Hawksford Trustees Jersey Ltd v P Ltd

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith OBE., Jurats Olsen, Ronge
Judgment Date:	04 May 2021
Neutral Citation:	[2021] JRC 130
Court:	Royal Court

vLex Document Id: VLEX-873368391

Link: https://justis.vlex.com/vid/hawksford-trustees-jersey-ltd-873368391

Text

[2021] JRC 130

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith OBE., Commissioner, and Jurats Olsen and Ronge.

In the Matter of the Representation of Hawksford Trustees Jersey Limited

and

In the Matter of the M Settlement

and

In the Matter of Article 47G of the Trusts (Jersey) Law 1984

Between
Hawksford Trustees Jersey Limited
Representor

and
P Limited
Respondent

Advocate E. Moran **for the Representor**.

Authorities

Trusts (Jersey) Law 1984.

Snell's Equity 34th edition.

Chitty on Contracts 33rd edition volume 1.

Pitt v Holt [2013] UKHC 26.

Kennedy v Kennedy [2014] EWHC 4129 (Ch).

Mackay v Wesley [2020] EWHC 3400.

BNP Paribas Jersey Trust Corp Limited and Ors v Crociani and Ors [2018] JCA 136A.

Re B Trust [2019] JRC 035.

Re Grundy [2020] JRC 071.

Re Z Trust [2016] JRC 048.

Trusts.

THE COMMISSIONER:

1 This is an application by the current trustee of the M Settlement ("Hawksford") under Article 47G of the Trusts (Jersey) Law 1984 ("the Trusts Law") to set aside part of a transaction entered into by the former trustee ("the Former Trustee") on 12 th March 2012 in the mistaken belief that the only relevant UK tax was Capital Gains Tax, whereas in fact the transaction increased the Inheritance Tax Charge ("IHT") payable on the ten-year anniversary of the establishment of the trust by approximately £500,000.

The M Settlement

2 The M Settlement ("the Trust") was established on 29 th June 2009. It is a discretionary trust in fairly standard form governed by Jersey law. The beneficiaries are the settlor, members of her family and, in ultimate default, charitable purposes generally. The assets of the Trust

are largely illiquid, comprising interests in real estate and interests in several venture capital funds. The current value of the Trust is approximately US$100 million.

3 Hawksford replaced the Former Trustee as trustee of the Trust on 23rd February 2018.

The transaction

4 The Trust held through a nominee ("the Nominee") a 90% interest in a Jersey registered company called N Limited. The other 10% was held by a wholly unrelated trust known as the C Trust. There were ten ordinary shares issued in N Limited of which the Trust beneficially owned nine and the C Trust one.

5 A beneficiary of the C Trust wanted to borrow money from the C Trust and this created a need to move money up from N Limited so that it could be lent to the beneficiary. The Trust had no need for money to be moved up from N Limited.

6 Advice was taken by the Former Trustee from Brebners, a firm of chartered accountants. The only record of that advice is contained in two communications, the first being a letter from Brebners to the settlor of the Trust dated 14th December 2011, which is in the following terms:

> *"I refer to our telephone conversation and can confirm that the proposed solution to the issue of the loan required by [the beneficiary] is as follows:*
>
> *1. Both [M] Settlement and [C] will create newcos in Jersey.*
>
> *2. The trustees of the two settlements will transfer their shares in [N Limited] to the newcos.*
>
> *3. Each newco will sell some of their shares back to [N Limited] whilst maintaining the 90/10 shareholding.*
>
> *4. The cash received by the Company owned by [C] will then be used to make the loan to [the beneficiary].*
>
> *5. The company owned by [M] Settlement will then own all of the cash realised on the share sell back to [N Limited]. The cash can be invested by way of loans to [N Limited] or for other investment purposes."*

7 On the assumption that there were funds within N Limited available to be moved up to its shareholders, there is no evidence as to why these funds could not simply be distributed or loaned up to the two trusts in the proportion of their respective shareholdings. There is no evidence as to the instructions given to Brebners or the ambit of the tax issues they were asked to address, although the second communication, being an email from Brebners to

the Former Trustee of 20th January 2012, indicates that Brebners were concerned with Capital Gains Tax:

