

The Representation of Anthony Holbrook Bell and Lorraine Every Bell (Née Wood)

Jurisdiction:	Jersey
Judge:	Bailiff
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Text

[2018] JRC 45

Royal Court

(Samedi)

Before:

T J Le Cocq, Esq., Deputy Bailiff with Jurats Sparrow and Christensen.

In the Matter of the Representation of Anthony Holbrook Bell and Lorraine Every Bell (Née Wood)

In the Matter of the Bell Annuity Investment Trust

Advocate P M Livingstone for the Representors.

Mr D Petit for Valla Limited (in person).

Authorities

Representation re Robinson [\[2014\] JRC 133](#)

Insurance Business (Jersey) Law 1996.

Trusts (Jersey) Law 1984

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

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

Trust — reasons for declaring the Bell Annuity Trust void

Bailiff

THE DEPUTY

- 1 On 18th January, 2018, we declared that the Bell Annuity Investment Trust (“the Trust”) had been created by reason of a mistake and was void *ab initio*. These, in brief, are our reasons.
- 2 This is not the first time that this Court has been called upon to make a determination of this nature with regard to trusts set up following inheritance tax and estate planning advice from the firm of English solicitors Baxendale Walker (“BW”) (see, for example, *Representation re Robinson* [\[2014\] JRC 133](#)). Two principals of that firm, Paul Baxendale Walker and William Auden (“Mr Auden”) have since been struck off the roll of Solicitors of England and Wales and Baxendale Walker no longer exists as a firm. This case has a slightly unusual feature in that Mr Auden is the son-in-law of Mr Anthony Holbrook Bell (“Mr Bell”) and Lorraine Every Bell (née Wood) (“Mrs Bell”) who are the Representors in this matter.
- 3 The application before us was made by Mrs Bell in her own name and on behalf of Mr Bell who is the subject of a lasting power of attorney in favour of Mrs Bell registered by the office of the public guardian on 29th March, 2010 which was itself registered in this Court on 16th November, 2017.
- 4 In 2003 the Representors received inheritance tax and estate planning advice from Baxendale Walker. At the time they owned a property called Hob Cottage, Hob Hill, Hazelwood, Belper, Derbyshire (“Hob Cottage”) with an approximate value of £395,000 and a managed portfolio worth approximately £240,000 and National Savings Bonds worth approximately £52,000.
- 5 The Representors were advised by Baxendale Walker that they could enter into

arrangements whereby they would be able to receive an annuity from the date that each of them respectively reached the age of 75 through the medium of an Estate Income Trust with offshore trustees. Their assets would be transferred to the offshore trustees and would be used for the primary purpose of securing annuity benefits for them. They received a written report in March 2003 from Baxendale Walker in which it was proposed that a Jersey company, Atlas Trust Company (Jersey) Limited ("Atlas") would be appointed as a trustee of the Estate Income Trust. The Representors were advised amongst other things by Baxendale Walker that Baxendale Walker would devise a strategy designed to secure a deferred annuity upon certain personal assets through a trust structure, the company underlying the trust would be formed to hold ownership of Hob Cottage, Baxendale Walker would liaise with an appropriate independent financial adviser concerning the annuity to be purchased and that the Representors should consider the sale of assets valued at approximately £700,000 to the Trust.

