

A v EFG Trust Company Ltd

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith O.B.E., Jurats Ramsden, Pitman
Judgment Date:	03 October 2019
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Text

[2019] JRC 195

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith O.B.E., **Commissioner, and** Jurats Ramsden **and** Pitman

In the Matter of the Representation of A

And in the Matter of L Trust

And in the Matter of Articles 11, 47E, 47I, 51 and 53 of the Trusts (Jersey) Law 1984 (As Amended)

Between
A
Representor
and

EFG Trust Company Limited
First Respondent

and

B
Second Respondent

and

C
Third Respondent

and

D
Fourth Respondent

and

E
Fifth Respondent

Advocate O. J. Passmore **for the Representor.**

Authorities

Trusts (Jersey) Law 1984

In the matter of the K Trust [\[2017\] JRC 177](#).

In the matter of the G Trust [\[2018\] JRC 159](#).

In the matter of the G Trust [\[2019\] JRC 056](#).

In the matter of the Robinson Annuity Investment Trust [\[2014\] JRC 133](#).

In the matter of the S Trust and In the matter of the T Trust [\[2015\] JRC 259](#).

Re Lochmore Trust [\[2010\] JRC 068](#).

Re S Settlement [\[2011\] JLR 375](#).

In re R remuneration Trust [\[2009\] JRC 164A](#).

Trust — reasons for declaring the trust invalid

THE COMMISSIONER:

- 1 On 29th May, 2019, the Court declared the L Trust invalid, pursuant to Article 11(2)(b)(i) of the Trusts (Jersey) Law 1984 ("the Trusts Law") and we now set out our reasons.
- 2 This case followed a number of similar cases in which settlors, who are neither resident nor domiciled in the United Kingdom, had been advised to settle funds into a Jersey trust using a UK based bank account, giving rise to quite unnecessary exposure to substantial IHT charges. These cases, for example, include *In the matter of the K Trust* [\[2017\] JRC 177](#), *In the matter of the G Trust* [\[2018\] JRC 159](#) and *In the matter of the G Trust* [\[2019\] JRC 056](#).

The facts

- 3 The representor was born in Country A, and lived there until July 2015, when she relocated to the United Kingdom. With her late husband, she had a number of investment properties in the United Kingdom (and in Country A), of which, on his death in 2007, she became the sole owner.
- 4 In or around May 2014, the representor was contemplating selling her UK properties, and, through an introduction by a friend, took advice from EFG Private Bank Limited in London ("EFG London") as to how to structure the proceeds with succession purposes in mind. She had three adult children, namely the second to fourth respondents.
- 5 EFG London advised the creation of an offshore trust structure and a questionnaire was completed for the representor to sign, addressed to EFG Offshore Limited (later EFG Wealth Solutions (Jersey) Limited), which wholly owns the first respondent EFG Trust Company Limited. There was a section on page 8 of the questionnaire asking whether the representor had a professional adviser, which was left blank as the representor did not have a relevant professional adviser and was reliant on the advice and guidance on this matter provided to her by EFG London.
- 6 On 19th August 2014, the representor executed the settlement known as "the L Trust" ("the Trust") with EFG Trust Company Limited as the trustee ("the Trustee"). It is a Jersey proper law discretionary trust in standard form, with the beneficiaries being her three adult children. There are default trusts in favour of charitable purposes. On 16th December, 2014, the fifth respondent, the husband of the second respondent, was appointed as an additional beneficiary. The initial property constituting the Trust was £10. A BVI company called L Limited ("the Company") was incorporated as a wholly owned asset of the Trust.
- 7 On the advice of EFG London the Trust was funded in this way:-

- (i) The representor was advised to open an onshore personal account with EFG

London on which the initial settled sum of £10 was held to the Trustee's order, and later refunded from her offshore account in Guernsey.

(ii) Three transfers were made shortly thereafter following the sale of her investment properties directly from the client account of the London based lawyer acting on the sales to the account of the Company with EFG London. The transfers were book kept as additions to the Trust, and onward loaned to the Company. The transfers were as follows:-

Date	Amount
4 th September 2014	£1,457,138.69
9 th October 2014	£416,651.54
3 rd November 2014	£1,525,505.54
Total	£3,339,295.77

8 In July 2018, the representor was informed by EFG London that the transfers may have given rise to tax liabilities. On 8th March 2019, Oliver Conolly, English counsel, gave the following advice, in summary:-

(i) The transfers in question gave rise to 20% IHT charges which became due and payable six months after the transfers themselves.