> *"Thank you for your email of 19th January.* I hope the following deals with the two points you have raised.
>
> > *1. As I have already advised Mark it matters not what consideration is paid by the newcos for the transfer to them of shares from the settlements in [N Limited]. However, for tax purposes, the shares will be deemed to have passed at market value with the result, of course, that stock piled capital gains will arise to the settlements.*
> >
> > *2. If [N Limited] repurchased shares held by [P] Ltd but had insufficient cash I do not see a tax difficulty if the consideration is, in whole or in part, represented by a loan due from [N Limited] to [P] Ltd."*

8 There is no record of the e-mail of 19th January or of the previous advice referred to, but it can be gleaned from this that it was now proposed that the new companies would acquire their shares in N Limited by way of purchase.

9 There is no record of any other advice being obtained by the Former Trustee, and so we move directly to the steps that were taken:

(i) The Former Trustee established a new holding company known as [P] Limited.

(ii) A sale and purchase agreement was entered into between the Former Trustee and P Limited on 12th March 2012 for the sale of the 90% shareholding in N Limited to P Limited for a purchase consideration of US$18.9 million ("the N Limited Share Sale Agreement").

(iii) On the same day, an agreement was entered into between the Former Trustee and P Limited for the loan back of the purchase consideration ("the First Loan Back Agreement").

(iv) On the same day a direction was given by the Former Trustee to the Nominee to now hold the shareholding in N Limited for P Limited ("the 12th March 2012 Nominee Direction").

(v) On the same day and pursuant to that instruction, the Nominee executed a new declaration of trust that it held the 90% shareholding in N Limited for P Limited ("the 12th March 2012 Declaration of Trust").

10 The resolution of the Former Trustee passed on the 12th March 2012 noted that it had agreed to sell its beneficial interest in N Limited to P Limited for a purchase price of US$18.9 million, under the terms of a sale and purchase agreement that was attached to

the resolution, with the purchase price remaining outstanding as a loan. It resolved as follows:

> *"(i) to sell the Shares on the terms of the Agreement and for this purpose to authorise any 2 directors to sign the Agreement, and*
>
> *(ii) to make the Loan available on the terms set out in the facility letter attached hereto (the "Facility Letter") and to authorise any director of [the Former Trustee] to sign the Facility Letter.*
>
> *(iii) To authorise any director of [the Former Trustee] to sign and, upon satisfactory Completion of the sale of the Shares as defined in the Agreement, to deliver to [the Nominee] a letter in the form attached instructing the Nominee to execute a declaration of trust relating to the Shares in favour of the Purchaser."*

11 The N Limited Share Sale Agreement provided for the sale of the shares in N Limited to P Limited for US$18.9 million, with the consideration being left outstanding by way of loan under the terms of the First Loan Back Agreement. Paragraph 3 provided that on the completion date:

> *"3 Completion*
>
> *On the Completion Date:*
>
> *(i) The Vendor shall procure that the Nominee shall:*
>
> *(a) cancel the Declaration of Trust, and*
>
> *(b) execute and deliver to the Purchaser a new declaration of trust whereby the Nominee will declare that it holds the Sale Shares as nominee for and to the order of the Purchaser.*
>
> *(ii) the Purchaser shall deliver to the Vendor a counterpart of the Loan Agreement duly signed by the Purchaser."*

12 As a consequence, on the 12 th March 2012 P Limited had been interposed as a holding company with the Trust owning the shares in P Limited, together with having the benefit of the loan due by P Limited in the sum of US$18.9 million. P Limited in turn owned the 90% shareholding in N Limited through the Nominee. The C Trust took similar steps to interpose its new holding company. No funds had, as yet, been moved up from N Limited to its shareholders and this was achieved in transactions which followed shortly:

> (i) On 13 th March 2012, N Limited passed a special resolution by which it sub-divided its ordinary shares of £1 each into 100 ordinary shares of £0.01 each. P Limited's shareholding of nine ordinary shares became a holding of nine hundred ordinary shares. The new holding company formed by the C Trust held the remaining one

hundred ordinary shares.

