aside.

THE COMMISSIONER:

¹ On 23rd November, 2016, the Court set aside certain transfers of UK situs assets made by

the representors into the A Family Trust ("the Trust"), which was declared by B ("the Trustee") on 2nd April, 2015. We now set out our reasons.

- 2 The Trust is a discretionary trust in familiar form, subject to the proper law of Jersey. The beneficiaries are two of the three adult children of the representors and their children and remoter issue. The representors are excluded from benefit.

Background

- 3 In 2005, the representors sold their successful hotel and restaurant business in England and retired to live in a foreign jurisdiction. In 2014, they considered moving back to England to be closer to their children and grandchildren. At that time, their assets comprised their home in the foreign jurisdiction and four investment accounts with a foreign bank.
- 4 They took tax advice from a firm of London lawyers which was to the effect that whilst they remained non-UK domiciled, any of their non-UK assets which were transferred into a trust would remain free from Inheritance Tax ("IHT"), even if the representors acquired a UK domiciled status on coming back to live in England. Furthermore, UK assets could be sheltered from IHT if the trust held those assets via a non-UK company; the non-UK company effectively blocking the UK situs of the underlying assets.
- 5 It was thought likely that the assets to be transferred would constitute their foreign home and funds from the investment accounts with the foreign bank. In general terms, they were advised that assets transferred into a trust would not attract UK tax consequences, unless they constituted UK assets, although there was no further explanation of what was meant by UK assets.
- 6 The representors were introduced by the lawyers to the Trustee, which carries on trust and company business in Jersey, and which declared the Trust. The representors decided to keep their foreign home in their own names (with the intention to sell it in due course), but to settle the four investment accounts, which being accounts with a foreign bank, they assumed were non-UK assets.
- 7 The London lawyers prepared an instrument of addition which recited that the representors were *"the legal and beneficial owners of the assets within"* the four accounts with the foreign bank. The instrument was executed and those assets thus added to the Trust. There was no inquiry on the part of the London lawyers or the Trustee as to the assets held within the accounts and, in particular, whether they comprised UK assets.
- 8 In fact, some 38% of the assets added were situated in the UK, giving rise to an immediate IHT entry charge equivalent to 20% of the value of the UK assets added, with ongoing tax consequences for the Trust.

- 9 Until the representors can sell their foreign property, they do not have the means to meet this liability and if it is paid out of the eventual sale proceeds, that would diminish the funds they have to live off for the rest of their lives. The consequence is that the Representors no longer feel financially secure.

Test for mistake

- 10 The test for mistake under Article 47E of the Trusts (Jersey) law 1984 ("the Trusts Law") has been summarised in the case of *In the matter of the Robinson Annuity Investment Trust* [2014] (2) JLR Note 6:–

"The statutory test under art.47E(3) is, however, for all practical purposes identical to the test that has been established by the courts on applications under art. 11, i.e. the court has to ask itself (a) whether there was a mistake on the part of the settlor; (b) whether the settlor would not have entered into the transaction but for the mistake; and (c) whether the mistake was of so serious a character as to render it unjust on the part of the trustee to retain the property (In re Lochmore Trust

[2010] JRC 068 applied). It is also clear from the case law on art. 11 that it does not matter whether the mistake is of fact, law, effect or consequences. A mistake as to the tax consequences of a trust or a transfer to a trust is a mistake for these purposes (*In re S Trust* ***[2011] JLR 375 applied***). The definition of 'mistake' in art.47B(2) is to the same effect."

Decision

- 11 The Court was satisfied that this was a clear case of mistake on the part of the representors, who had assumed that their investment accounts held with a foreign bank were non-UK assets. If they had appreciated that regard would be had to the situs of the assets held through those accounts, then they would have taken the simple and perfectly proper expedient of either selling them or transferring them to an offshore company and then settling that company into the Trust, or of not settling them at all. They had no reason to incur an immediate charge of 20% of the value of the UK assets settled.
- 12 Having wished to shelter assets from IHT for the benefit of their family, they now found themselves with a substantial liability that they could not immediately meet, and which would deplete the funds upon which they had intended to rely for the rest of their lives.
- 13 We were satisfied that they would not have settled the UK assets in the investment accounts but for that mistake. Furthermore, it was a mistake of a serious character, in terms of the amounts involved and the impact upon their lives, so serious as to render it unjust on the part of the Trustee to retain those UK assets.

- 14 The Trustee and the Protector rested on the wisdom of the Court. HMRC had been notified and wrote to Advocate Moran, asking her to draw to our attention the Supreme Court's decision in *Futter and another (Appellants) v The Commissioners for Her Majesty's Revenue and Customs (Respondent)* and *Pitt and another (Appellants) v The Commissioners for her Majesty's Revenue and Customs (Respondent)* [\[2013\] UKSC 26](#), and in particular, to that part of the decision which deals with “*mistake*” at paragraph 99 onwards. Advocate Moran did so, but of course, this application was brought under Article 47E of the Trusts Law, the test for which is well established and clear.
- 15 Advocate Ward went into detail as to the wishes of the representors as to how the trust fund should be used to benefit their family, which it is not necessary to elaborate here. In broad terms, he said it was the intention of the representors to benefit all three of their adult children (the third child being added at an appropriate time, subject to relevant tax advice being taken). The Trust is a dynastic one and family harmony and loyalty were important considerations. On behalf of the minors and unborns, he supported the application.
- 16 We therefore set aside the disposition by the representors of the UK assets into the Trust and in doing so the Trustee became liable to transfer those assets back to the representors. Some of the UK assets had been sold, some redeemed and interest paid on investments, making it impossible to identify all of the UK assets in the form in which they were settled.
- 17 How the Trustee discharged its obligation to return these assets to the representors was a matter of negotiation between them, but advice had been obtained as to the proportion the UK assets bore to the total assets when they were added, subject to a number of adjustments. The Trustee was authorised to discharge its liability by transferring to the representors assets (including as many UK assets as possible) of a value equivalent or as near as reasonably practicable to that proportion; the representors being content to accept the same in discharge of the Trustee's obligation to them. Any UK assets remaining in the trust fund were to be sold.