(ii) If the representor discharges the IHT due, it is computed at £752,823.94, with statutory interest at approximately £85,219.67.

(iii) If the Trustee discharges the IHT, the IHT liability is £602,259.15 and interest is approximately £68,175.73.

(iv) Penalties are a maximum of £3,600, but are likely to be nil to minimal.

(v) If the transfers are set aside, it will be possible for the representor to make a claim under section 150 of the Inheritance Tax Act 1984 which will have the effect that no IHT, interest or penalties are payable in relation to them.

(vi) If these transfers had been made from a non-UK situs bank account, no liability to IHT would have arisen.

9 The representation has been served upon the respondents, all of whom support the application. HMRC was notified by letter dated 8th May 2019, and responded saying that it did not wish to be joined in to the application or to make any comment upon it. The Attorney

General was notified of the application on 8th May 2019 and responded saying that he did not propose to appear, in view of the unlikelihood of the trust assets being the subject of charitable distributions.

The Law

- 10 Article 9(1) of the Trusts Law provides that the validity of a Jersey trust (Article 9(1)(a)) and the validity and effect of any transfer of property to a Jersey trust (Article 9(1)(b)) shall be determined in accordance with the law of Jersey and no rule of foreign law shall affect such question. This means the domestic law of Jersey without reference to its conflict of law principles (see *In the matter of the Robinson Annuity Investment Trust* [\[2014\] JRC 133](#) at paragraph 23).
- 11 The mistake in question is in relation to transfers of assets onto the Trust. *In the matter of the S Trust and In the matter of the T Trust* [\[2015\] JRC 259](#) considered the legal basis for an order seeking a transfer of property onto a trust to be set aside on grounds of mistake and declared void and outlined (at paragraphs 17 to 22 of the judgment) the following points of broad application:-
- (i) Article 11 of the Trusts Law relates to the invalidity of a trust as a whole;
 - (ii) In so far as transfers which were the subject of the application included the transfer which immediately constituted the trust, Article 11 would seem to apply;
 - (iii) In so far as a transfer is made to an existing trust, Article 47E would apply; and
 - (iv) For the purposes of Article 11 or 47E it does not matter whether the asserted mistake was of fact or law, as to the effect or as to consequences and as such a mistake as to the tax consequences of a trust or a transfer to a trust is a mistake for these purposes.
- 12 This matter concerned three separate transfers over a relatively short period of time, and was therefore brought alternatively under Article 11 or under Article 47E. While the three transfers did not include the initial transfer, this did not necessarily mean that Article 11 could not apply. The Court will generally look at the arrangements in relation to a trust in the round and, as was stated in *the S Trust and the T Trust* at paragraph 17:-
- “it would seem to be inconceivable that the trusts themselves, constituted by the payment of £20 into the relevant trust on the date it was established, would have been made had there been any contemplation that the further dispositions later made into trust were not to be made.”***
- 13 Furthermore, the Court said in *Robinson Annuity Investment Trust* that:-

“in many if not most cases, the transfer of property will occur at much the same time as the creation of the trust and the same mistake will be operating on the mind of the settlor both in relation to the creation of the trust and the transfer of the property to it.”

Such an approach was taken by the Court in *Representation of A in the matter of the G Trust* [2018] JRC 159 at paragraphs 21 and 22.

- 14 Under the test summarised in *Re Lochmore Trust* [2010] JRC 068 and settled in *Re S Settlement* [2011] JLR 375 and which is applicable to applications brought under Article 11 of the Trusts Law, the Court must 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 to render it unjust on the part of the donee to retain the property?

- 15 In the *S Trust and the T Trust*, the Court said at paragraph 20 that:-

“... the judicial test, in requiring the Court to consider whether it is unjust on the part of the donee to retain the property, seems ... to contemplate that the Court is measuring justice by reference to the position of the donee ... the focus of the statutory test, by contrast, is whether it is just for the Court to make a declaration that a disposition of property to a trust is voidable ... because of a mistake made by the donor ...”

and clarified that there might be a factual circumstance where the distinction is relevant but that ...

“in most cases the result of the statutory and judicial tests will be the same.”

