# The Representation of Equiom Trust (CI) Ltd and the L Trust

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| **Jurisdiction:** | Jersey |
| **Judge:** | J. A. Clyde-Smith, Jurats Olsen, Thomas |
| **Judgment Date:** | 10 November 2017 |
| **Neutral Citation:** | [2017] JRC 191 |
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| **Court:** | Royal Court |
| **Date:** | 10 November 2017 |



**Text**

[2017] JRC 191

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, Esq., Commissioner and Jurats Olsen and Thomas

In the Matter of the Representation of Equiom Trust (CI) Limited and in the Matter of the L Trust
And in the Matter of Articles 47G, 47H and 51 of the Trusts (Jersey) Law 1984, as Amended

**Advocate** M. P. Cushing **for the Representor**.

**Authorities**

Trusts (Jersey) Law 1984.

Inheritance Tax Act 1984.

*RBC Trust Company (Jersey) Limited v A, C, D and Franckel* [2013] (1) JLR 1 .

*In re Remuneration Trust* [2009] JRC 164A .

*Parish of St Helier v Minister of Infrastructure* [2017] JCA 027 .

Trust — declaration by the Court that protector consent not required relating to the creation of the life interest in favour of the settlor under the 2003 deed

**THE COMMISSIONER:**

1 On 13 th October, 2017, the Court declared void and of no effect an instrument of variation and appointment of a joint life interest made by the trustee of the L Trust and this pursuant to Articles 47G and H of the Trusts (Jersey) Law 1984 ("the Trusts Law"). The Court also made a declaration pursuant to Article 51 of the Trusts Law in relation to an earlier deed of appointment of life interest and variation.

**The L Trust**

2 The L Trust was declared by a declaration of trust dated 25 th June, 1996, by Walbrook Trustees (Jersey) Limited ("Walbrook"). It is a Jersey law discretionary settlement, the current beneficiaries of which comprise Mr C, the economic settlor of the L Trust ("the settlor"), his wife, Mrs C and their three adult children, D, E and F. The beneficiaries also include the unborn issue of the settlor, who were represented by Advocate Le Maistre.

**Background**

3 From 1994 until 6 th April this year, the settlor had been resident and tax resident for inheritance tax purposes in the United Kingdom. The most substantial asset in the L Trust is a freehold property in the UK, in which the family lived.

4 On 1 st July, 2003, Walbrook executed a deed ("the 2003 deed") under which:-

(i) It firstly appointed a life interest in the trust fund to the settlor. The purpose was to give the settlor rights of residence in the property.

(ii) Secondly, it varied the terms of the trust to incorporate protector provisions and

appointed a protector.

5 Walbrook retired as trustee of the L Trust on 23 rd June, 2006, and Vivat Trustees Limited ("Vivat") was appointed trustee in its place.

6 On 22 nd October, 2013, Vivat executed an instrument ("the 2013 instrument") under which it varied the 2003 deed by appointing a joint life interest in the income of the L Trust in favour of the settlor and his wife, the purpose being to give his wife rights of residence in the property.

7 Prior to entering into the 2013 instrument, Vivat sought tax advice from the then tax advisers to the L Trust, a firm of tax accountants known as Brebners, who confirmed that the appointment of the joint life interest would not create any tax issues. Specifically, on 15 th October, 2013, Brebners wrote confirming that the creation of a joint life interest "…would not create any tax issues at all, since it would be an intra-spouse transfer as the life interest commenced before March 2006. The life interest being treated as part of the estates of [the settlor] and [his wife] with the inheritance tax issues being deferred until they ultimately demised."

8 In 2016, Vivat merged with the Representor and ceased to exist. New tax advisers, Blick Rothenberg, were engaged in November 2015, and they wrote to the representor on 14 th March, 2016, advising that the 2013 instrument had given rise to significant tax liabilities under the Inheritance Tax Act 1984. They summarised the position as follows:-

> *"33.1 An inheritance tax charge of approximately £425,000 has arisen and the IHT 100 reporting the transaction should have been submitted to HMRC by 31 October 2014;*
>
> *33.2 There will be a charge to tax on the value of one half of the Trust property on 25 June 2016 (the 10-year anniversary charge) at a rate of 1.5% on the value that exceeds £325,000;*
>
> *33.3 There will be a charge to tax on the value of one half of the Trust property at each subsequent 10-year anniversary at a rate of 6% that exceeds the nil rate band applicable at that time; and*
>
> *33.4 If the structure remains unchanged upon the Settlor's death, a charge arises on death on the value of the whole property at that time at a rate of inheritance tax applicable to the Settlor's estate.* Credit will be given for any tax paid at 33.1 above."

9 Following receipt of this advice, the Representor engaged in correspondence with Brebners through its English solicitors, Wallace LLP, and through its Jersey advocate, Appleby, in order to obtain Brebner's comments on the tax issues identified by Blick

Rothenberg and to seek to identify a pragmatic way of dealing with the issues that had arisen.