(ii) On 20 th March 2012, P Limited sold 855 of its 900 ordinary shares in N Limited back to N Limited for a consideration of US$20.3 million which was left outstanding by way of loan ("the Second Loan Back Agreement"). A similar transaction was entered into by the new holding company of the C Trust.

Consequences of the transaction

13 The settlor of the Trust, although domiciled under the general law outside the UK, was deemed to be domiciled in the UK for IHT purposes by reason of her long residence in the UK, and accordingly the Trust is exposed to IHT charges on its world-wide assets, not merely those situated within the UK. The ten-year charge to IHT arose on 19 th June 2019, the tenth anniversary of the date of constitution of the Trust. The charge is on the value of the trust assets owned by the trustee at the date of the ten-year anniversary. Generally, for IHT purposes, the value of an asset that is material is its market value. The shares in P Limited qualified for business property relief at the 100% rate, but the loan due under the First Loan Back Agreement did not. This receivable, net of other receivables due to P Limited from the Trust, equated to £11.2 million on which IHT was chargeable (subject to certain deductions) in an amount of just over £500,000. The reduction in value of the shares in P Limited caused by the existence of this net receivable was wasted for IHT purposes as the value of those shares was reduced to nil by the business property relief. The IHT charge in respect of this net receivable would never have arisen if there had been no N Limited Share Sale Agreement and no First Loan Back Agreement, just the 12 th March 2012 Nominee Direction and the 12 th March 2012 Declaration of Trust i.e. if the Former Trustee has simply transferred the shares in N Limited to P Limited by way of gift.

14 The IHT issue came to light when Hawksford engaged Blick Rothenberg Limited, a tax accounting and business advisory firm, to prepare the IHT return in respect of the ten-year charge.

Remedy sought

15 Advocate Moran sought orders in the following terms:

(i) A Declaration that the N Limited Share Sale Agreement be set aside on the grounds of mistake pursuant to Article 47G of the Trusts Law and be of no effect from the date of that agreement.

(ii) A Declaration that the First Loan Back Agreement be set aside on the grounds of mistake pursuant to Article 47G of the Trusts Law and be of no effect from the date of that agreement.

(iii) A Declaration that, for the avoidance of doubt, nothing in the orders above

prejudices the validity or effect of the 12 th March 2012 Nominee Direction or the 12 th March 2012 Declaration of Trust or any letters of direction or declarations of trust concerning shares in N Limited which subsequently directly or indirectly replaced that Letter of Direction and Declaration of Trust.

16 P Limited agreed to the remedies being sought and took no part in the proceedings.

The mistake

17 The application is made under Article 47G of the Trusts Law which is in the following terms:

> ***"47G Power to set aside the exercise of powers in relation to a trust or trust property due to mistake***
>
> > ***(1) In this paragraph, "person exercising a power" means a person who, otherwise than in the capacity of trustee, exercises a power over, or in relation to a trust, or trust property*** .
> >
> > ***(2) The court may on the application of any person specified in Article 47I(2), and in the circumstances set out in paragraph (3), declare that the exercise of a power by a trustee or a person exercising a power over, or in relation to a trust, or trust property, is voidable and –***
> >
> > > ***(a) has such effect as the court may determine; or***
> > >
> > > ***(b) is of no effect from the time of its exercise*** .
> >
> > ***(3) The circumstances are where the trustee or person exercising a power –***
> >
> > > ***(a) made a mistake in relation to the exercise of his or her power; and***
> > >
> > > ***(b) would not have exercised the power, or would not have exercised the power in the way it was so exercised, 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."***

18 The application was supported, *inter alia*, by two affidavits from Mark Baker, a director of the Former Trustee, who was involved in the transaction at the relevant time, although he deposes that the three individuals primarily involved no longer worked for the Former Trustee. Whilst unable to assist on the instructions given to Brebners, or why the transaction proceeded by way of sale, as opposed to a simple transfer, he confirmed that he

was aware of the advice contained in the two communications set out above, which was taken into account. He states that had the Former Trustee been aware of the IHT consequences, it would not have entered into the N Limited Share Sale Agreement and the First Loan Back Agreement. The shares in N Limited could have been transferred for no consideration or by way of a share for share exchange, but it would still have been necessary for the 12 th March 2012 Nominee Direction and the 12 th March 2012 Declaration of Trust to have been executed. Had it been aware of this future IHT liability, the Former Trustee would not have exercised its powers as it did.

