

## Mr A v C Trustees Ltd

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	Bailiff
<b>Judgment Date:</b>	23 November 2017
<b>Neutral Citation:</b>	[2017] JRC 198
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<b>Court:</b>	Royal Court
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### Text

[2017] JRC 198

ROYAL COURT

(Samedi)

Before:

T. J. Le Cocq, Esq., Deputy Bailiff, and Jurats Ramsden and Pitman.

In the Matter of the M Trust

And in the Matter of Articles 11 and 47E of the Trusts (Jersey) Law 1984

Between  
Mr A  
Representor  
and  
C Trustees Limited  
Respondent

**Advocate J. M. Sheedy for the Representor.**

**Advocate D. James for the Respondent.**

### **Authorities**

Trusts (Jersey) Law 1984.

Inheritance Tax Act 1984.

*In the matter of the Lochmore Trust* [\[2010\] JRC 068](#) .

*In the matter of the Strathmullen Trust* [2014] (1) JLR 309 .

*Re S and T Trusts* [\[2015\] JRC 259](#) .

Trust — application requesting the court to set aside a transfer of assets into a Jersey discretionary trust.

Bailiff

### **THE DEPUTY**

- 1 This is an application by Mr A (hereafter called the Representor) in which he asks the Court to set aside the transfer of assets into a Jersey discretionary trust known as the M Trust (the Trust) pursuant to Articles 11 and / or 47E of the Trusts (Jersey) Law 1984 (TJL). The trustee of the Trust is C Trustees Limited (C).
- 2 The factual basis upon which this application is made is straightforward. The Trust is a Jersey Law Discretionary Settlement and was settled by the Representor on the 12<sup>th</sup> June, 2012. C was the first and is the current trustee of the Trust.
- 3 The Representor is a foreign national and is a non-UK domiciled individual although he has been a long-term resident in the United Kingdom since the 1970s and by virtue of that residence is deemed domiciled for the purposes of UK inheritance tax.
- 4 The Representor, who lives in London, is the settlor and is the sole discretionary beneficiary of the Trust.
- 5 The assets of the Trust are the shares in M Limited which was a pre-existing limited liability company used by the Representor to sell products under his personal brand. In addition the

assets of the Trust include a substantial art collection which the Representor had collected either by purchase or by gifts over a number of years.

- 6 The Trust was created by the Representor on the advice, both written and oral, of his then UK tax adviser Mr D from a firm of UK accountants. In giving advice which led to the setting up of the Trust, it is alleged that Mr D failed to advise the Representor that as a deemed UK domiciliary under the Inheritance Tax Act 1984 any assets he settled into trust would be subject to the relevant property regime and would give rise to an immediate tax charge for UK inheritance tax plus ongoing periodic tax charges every ten years. Mr D also did not advise the Representor that as a UK resident there would be an immediate capital gains tax charged on the deemed disposal of the properties of the Trust.
- 7 The representation of the Representor was supported by his affidavit and he explains that he had dealt with Mr D for a number of years and that Mr D had an intimate knowledge both of his company's financial situation and his personal financial situation. The Representor indicates that he is personally ignorant of financial and tax matters and relied on Mr D believing him to be knowledgeable in them.
- 8 In around June of 2011 Mr D had suggested that because of the Representor's non-UK domicile and the international nature of his work he would benefit from setting up a company and a trust in Jersey to hold certain assets. This would be to assist in tax planning. The Representor knew nothing about offshore structures. The Representor confirms, as is hardly surprising, that had he realised that in setting up the Trust and transferring the assets to the trustees he would incur an immediate UK tax liability and an ongoing liability he would not have set up the Trust.
- 9 We were shown a letter from the Representor's current tax advisers that analyses the position of the Trust from an English tax point of view. On the matter of the artwork alone, on the basis of its assumed value, there would be a tax bill of several hundreds of thousands of pounds.
- 10 As we have said the application is made before us under either Articles 11 or 47E of the TJL.
- 11 Article 11(2)(b)(i) provides that:-  
  
***“A trust shall be invalid ... to the extent that the court declares that ... the trust was established by ... mistake ...”.***
- 12 The test that the Court applies in determining applications under Article 11 is well understood. It has been expressed in a number of cases but for these purposes we cite from *In the matter of the Lochmore Trust* [\[2010\] JRC 068](#) where the Court said, at paragraph 11:-

***“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 the mistake of so serious a character as to render it unjust on the part of the donee to retain the property?”***

13 Article 47E of the TJJ provides as follows:-

***“47E Power to set aside a transfer or disposition of a property to a trust due to mistake***

***...***

***(2) The Court may on the application of any person specified in Article 47I(i), and in the circumstances set out in paragraph (3), declare that a transfer or other disposition of a property to a trust:***