10 Brebners did not accept that it had given incorrect tax advice, avoiding the substance of Blick Rothenberg's advice and asserting instead that the creation of a life interest in favour of the settlor by the 2003 deed was invalid, because it did not have the consent of the protector, a role of course created by the same deed. Brebners maintained that the advice given in 2013 was on the basis that the L Trust was a life interest settlement, when in fact it was discretionary.

11 The Representor took advice from leading tax counsel in the United Kingdom, namely James Kessler QC of Old Square Tax Chambers, who advised that Brebners' advice to the Representor in 2013 that there would be no tax issues arising from the appointment of a joint life interest was incorrect. Mr Kessler effectively confirmed the advice given by Blick Rothenberg.

12 Mr Kessler further advised that had the Representor been properly advised in 2013, then it would have been advised to take the following steps:-

(i) To retain the settlor's existing interest in possession.

(ii) To appoint that, subject to that interest, on the settlor's death, any non-excluded property in the L Trust would be held on trust for the settlor's widow for her life.

13 The effect of taking those steps, which Mr Kessler advised was standard practice, accepted by HMRC and not regarded as in any sense contrary to the intention of the UK parliament, would have been that:-

(i) there would have been no inheritance tax charge on the making of the 2013 instrument;

(ii) there would be no inheritance tax 10 year charge in 2016;

(iii) there would be no future inheritance tax 10 year or exit charge, at least until the death of the survivor of the settlor and his wife;

(iv) there would be no inheritance tax charge on the death of the settlor, if survived by his wife, and inheritance tax, if any, would be deferred until the death of the survivor.

14 Since 6 th April, 2017, the settlor has resided abroad, and should be regarded as non-UK resident. Blick Rothenberg have advised that this change in his status does not affect the advice given, or the liabilities that have arisen.

15 The application by the Representor was supported by an affidavit by Alice Dumoitier, a director of the Representor, who said that there was no great imperative to create the joint life interest in 2013. It was only done in order to give the settlor's wife rights of residence in the property owned by the L Trust, which was not essential. Had the Representor been correctly advised as to the tax consequences of the creation of a joint life interest in favour of the settlor and his wife, she said that the Representor would not have entered into the 2013 instrument, but would, instead, have taken the steps outlined above.

16 The application was supported by all of the adult beneficiaries and by Advocate Le Maistre for the unborns. HMRC had been notified of the application, but had not responded.

**The law**

17 The application to set aside the 2013 instrument was made under Article 47H and Article 47G of the Trusts Law in that order.

18 Article 47H is in the following terms:-

> ***"(1) …***
>
> ***(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, in relation to the exercise of his or her power, the trustee or person exercising a power –***
>
> ***(a) failed to take into account any relevant considerations or took into account irrelevant considerations; 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 failure to take into account relevant considerations, or that taking into account of irrelevant considerations."***

19 The Representor is a person specified in Article 47I(2).

20 Article 47H puts on a statutory footing the jurisdiction previously applied by the Court under what is known as the rule in *Re Hastings Bass* and Advocate Cushing suggested that it would be helpful to have regard to the questions to be asked under the pre Article 47H

application of the *Hastings Bass* jurisdiction as set out in *RBC Trust Company (Jersey) Limited v A, C, D and Franckel* [2013](1) JLR 1 as follows:-

> ***"1. What were the trustees under a duty to consider?***
>
> ***2. Did they fail to consider it?***
>
> ***3. If so, what would they have done if they had considered it?"***

21 We were not persuaded that it was necessarily helpful to have regard to the questions previously posed under the *Hastings Bass* jurisdiction, when Article 47H(3) itself sets out with clarity the circumstances in which a declaration can be made, namely, where the trustee:-

> (i) has failed to take into account any relevant considerations or took into account irrelevant considerations, and
>
> (ii) would not have exercised the power, or would not have exercised the power in the way in which it was exercised, but for that failure to take into account relevant considerations, or that taking into account of irrelevant considerations.

22 There is no suggestion that in this case the Representor is in any way at fault in the way it exercised its powers, in that it took and relied upon the advice of Brebners as to the tax consequences. It is the advice that it received from Brebners that leading counsel has confirmed was incorrect, and in that respect, Article 47H(4) provides as follows:-

> ***"(4) It does not matter whether or not the circumstances set out in paragraph (3) occurred as a result of any lack of care or other fault on the part of the trustee or persons exercising a power, or on the part of any person giving advice in relation to the exercise of the power."***

23 Article 47G is in the following terms:-

> ***"1 …***
>
> ***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."***

Again, the Representor is a person specified in Article 47I(2).

**Decision**

24 The application succeeded under both Article 47H and Article 47G. Taking Article 47H first, the tax consequences of the proposed appointment under the 2013 instrument were clearly a relevant consideration. Because of the incorrect advice it had received, those consequences were not taken into account by the Representor, and we accepted the evidence of Alice Dumoitier that the Representor would not have exercised the power in the way that it did had the Representor received the correct advice. It would instead have exercised the power in the manner outlined by Mr Kessler in his advice.

25 The absence of any breach of duty on the Representor's part is no bar to the Court exercising its jurisdiction under Article 47H(2), as made clear in Article 47H(4). The Court was satisfied, therefore, that the circumstances in Article 47H(3) applied, and that this was a case in which a declaration should be made.