19 As to the consequences of proceeding by way of sale and loan back, Advocate Moran submitted that there had been a clear mistake on the part of the Former Trustee as to the consequences of the 12 th March 2012 transaction that satisfied the test in Article 47B(2) of the Trusts Law, which is in the following terms:

> ***"(2) In Articles 47E and 47G, "mistake" includes (but is not limited to)***
>
> ***(a) a mistake as to –***
>
> ***(i) the effect of*** ,
>
> ***(ii) any consequences of, or***
>
> ***(iii) any of the advantages to be gained by a transfer or other disposition of property to a trust, or the exercise of a power over or in relation to a trust or trust property;***
>
> ***(b) a mistake as to a fact existing either before or at the time of, a transfer or other disposition of property to a trust, or the exercise of a power over or in relation to a trust or trust property; or***
>
> ***(c) a mistake of law including a law of a foreign jurisdiction."***

20 Had the tax consequences been known, the N Limited Share Sale Agreement and the First Loan Back Agreement would not have been executed. This was a serious mistake, she said, because it had led to an IHT liability of just over £500,000 plus interest for a largely illiquid trust.

Procedural History

21 The representation first came before the Court on 10 th July 2020, when the Court ordered that P Limited be convened and HMRC notified. HMRC responded on 21 st September 2020, saying it did not wish to intervene or make any submissions to the Court. The adult beneficiaries had been informed of the application and none objected. Indeed, it is manifestly in the interests of the trust estate to support the application, as its sole purpose is to relieve the Trust of an IHT liability of some £500,000.

22 The application came before the Court on 25 th September 2020 (the Deputy Bailiff presiding) and the Court indicated that it was not comfortable with just setting aside the N Limited Share Sale Agreement and the First Loan Back Agreement. It felt that the 12 th March 2012 Nominee Direction and the 12 th March 2012 Declaration of Trust were part of one transaction and the Court was concerned with setting aside part of one composite transaction rather than the whole of it. The Court agreed to adjourn the application so that Hawksford could obtain advice on the tax implications of setting aside all four parts of the transaction.

23 That advice has now been obtained from Blick Rothenberg and it transpires that if all four parts of the transaction on the 12 th March were set aside, then it would have the effect of moving up the loan under the Second Loan Back Agreement to trust level so that it would become a receivable of US$20.3 million in the hands of the trustee, as opposed to a receivable of US$18.9 million, thus increasing the IHT liability. It would not be appropriate to seek to set aside the Second Outstanding Loan as that would affect a third party, namely the C Trust, and destroy the shareholding ratio between the two trusts. The only solution (apart from issuing a negligence claim against Brebners) therefore is for a partial setting aside of the 12 th March 2012 transaction. The issue is whether the Court has the power to do so under Article 47G of the Trusts Law.

Hawksford's case

24 Hawksford has obtained a helpful opinion from Mr Lynton Tucker of Lincoln's Inn, dated 25 th March 2021. We summarise that advice as follows:

> (i) He first considers the general law of England as to partial rescission, namely that as a general principle of English contractual law, a contract cannot be set aside under the equitable remedy of rescission on a partial basis (see *Snell's Equity 34th edition paragraphs 15–017 and Chitty on Contracts 33rd edition volume 1 paragraphs 7 – 127*). The principle, which has been developed mainly in the context of misrepresentation and fraud, is that the court cannot make a new bargain for the parties, and the parties must be reinstated in their former situation. Hence, the Court cannot order partial rescission since that involves altering the bargain between the parties and fails to reinstate the parties in their former situation. The principle has not been applied in England in the context of an application to set aside part of the exercise of a trustee power on the grounds of mistake in accordance with the principles established in *Pitt v Holt* [2013] UKHC 26, where the mistake applied to only the part of the exercise of the power sought to be set aside — see *Kennedy v Kennedy* [2014] EWHC 4129 (Ch). That case differs from the present case in that the relevant power in the Kennedy case was as a dispositive power of appointment which was exercised unilaterally by the trustee without any contract being involved. Another English trust case where partial rescission was considered is *Mackay v Wesley* [2020] EWHC 3400, where it was held that the claimant's acceptance of her

appointment as a trustee could be set aside on the ground of undue influence because this was considered to be a self-contained and severable part of the appointment and retirement of trustees.