***(a) by a settlor active in person (whether alone or with another settlor); or***

***(b) through a person exercising a power ,***

***is voidable and –***

***(i) has such effect as the court may determine, or***

***(ii) is of no effect from the time of its exercise .***

***(3) The circumstances are where the settlor or person exercising a power***

***—***

***(a) made a mistake in relation to the transfer or other disposition of property to a trust; and***

***(b) would not have made that transfer or other disposition but for that mistake, and***

***the mistake is of so serious a character as to render it just for the court to make a declaration under this Article.”***

14 *In the matter of the Strathmullen Trust* [2014] (1) JLR 309 the Court said this:-

***“23. It is well settled in Jersey 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 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 ...***

***24. We also note that in his judgment Lord Walker said this...:***

***“Had mistake been raised in *Futter v Futter* there would have been an issue of some importance as to whether or not the court should assist in extricating claimants from a tax avoidance scheme which had gone wrong. The scheme adopted by Mr Futter was at no means at the extreme of artificiality ... 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 of the scheme would prove ineffective, or on the ground that discretionary leave should be refused on grounds of public policy....”***

15 There is some lack of clarity in the local authorities as to whether or not the Court should approach such an application under Article 11 or Article 47E of the TJL.

16 We note that in *Re S and T Trusts* [\[2015\] JRC 259](#), the most recent judgment that we are aware of on this point, the Court at paragraph 20 et seq said this:

***“20. As the Court indicated in the *Robinson Annuity case*, the only difference between the test adumbrated in the cases and the statutory test is that the wording concerning the seriousness of the mistake is inverted. In the statute, the Court decides whether a mistake is so serious as to render it just for the Court to make a declaration under the Article, whereas in the judicially adumbrated test in relation to mistake, the question is whether the mistake is so serious as to render it unjust on the part of the donee to retain the property. Sir Michael Birt, Bailiff, considered that this was a distinction without a difference but of course he cannot have had in mind circumstances such as exist in the present case. It appears to us that there is potentially this difference between the statutory and the judicial tests – 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 us to contemplate that the Court is measuring justice by reference to the position of the donee – is it just for the donee to retain the property in the circumstances of the mistake? 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 with some or no effect as the Court determines because of a mistake made by the donor. These are very fine margins, and whilst we agree that in most cases the result of the statutory and the judicial tests will be the same, we are not sure that there will not be***

***some factual circumstances which might make the distinction between the two tests relevant .***

***21. In the Robinson Annuity case, the application was to have the trust itself declared invalid and the Court approached the matter under Article 11. In the present case, the application is to have the transfers of money made by the First Representors into the S Trust and by the Second Representors into the T Trust set aside on the grounds of mistake and declared void or voidable and of no effect. In so far as the transfers included the transfer which immediately constituted the Trusts, Article 11 would seem to apply. In so far as the transfers were made to an existing trust, Article 47E would apply .***

***22. What is clear is that whether one is looking at the matter under Article 11 or under Article 47E, it does not matter whether the mistake was of fact, law, as to the effect or as to the consequences. Accordingly a mistake as to the tax consequences of a trust or a transfer to a trust is a mistake for these purposes (see *Re S Trust* [2011] JLR 375 ). We agree with Sir Michael Birt, Bailiff, that the definition of “mistake” in Article 47B(2) is to like effect (see paragraph 29 of the Robinson Annuity case).”***

- 17 In the circumstances, namely that the effect of the order would be to denude the trust of any meaningful assets and hence bring it to an end, we approach the matter pursuant to Article 11 of the TJL.
- 18 We do not feel the need to go into all of the evidence deployed before us within the affidavits but we are satisfied that there was a genuine mistake on the part of the Representor in setting up the Trust because he had not been advised as to the UK tax consequences of doing so. We accept that had he been so advised the Trust would not have been set up and the transfers into Trust would not have been made.
- 19 The trustees were represented before us although we had already seen correspondence from Advocate James to the effect that his clients were neutral and did not wish to resist the Representor's application. Accordingly, that being confirmed, we released Advocate James who took no further part in the application before us.
- 20 Accordingly we were satisfied that we should exercise our discretion under Article 11 of the TJL and declare the transfers into Trust as void.
- 21 Lastly, we make the observation that pursuant to the directions given by the Court when this matter was first presented, the attention of HMRC has been drawn to this application and they have taken no part in it. We noted that there had been an agreement between the parties that the Representor would pay the trustee's costs and accordingly we make no order in that regard.