26 Turning to Article 47G, ***"mistake"*** is defined in Article 47B(2) as including:-

***"(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;"***

27 The Representor was mistaken as to the tax consequences of the exercise of the power under the 2013 instrument, and it was an operative mistake, in that the Representor held an incorrect conscious belief that it would not create any tax issues for the L Trust as advised by Brebners. Again, we accepted the evidence of Alice Dumoitier that the Representor would not have exercised the power in the way that it was exercised but for that mistake.

28 Finally, it was clear from the advice of Blick Rothenberg and Mr Kessler that it was a serious mistake, rendering it just for the Court to make a declaration. It would not be unjust on the beneficiaries, in particular the settlor's wife who would stand to lose her joint life interest, all of whom supported the making of a declaration and there were no third parties whose interests would be prejudiced ( *In re Remuneration Trust* [2009] JRC 164A at paragraph 32).

29 In conclusion, the Court declared the variation and appointment of the life interest created by the 2013 instrument to be void and of no effect from the date of the instrument under both Article 47H and Article 47G of the Trusts Law.

**Declaration**

30 The Representor sought the further assistance of the Court in the ongoing administration of the L Trust and this related to the contention on the part of Brebners that the appointment of the life interest in favour of the settlor under the 2003 deed was invalid, as it did not have the consent of the protector.

31 As we said earlier, the 2003 deed did two things in this order:-

> (i) Pursuant to clauses A6.01 and A6.02 of the L Trust deed, it irrevocably created a life interest in the income of the L Trust in favour of the settlor, and
>
> (ii) It varied the L Trust deed to create protector provisions, requiring the consent of the protector to a number of specified powers, which included clauses A6.01 and A6.02. The first protector named in the 2003 deed witnessed the signature of the settlor and by which the settlor acknowledged and accepted the appointment of the life interest in his favour.

32 We have had regard to the principles to be applied in the construction of documents, as summarised by the Court of Appeal in *Parish of St Helier v Minister of Infrastructure* [2017] JCA 027 at paragraph 12 as follows:-

> ***"12 The Royal Court set out extensively the principles applicable to the construction of documents, primarily by reference to the decisions of this Court in*** *Trilogy Management v YT Charitable Foundation (International) Ltd* [2012] JA 152 ***and*** *La Petite Croatie Ltd v Ledo* [2009] JCA 221 . ***Those principles, which are well-known, may be stated as follows:***
>
> > ***(1) the aim is to establish the presumed intention of the makers of the document from the words used;***
> >
> > ***(2) the words must be construed against the background of the surrounding circumstances or matrix of facts existing at the time of***

***execution of the document:***

***(3) the circumstances relevant and admissible for this purpose are those that must be taken to have been known to the makers of all parties to the document at the time, and include anything which would have affected the way in which the language of the document would have been understood by a reasonable man*** .

***(4) evidence of subjective intention, drafts, negotiations and other matters extrinsic to the document in question is inadmissible as an aid to construction, but may be admitted to resolve a latent ambiguity (that is to say) an ambiguity that only becomes apparent when otherwise clear words are related to the surrounding circumstances;***

***(5) evidence of events subsequent to the making of the document is inadmissible as an aid to construing the original meaning of the document;***

***(6) words must be read in the context of the document as a whole;***

***(7) words should so far as possible be given their ordinary meaning; and if the language is unambiguous the Court must apply it unless the result is commercially absurd;***

***(8) if the words used are ambiguous, in the sense of being capable of more than one construction, the court should adopt the construction that appears most likely to give effect to the commercial purpose of the agreement and to be consistent with business common sense; but there is a correlation between the degree of ambiguity and the persuasiveness of a common sense construction, so that the greater the ambiguity the more likely it is that the court will adopt a construction based on common sense, and vice versa."***

33 Whilst the 2003 deed did provide under Clause 3 that the variation creating the protector provisions would have effect from the date of the deed, at the time that the 2003 deed was entered into there were no protector provisions, and therefore no restrictions upon the exercise of the trustee's powers. Furthermore, it cannot have been the intention of the trustee to create the life interest in favour of the settlor *"irrevocably"*, a life interest formally accepted by him, and then to make it subject to the consent of the protector, with the possibility that such consent may have been refused i.e. to allow the irrevocable creation of the life interest to fail.

34 It seems clear to us that under the 2003 deed, the trustee firstly irrevocably created a life interest in favour of the settlor, exercising powers over which there was no restriction, and secondly, varied the trust deed to include protector provisions, which as a matter of common sense could not have been intended to apply to the creation of the life interest.

35 The argument was raised by Brebners in defence of the claims made against it in relation to the tax advice it had given in 2003, and it has given rise to uncertainty in the ongoing administration of the L Trust. A declaration making the position clear was supported by all of the adult beneficiaries, and by Advocate Le Maistre acting for the unborns, and we determined that it was an appropriate case for the Court to make a declaration that the creation of the life interest in favour of the settlor under the 2003 deed did not require protector consent.