(ii) It was doubtful, in his opinion, whether there would be any jurisdictional bar under English law to the setting aside of the N Limited Share Sale Agreement and the First Loan Back Agreement, because these contracts formed part of an internal restructuring made between a trustee and its wholly owned company. The mistake applied to the sale and loan back contracts and not to the later transfer of ownership, the latter being of critical importance to the Trust since it enabled the Trust to enter into another transaction involving the purchase of shares in another company in which the Trust had a very substantial interest, without that other transaction generating a serious IHT liability for the Trust. P Limited would be caused no prejudice; on the contrary, its assets were being enhanced. It is not being asked to incur a different obligation under an altered contract, but being allowed to keep an asset which it was intended by both parties to have, without the obligation to pay a purchase price for it or other contractual obligations and indeed to have a credit for part repayments under the First Loan Back Agreement which had already been made.

(iii) It was not necessary for him to explore English principles further, because the present application is made under Article 47G of the Trusts Law, which provides that where the circumstances in Article 47G(3) are satisfied in relation to the exercise of a power by a trustee, the Court may, under Article 47G(2), declare that the exercise of the power is voidable and either has such effect as the Court may determine or is of no effect from the time of its exercise. The manifest effect of this wording is to exclude the all or nothing principle which at least generally applies to rescission as an equitable remedy under English contractual law and to enhance the flexibility of the remedy. The Court may determine in its discretion the extent to which the exercise of the power has effect (partial setting aside only) or it may determine that the exercise of the power has no effect from the time of its exercise (total setting aside).

(iv) There was no Jersey case specifically considering the nature of the remedy under Article 47G(2) so far as relating to partial rescission. The wording of the remedy under Article 47G(2) is very similar to the wording of the remedies under Articles 47E(2), 47F(2) and 47H(2). The nature of the remedy under Article 47E(2) was considered by the Court of Appeal in *BNP Paribas Jersey Trust Corp Limited and Ors v Crociani and Ors* [2018] JCA 136A at paragraphs 70–99. The Court of Appeal was concerned in that case with the date from which the setting aside of the relevant appointment should be deemed to have taken effect. Quoting from paragraphs 85 and 87:

> ***"85. The starting point in construing Article 47E is that one must take the ordinary and natural meaning of the words. In our view the natural meaning of Article 47E(2) is that where a settlor has made a mistake having the characteristics set out in paragraph 3 of that Article the Court may follow one of three courses:***
>
> > ***(i) It may declare the transfer to be avoided and of no effect from the time of its having taken place*** .

(ii) It may declare the transfer to be avoided from the time of its having taken place but nonetheless be deemed to have had such effect as the Court may determine; or

(iii) It may declare the transfer to be avoided from a date subsequent to the time of its having taken place .

86. …

87. In our judgment this construction of Article 47E(2) is consistent with the general approach of the Trusts Law in establishing overall principles and allowing them to be developed flexibly by the Royal court. In essence, the legislature has conferred upon the court a discretion to determine which of the three courses it would follow if satisfied that the mistake was of so serious a character as to render it just for the court to make any declaration at all under that Article."

(v) The Court of Appeal said further at paragraphs 93 and 97:

93. … We therefore find that upon a proper interpretation, Article 47E is the statutory embodiment of an existing equitable jurisdiction, the purpose of which is to enable a mistaken transferor to recover his or her property, with the appropriate remedial declaration and consequential orders being at the discretion of the court. The innovation of the Article lies in confirming that the court has alternate powers (a) to allow some effect to the transfer or (b) to declare that it has been of no effect. That provision, however, may be little more than a reflection of a need to give consideration to the interests of donees and third parties and of the possible availability of change of position defences (as compared with the position of the bona fide purchaser for value and without notice whose protection is maintained under Article 47I(4)) .