- 16 The present matter is an instance where application of the judicial or statutory test will yield the same answer and therefore, for all practical purposes the test as summarised in *Re Lochmore* and confirmed in *In the matter of the S Trust and in the matter of the T Trust* and the authorities in relation to that test are relevant to the present application.
- 17 In deciding whether to exercise the discretion under Article 11 to set aside a settlement on the grounds of the mistake of the settlor as to its legal effect, two factors which the Court will take into account are: first, whether it would be unjust on the beneficiaries for the settlement to be set aside, and second, whether the position of third parties would be prejudiced if the settlement were to be set aside (see *In re R remuneration Trust* [2009] JRC 164A at paragraph 32).

- 18 Although there have been many Jersey cases on mistake in this context, no Jersey decisions were cited to the Court which attempted to define what may be considered as an operative mistake either under the Trusts Law or at customary law.
- 19 In the recent decision of *In the matter of the G Trust* [\[2019\] JRC 056](#) (at paragraphs 13 – 16), the Court concluded that it is inappropriate to make the distinctions made in English law as to incorrect conscious beliefs, incorrect tacit assumptions or mere causative ignorance because in the Court's view such distinctions were rather artificial.
- 20 In relation to the seriousness of the mistake, the Court at paragraph 17 of its judgment in *In the matter of the G Trust* comments as follows:-

“... the Court needs to ask itself whether the mistake was of such a serious character as to render it just for the Court to make a declaration.

The grammar of the question makes it plain that there are two component parts, the first as to whether the mistake was of a serious character and the second as to whether it is just for the Court to make a declaration. The seriousness of the mistake will often be analysed by reference to the effect both on the transferor and potentially on the trustees and beneficiaries of the trust. In the context of taxation consequences, the mistake may not be of a very serious character if the quantum of tax exposure is very limited as compared with the value of the Trust Fund or of the remaining assets held by the transferor, although that might also depend on whether there are any future consequences including the loss of future potential in relation to the trust as a result of the particular transfer which is impugned.”

- 21 The Court continues at paragraph 18 to state:-

“The question of justice is more nuanced. It is well settled that mistakes in relation to tax are capable of being taken into account by the Court in deciding whether or not to set aside a transfer or disposition into trust or indeed the trust itself.”

- 22 Having discussed a number of examples, the Court concluded at paragraph 22 that there is a ***“ real discretion to be exercised”***.
- 23 If the Court declares that the Trust was established by mistake (Article 11(2)(b)(i)) and is therefore invalid, then the trust property would (subject to any order of the Court) be held for the representor absolutely (Article 11(6))

Decision

- 24 The Court had no difficulty applying the relevant tests as set out in *Re Lochmore Trust* with the facts of this case. It is manifest that there was a mistake on the representor's part in funding the trust in a manner which quite unnecessarily gave rise to these IHT liabilities. No rational person would volunteer a liability in this way. It is true that in the document the representor was asked to sign in relation to the three substantive transfers, she confirmed that she had taken “*appropriate advice as to the effect of settling these assets into trust*” but EFG London knew from the questionnaire they had completed for her that she had no tax adviser, and that she was relying upon it for guidance. It was EFG London who advised her as to the mechanics of the transfers with such potentially disastrous results.
- 25 It follows that the representor would not have funded the initial property and made these transfers in this way but for the mistake, and in view of the amounts involved, the mistake was a serious one. The Court could see no justice in these funds being retained within the Trust in these circumstances, and none of the convened parties argued to the contrary; indeed they supported the application.
- 26 The Court had an affidavit from Constance Clark, a director of the Trustee, detailing the financial history of the Trust and the Company. There had been no distributions made out of the Trust, and we were satisfied that setting aside the Trust would not adversely affect any third party. The Company had issued a number of guarantees, none of which would be affected by a change in the ownership of the Company from the Trustee to the representor following a declaration of invalidity.

Conclusion

- 27 For all these reasons, the Court declared that the trust was invalid for mistake pursuant to Article 11(2)(b)(i) of the Trusts Law, and ordered that the trust fund should be held by the Trustee on trust for the representor as settlor absolutely. The Court made the following consequential orders, namely:-
- (i) that the Trustee can retain the remuneration it had already charged and the reimbursement it had already received for expenses and liabilities reasonably incurred and could continue to charge its reasonable remuneration and reimburse itself for expenses and liabilities reasonably incurred up to the date of the declaration; and
 - (ii) directed that the Trustee is relieved from liability for any breach of the bare trust upon which it has held the trust assets, save to the extent that any breach of the bare trust would also constitute a breach of the Trust, assuming it had been correctly constituted.