- 6 The Representors were also told that any obligation to pay rent to the Trust for Hob Cottage (once it had been transferred to the trustee) would be offset against a contractual entitlement on the part of the Representors to receive income by way of annuity payment. They were also informed that sums of money could be withdrawn by them by way of commercial loans and that certain assets (specifically Hob Cottage) could not be disposed of by the trustees against the Representors' wishes and would be tasked as "restricted assets". The beneficial interest in the Representors estate, as specified above, would be sold to the Trust in effect in return for the income stream or a deferred income stream.
- 7 The report by Baxendale Walker on which the Representors clearly relied made statements to the effect that:-
 - (i) The Representors assets being subject to rules of accession and succession were therefore subject to risks and uncertainties and that although under a single ownership they produced neither any "synergy investment value" nor any certainty of an appropriate income in the later lives of the Representors;
 - (ii) The Trust arrangement would sell an annuity to the Representors which would ensure that the primary rule, therein stated to be that the assets would be used for the purposes of securing an annuity and not for the purposes of tax avoidance, would not be breached;
 - (iii) That whilst the Trust would be liable to UK income tax on certain UK source income, it would not be liable to tax on offshore income or on UK gains. The trust property would be exempt from inheritance tax when passing to "death beneficiaries";
 - (iv) The purpose of the Trust, or at least its primary purpose, would be to secure a deferred annuity income for the Representors and there would be provision, as we have said above, for "restricted assets".

- 8 In June of 2003 the Representors took steps to put the arrangements advised by Baxendale

Walker into effect. As a result the Trust was created with Enhance Inc., a BVI Corporation, stated to be both the founder and enforcer of the Trust with Atlas as Trustee. Enhance Inc. had been provided with £500 by the Representors as initial trust property. Enhance was owned by Baxendale Walker at the material time although the Representors were themselves unaware of that connection. The purpose of the Trust was in effect to provide a deferred annuity to the Representors in consideration for the performance of the annuity contracts between Atlas and the Representors. It was expressed to be governed by Jersey law.

- 9 In July 2003 Mr Bell and Mrs Bell individually entered into an annuity contract drafted by Baxendale Walker whereby Atlas would pay to them an annuity in consideration for the transfer of property. The property comprised of Hob Cottage, a national savings bond and managed portfolio with the approximate values set out above. Pursuant to these contracts, the Representors liquidated the bonds and the managed portfolio and paid cash to Atlas in the sum of £290,744.90 in August 2003.
- 10 The annuity was to commence on the respective 75th birthdays of each of the Representors and then to continue until the death of each of them. Under the annuity contract the Representors were to hold their legal title to the property on trust for Atlas and the annuity contract was itself expressed to be governed by the law of England and Wales. It made no mention of the Trust or indeed Atlas's capacity as a trustee.
- 11 Also in July 2003 Atlas in its capacity as landlord entered into a tenancy agreement with the Representors (again on advice from Baxendale Walker and drafted by them) under which Hob Cottage was leased to them for a term of seven years. No rent was ever paid under that tenancy agreement and the lease expired in July of 2010 and was not renewed although the Representors have remained in possession of Hob Cottage to the present day.
- 12 Presumably pursuant to the arrangements advised by Baxendale Walker by letter to Atlas in June 2003 Enhance Inc. advised that Hob Cottage was to be a restricted asset. Also in June 2003 Enhance Inc. purported by written resolution to appoint Mr Bell and Mrs Bell as enforcers of the BAIT.
- 13 A number of other arrangements took place in connection with the Trust. In November 2006 by deed of variation between Mr Bell in his own name and Atlas Mr Bell sought to amend the terms of the annuity contract by changing the date for commencement from his 75th birthday to his 78th birthday.
- 14 By further agreement Atlas lent to another company called Jitlis Limited (which Atlas owned) an amount of £19,217 for the purposes of providing loan finance to Mr Bell. A similar agreement was entered into by Jitlis and Mr Bell at around the same time. There then followed a number of similar arrangements between 2006 and 2007 to various sums

between £5,000 and £10,000 each for a period of 10 years, sometimes to Mr Bell and sometime to Mrs Bell. There then followed a number of further loans to the Representors from Atlas and their successor trustees although by way of direct loans to the Representors and not through Jitlis Limited.