94. …

95. …

96. …

97. Given that we construe Article 47E to be providing a flexible framework, we do not think that it is appropriate to attempt an exclusive list of factors which will be relevant from case to case; but in our judgment potentially many factors could be relevant considerations in the process of identifying the appropriate declaration. In some instances the parties may be indifferent as to the date as at which the transfer is avoided: an example is the simple mistake, with no taxation consequences and no distributions in the intervening period. On the other hand, a mistaken transfer may well have unattractive taxation consequences and the court must be persuaded that a declaration that the transfer has had no effect is a proper

declaration to make. Equally, there may be competing factors to be taken into consideration in identifying which, if any, of the effects of a transfer are to be declared to be retained. Where, as here, the transferee is no longer in possession of the assets transferred, the exercise will be more complex."

(vi) In Mr Tucker's view, similar considerations apply to Article 47G save that the degree of flexibility available under Article 47G is perhaps greater than that under Article 47E, in view of the many different kinds of exercises of powers to which Article 47G applies. What is sought in the present case is that the inter-related exercises of powers by trustees having three elements, namely, sale, loan back and disposition of beneficial ownership have no effect from the time of the exercise of the related powers, save that one element of the exercises of the powers is allowed to stand, namely the disposition of beneficial ownership. What is sought is, in his opinion, consistent with the approach of the Court of Appeal in the *Crociani* case.

(vii) In *Re B Trust* [2019] JRC 035, the Court set aside a transfer of property into a trust under Article 47E of the Trusts Law on the grounds of mistake, but declined to make an order that the transfer should take effect as outright transfers to the settlor's wife. Quoting from paragraph 42 of the judgment:

"42. The second submission which Advocate Brown made in this connection was that Article 47E contains innovative powers as described in the** Crociani **case and there is no reason why the Court should not therefore direct the repayment of money not to the Representor but to his wife. For similar reasons as described above, we are not prepared to do this. It requires the Court to take a positive step to improve the taxation outcome for the Representor as though that were the objective itself. It may be the Representor's objective, but it is not the objective of the Court."

The Court in this case is not being asked to engage in imaginative tax planning for the Trust, rather it is being asked to allow that one crucial aspect of the overall transaction which the Former Trustee was correctly advised to undertake should be allowed to stand.

(viii) In *Re Grundy* [2020] JRC 071, the trustee had responded to the threat of IHT charges as a result of reforms to the tax treatment of UK residential property indirectly held for the benefit of non-UK domiciled persons through offshore structures by taking the draconian step of completely excluding the settlor and his wife. Exercising its powers under Article 47H of the Trusts Law, the Court decided to partially set aside the trustee's exercise of the powers of exclusion by allowing the exclusion to take effect to the extent that it excluded the settlor from benefit and the settlor's wife from benefit during the settlor's lifetime only. Commenting at paragraph 35 that the Court is not entitled to re-write history or to make a new decision which the trustee wished it had made at the time, the Court said this at paragraph 36:

"In this case the Former Trustee intended to exclude Mrs S and did

> ***so.*** However, that decision was flawed and is liable to be set aside ab initio. The Former Trustee had a duty to consider the exclusion of Mrs S very carefully and take into account the relevant considerations listed above and not take into account irrelevant considerations. Had the Former Trustee acted in accordance with its duty there can be no doubt that it would have excluded Mrs S during the settlor's lifetime only. It would have been the obvious course. Accordingly for the Court to order the exclusion of the settlor's wife as a beneficiary to take effect only for the duration of the settlor's life is not to substitute a different transaction for that which was undertaken. To make such an order is squarely within the Court's power to declare that the Former Trustee's exercise of its fiduciary power shall have such effect as the Court may determine."

Mr Tucker said that similarly with the present application, the relief sought is that the overall transaction should be determined to have effect to the extent that it provided for a disposition of beneficial ownership, but not to the extent that it involved a sale and loan back.

