

# Derek James Moffat and Jane Crabbe Moffat (nee McCluskie) v Apex Trust Company Ltd

<b>Jurisdiction:</b>	Jersey
<b>Judge:</b>	Bailiff
<b>Judgment Date:</b>	18 December 2014
<b>Neutral Citation:</b>	[2014] JRC 252
<b>Reported In:</b>	[2014] JRC 252
<b>Court:</b>	Royal Court
<b>Date:</b>	18 December 2014

**vLex Document Id:** VLEX-793347137

**Link:** <https://justis.vlex.com/vid/derek-james-moffat-and-793347137>

## Text

[2014] JRC 252

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, Kt., Bailiff, **and** Jurats Fisher **and** Blampied

Between  
Derek James Moffat and Jane Crabbe Moffat (nee McCluskie)  
Representors  
and  
Apex Trust Company Limited  
Second Plaintiff

---

**Advocate R. J. Renouf for the Representors.**

Mr D. Petit, **Director for the Respondent.**

**Authorities**

*CC Limited v Apex Trust Limited* [\[2012\] \(1\) JLR 314](#) .

*Tait v Apex Trustees Limited* [\[2012\] JRC 148](#) .

*Seggins v Apex Trust Company Limited* [\[2013\] JRC 077](#) .

*Robinson v Apex Trust Company Limited* [\[2014\] JRC 133](#) .

Income and Corporation Taxes Act 1988.

Insurance Business (Jersey) Law 1996.

Trusts (Jersey) Law 1984.

Trusts (Amendment No.6) (Jersey) Law 2013.

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

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

Trust — application to set aside a trust on the ground of mistake.

Bailiff

**THE**

- 1 This is an application to set aside a trust on the ground of mistake. It is another unfortunate story arising from the less than satisfactory activities of a firm of English solicitors called Baxendale-Walker, two of whose principals were Paul Baxendale-Walker and William Auden. Previous examples relating to schemes marketed by the firm where the court set aside a trust on the ground of mistake are to be found in *CC Limited v Apex Trust Limited* [\[2012\] \(1\) JLR 314](#); *Tait v Apex Trustees Limited* [\[2012\] JRC 148](#); *Seggins v Apex Trust Company Limited* [\[2013\] JRC 077](#), and *Robinson v Apex Trust Company Limited* [\[2014\] JRC 133](#). The court was informed that Messrs Baxendale-Walker and Auden had both been struck off the role of solicitors in England and Wales and the firm of Baxendale-Walker is no longer in existence.
- 2 The facts of this case are very similar to those in some of the cases referred to above and for convenience the court will borrow heavily from the judgment in *Robinson*.

## Factual background

- 3 The Representors are married and have at all times been resident and domiciled in the United Kingdom. They have five children. In late 2003 they took tax and estate planning advice from Baxendale-Walker. At the time they owned three properties in Inverness. The first was a property called Mayfield which was their home and in which they continue to reside. It was then valued at £195,000. The other two properties ("the Let Properties") were also in Inverness and were valued in aggregate at £160,000. They were undergoing refurbishment at the time but have subsequently been leased. All three properties were in the joint names of the Representors and are together referred to as "the Properties". The Court is satisfied from the evidence that the main purpose in seeking advice from Baxendale-Walker and thereafter entering into the proposed arrangements was to save inheritance tax upon the Representors' death.
- 4 On 28<sup>th</sup> August, 2003, Baxendale-Walker produced a document for the Representors entitled "*Estates Income Plan Arrangements Report*" containing their advice. The proposal in very broad outline was that the Representors should transfer assets to the trustees (who would be resident outside the United Kingdom) of a trust in exchange for which the trustees would agree to provide a deferred annuity income for the Representors. It was asserted in the document that the assets in the trust would be exempt from inheritance tax and could therefore be passed to the Representors' beneficiaries on death free of inheritance tax. The document also provided that the trust could make provision for assets to be designated as '*restricted assets*', which could not be sold by the trustees without consent.
- 5 The Representors decided to go ahead with the scheme put forward by Baxendale-Walker and accordingly on 21<sup>st</sup> November, 2003, the Derek James Moffat and Mrs Jane Crabbe Moffat Annuity Investment Trust ("the Trust") was constituted by deed made between a BVI company called Enhance Inc. ("Enhance") as settlor (referred to in the deed as 'the Founder') and Atlas Trust Company (Jersey) Limited ("Atlas") as trustee. Enhance appears to have been a company linked to Baxendale-Walker and was provided with the initial trust fund by the Representors. Atlas was an independent Jersey trust company recommended to the Representors by Baxendale-Walker. The Representors did not see the trust deed prior to its execution.