- 15 In February 2008 Atlas resigned as trustee of the Trust in favour of Nautilus Trustees Limited ("Nautilus") and on 8th July, 2009, Nautilus resigned in favour of Apex Trust Company Limited ("Apex") which has since changed its name to Valla Limited ("Valla"). Valla is the current trustee of the Trust.
- 16 The advice given by Baxendale Walker to the Representors was significantly flawed in a number of respects. Firstly any arrangement to pay annuities on human life is long-term insurance business under Schedule 1 of the Insurance Business (Jersey) Law 1996 and cannot be carried out by any person who does not have a permit to do so. Neither, Atlas or Nautilus had a permit and Valla the present trustee, also does not have a permit. Accordingly any payment of an annuity by persons without holding a permit would be a criminal offence. Atlas made a payment of £11,000 to Mr Bell on his 75th birthday described as being an annuity payment.
- 17 Furthermore the annuity contracts referred to above expressed to having been entered into personally by the Representors and Atlas in its own right. No reference to the Trust is made and it is not clear that Valla would ever have accepted any obligation to make annuity payments to the Representors. No company underlying the Trust was ever incorporated and to the extent that ownership of Hob Cottage has ever been transferred it would have been transferred to Atlas.
- 18 No rental payments have ever been made to Atlas or to the successor trustees nor have any been sought. As mentioned above there was an understanding that Hob Cottage was a restricted asset and could not be sold. The Representors had never intended that Hob Cottage be sold as it was their home. None of the trustees have ever held substantial funds from which annuities could have been paid without exhausting what was available in relatively short order. The cash held by Valla as trustee in two accounts for the Trust stands at £5,694.27 and £237,483.92. It would have been impossible for an annuity to be paid to the Representors after a number of years particularly when Mrs Bell's payments fell due. It is clear that the Trust had no prospect of being able to make the annuity payments on the basis of the calculation that they had advised should apply – the cash would simply have run out.
- 19 There are a number of other flaws in the arrangements which we do not need to go into.
- 20 Suffice it to say that it is clear from the affidavit of Mrs Bell of 2nd November, 2017, that she and her husband proceeded to enter into this arrangement on the express advice of Baxendale Walker (and specifically Mr Auden as a result of the familial connection) to enter

into a structure to receive annuity payments in future years and to secure an inheritance tax benefit to their children. She became aware of the difficulties because there were problems brought to her attention by Apex as a result of other cases before this Court involving advice from Baxendale Walker. She was advised of the problems and difficulties set out above and also that the tax planning element of the trust was ineffective and that she and Mr Bell were likely added as excluded persons. Most importantly, perhaps, was given that Hob Cottage was a restricted assets the funds left in the Trust would not have been sufficient to meet annuity payments for any length of time.

- 21 Mrs Bell has also received some informal tax advice from a firm of solicitors which made it clear that there were issues with the proposed tax benefits and that HMRC would find that there had been a tax avoidance motive.
- 22 The principles upon which this Court will declare the transfers into trust in this way void by reason of a mistake are well known and referred to in numerous authorities.
- 23 We take this application to be made under Article 11 of the Trusts (Jersey) Law 1984 ("the Law") and we apply the test established by the Court summarised *In the matter of the Lochmore Trust* [\[2010\] JRC 068](#) where, at paragraph 11 of the judgment, the Court said:-

"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?"

- 24 Case Law also makes clear that a mistake as to the tax consequences of a trust or a transfer to a trust was a mistake for the purposes of the Law (see *Re S Trust* [\[2011\] JLR 375](#)).
- 25 We are entirely satisfied that the Representors entered into all of these transactions as a result of the mistake created as a direct consequence of the erroneous advice received from Baxendale Walker. Without that advice they would not have done so. The mistake was serious and we are satisfied that we should set aside all and any transfers and declare that the Trust is void and it was void ab initio. Accordingly the current trustee holds any of the assets as bare trustee for the benefit of Mr and Mrs Bell.
- 26 We note that HMRC has been advised of this application and the Representors' legal advisers wrote to them on 19th October, 2017. A response has been received to the effect that HMRC do not intend to participate in and have no observations to make on the

Representors application to the Court.

- 27 We have received confirmation from Mr Petit of Valla who came to Court to assist that Valla agrees with this application and indeed we understand that arrangements have been made to keep costs to a minimum.