(ix) Mr Tucker accepted that the powers exercised by the Former Trustee on 12 th March 2012 formed part of one overall transaction and that normally, in a case where a trustee enters into a sale agreement under its administrative powers and the sale is set aside on the ground of mistake, it follows that a transfer of ownership to the buyer should also be set aside because the transfer is consequential on the sale and if the sale goes so too should the transfer. That is because, if a sale goes ahead and the transfer does not, the transaction is transformed into a voluntary transfer which is normally very different from a sale and normally wholly outside the objectives of the parties entering into the transaction. However, in his view, the circumstances in this case were most unusual in a number of ways:

> (a) The purpose of the transactions was to provide liquidity for the C Trust, for which the Trust had no requirement, whilst retaining the shareholding ratio of 90%/10%.
>
> (b) A purchase by N Limited of its own shares directly from the Trust with the purchase money being left as an outstanding loan would have generated a serious IHT liability, which would not arise if a new holding company was interposed. Brebners correctly advised that this should be done, but not why.
>
> (c) The purpose of the 12 th March transactions was to transfer the beneficial ownership of the shares in N Limited to P Limited and it made no difference whether this was done by way of sale for a full or nominal consideration.
>
> (d) Quoting from Mr Tucker's opinion:
>
> > *"What went wrong was that, in addition to the … 12 March 2012 Direction and the … 12 March 2012 Declaration of Trust, the sale and loan back transactions effected by the [N Limited] Share Sale Agreement and the First Loan Back Agreement were also entered*

into in circumstances where [the Former Trustee] mistakenly believed that they had no adverse tax implications following incorrect advice that it mattered not what was the consideration for the transfer by [the Former Trustee] as trustee of the Trust to [P Limited]. That mistake can be cured under Article 47G by way of partial setting aside of the overall transaction effected on 12 March 2012, that is by setting aside the sale and loan back. But it does not follow that it is the right course, in the circumstances of this case, for the court also to set aside a direction and declaration of trust which effected a transfer which was the whole object of the exercise on 12 March 2012, had the same economic effect (leaving aside tax implications) as a sale and loan back, enabled the subsequent purchase of own shares to take place without that purchase generating for the Trust an inheritance tax liability more serious than the one that arises as matters presently stand, and is in the best interests of the Trust while causing no prejudice to [P Limited] viewed from its own perspective as a corporate entity. To take that course and set aside the whole of the overall transaction on 12 March 2012, would be to throw out the baby with the bathwater."

(e) Mr Tucker had considered whether a similar result could be achieved if all of the 12 th March transactions were set aside, but the Court were to direct Hawksford to effect some form of confirmatory transfer in favour of P Limited (see *Re Z Trust* [2016] JRC 048). That would be made after the date of the ten-year IHT charge, and so would be too late.

(f) In conclusion, Mr Tucker accepted that a cautious approach will and should be taken by the Court to setting aside a sale and loan transaction without also setting aside an accompanying transfer of beneficial ownership, but in his view this was a course which could be taken under Article 47G and should be taken in the special circumstances such as those that arise in this case.

25 Advocate Moran relied upon the opinion of Mr Tucker in support of the application, emphasising that these were internal transactions between a trust and its wholly-owned company that affected no one other than HMRC, who did not wish to be involved and for whom IHT charges of £500,000 constituted a windfall. Setting aside the main transactions but retaining the transfer of the beneficial ownership of the shares in N Limited was the only remedy, save for making a negligence claim.

Decision

26 The Court accepts that the requirements of Article 47G(3) are met. When entering into the sale and loan back transaction on the 12 th March 2012, the Former Trustee was clearly mistaken as to the IHT consequences that would arise and we agree that it would not have exercised its powers in that way but for that mistake. It would simply have transferred the

shares in N Limited to P Limited by way of gift. The liability to IHT of £500,000 is proportionately small when set against trust assets, albeit illiquid, worth some £100 million, but even so, we accept that this is a material sum, constituting the mistake as being of so serious a character as to render it just for the Court to make a declaration. The issue is whether the Court has the power to set aside part only of the sale and loan back transaction in the manner sought.

27 The Court also accepts that Article 47G(2) provides the Court with a flexible remedy allowing it to determine the extent to which a voidable exercise of power has effect, and the Court also appreciates that these are transactions between a trustee and its wholly owned company, with the declaration sought adversely affecting no one other than HMRC. If granted, Hawksford as trustee is relieved of a liability to IHT of some £500,000 and P Limited is relieved of its liability under the First Loan Back Agreement of US$18.9 million.

28 Whist acknowledging the arguments put forward in support of the application, there was no-one before the Court to argue to the contrary. We would consider the contrary arguments to be as follows:

(i) Evidence as to why it was decided to proceed by way of a sale as opposed to an outright gift is not available. Neither the settlor nor Mr Baker is able to say what instructions were given to Brebners and how its initial advice that there should be a transfer of the shares mutated into a sale of the shares. By the time of Brebners' second short letter of 20 th January 2012, it seems that the decision had already been taken, presumably for what was thought to be good reason, to proceed by way of a written agreement of sale. The N Limited Share Sale Agreement provided firstly for the sale and purchase of the shares with the consideration remaining outstanding as a loan (to be governed by the contemporaneous First Loan back Agreement) and consequently, it provided for the cancellation of the existing declaration of trust and the issuing of a new declaration of trust by the Nominee in favour of P Limited on the completion date. This all formed part of one composite transaction of sale, as conceded.

(ii) Article 47G(2) enables the Court, where the requirements of Article 47G(3) are met, to declare ***"the exercise of a power"*** voidable and under Article 47G(2)(a) for that exercise of power to have such effect as it may determine. In this case the principal power being exercised was a power of sale of the shares in N Limited to P Limited, the loan back of the consideration being one of the terms of the sale. There is a material difference between determining the effect that an exercise of a power of sale may have and changing the nature of the power being exercised.

(iii) In *Re Grundy*, the power being exercised was a power of exclusion, and it remained a power of exclusion, although the effect of the exclusion was limited by the Court. In this case, the principal power being exercised is a power of sale of the shares, but by declaring the entirety of the sale (with its loan back) void, all that is left is the direction to the Nominee to be given on completion of the sale and the new

Declaration of Trust, consequential steps undertaken pursuant to that sale. Shorn of the sale and left in isolation these consequential steps constitute a gift of the shares. In reality the Court is being asked to substitute a different transaction for that which was undertaken, namely substituting a gift of the shares for a sale.

(iv) Mr Tucker accepted that where a trustee enters into a sale agreement under its administrative powers and the sale is set aside on the ground of mistake, it follows that a transfer of ownership to the buyer should also be set aside because the transfer is consequential on the sale and if the sale goes so too should the transfer. As he said that is because, if a sale goes ahead and the transfer does not, the transaction is transformed into a voluntary transfer which is normally very different from a sale and normally wholly outside the objectives of the parties entering into the transaction. The circumstances put forward to justify a departure from this are in essence that this was an internal transaction the purpose of which was to transfer the beneficial ownership of the shares in N Limited to P Limited and it made no difference whether that transfer was effected by sale or by gift. It proceeded by way of sale because of the Former Trustee's mistake as to the IHT consequences.

(v) We are not aware of the phrase *"internal transaction"* being legally defined or of the consequences in law, if any, that may flow from a transaction being *"internal"*, but if a shareholder and the company in which he or she holds shares elect to enter into a contract, then ordinarily that contract is no less valid and enforceable because the parties are connected in that way. The N Limited Share Sale Agreement is no less an agreement because it was entered into between the Former Trustee and P Limited. It would also be a common feature of any contract for the sale of shares that the parties intend the beneficial ownership to pass on completion of the sale; that is a necessary consequence of the sale.

(vi) The argument presented is that the Former Trustee was exercising inter-related powers of sale, loan back and disposition of beneficial ownership and the Court is simply being asked to allow the disposition of beneficial ownership to stand. However, this is to ignore the fact that the principal power being exercised is the power of sale and the power of disposition of beneficial ownership is necessarily consequential thereto. Left on its own the disposition of beneficial ownership changes the nature of the transaction from a sale to a gift. The Court may be able to limit the effect of the sale, but arguably not so as to transform it into a different transaction, namely a gift.

29 Standing back we can see that the arguments for and against the Court having the power to give partial effect to the transaction in this case are finely balanced, but we are not persuaded that the circumstances here do give the Court the power under Article 47G(2)(a) to effectively substitute a different transaction from that which the parties entered into. In our view the Court may have the power to determine the extent to which the sale transaction is given effect to, but not to the point where it is transformed into a different transaction; namely where it ceases to be a sale and becomes a gift. To do so would be to rewrite history by substituting a different transaction for that which was undertaken.

30 For these reasons, the Court is not prepared to make the declarations sought.