## The terms of the Trust

- 6 The Trust is expressly governed by the law of Jersey. It is a purpose trust and therefore has no defined beneficiaries. The primary purpose of the Trust is stated at clause 3.1 to be "...the negotiation, arrangement, execution and performance of Authorised Contracts". An Authorised Contract is defined in clause 1.1 to be a written agreement between the trustee and another person by which the trustee agrees to provide a deferred annuity to a person for valuable consideration and which satisfies the conditions precedent contained in Schedule 3 to the trust deed.

7 Paragraph 1 of Schedule 3 contains as the first such condition precedent:—

*“The purchaser of the annuity (hereafter in this Schedule “the Purchaser”) must be an employee or director or former employee or director of the Founder or other person approved by the Founder or any other person.”*

Clause 3.6 provided that the primary purpose could not be exercised so as to provide any benefit of any kind to any Excluded Person, which was defined as meaning ‘each and every person who is connected with the Founder (as that phrase is defined in the Income and Corporation Taxes Act 1988 of the English Parliament)’.

- 8 As can be seen immediately — and as was discussed in *Tait* at para 19 — paragraph 1 of Schedule 3 is very hard to make sense of and appears on its face to be inconsistent with the requirement that an annuity cannot be provided to an Excluded Person.
- 9 The trust deed goes on to provide at clause 4.1 that, subject to the execution of the primary purpose, the trustee may appoint the trust fund upon trusts for persons or classes of persons as beneficiaries subject to the written consent of the Enforcer and provided that no Excluded Person should be capable of receiving any benefit under any such appointment.

### Subsequent events

- 10 Three days later on 24<sup>th</sup> November, 2003, each of the Representors entered into an Estate Annuity Purchase Deed (“EAPD”) with Atlas drafted by Baxendale-Walker whereby Atlas would pay the relevant Representor an annuity in consideration of the transfer to Atlas of the beneficial ownership of the Properties. The annuity was to commence on the relevant Representor’s 75<sup>th</sup> birthday. The First Representor’s 75<sup>th</sup> birthday was on 14<sup>th</sup> April, 2011, i.e. some seven and a half years later, and the Second Representor’s 75<sup>th</sup> birthday was on 18<sup>th</sup> January, 2010, so that her pension was payable some six years later. Under the EAPD’s the Representors were stated to hold legal title to the Properties upon trust for Atlas. The document was expressed to be governed by the law of England and Wales. It made no mention of the Trust or the capacity in which Atlas was entering into the deed, although it seems clear from the surrounding circumstances that it must have been doing so as trustee of the Trust.
- 11 On 28<sup>th</sup> November, 2003, Atlas, in its capacity as trustee of the Trust, entered into a tenancy agreement with the Representors under which Atlas leased Mayfield to the Representors for a term of seven years in consideration of a rental of £700 per month.
- 12 Baxendale-Walker advised the Representors that a BVI company should be incorporated to hold the beneficial ownership of the Let Properties, with the Representors retaining legal

title thereto. A company called Craig-M-Properties Limited ("Craig") was duly incorporated and on 11<sup>th</sup> February, 2004, Atlas, as trustee of the Trust, entered into a sale agreement with Craig whereby the Trust sold its beneficial interest in the Let Properties to Craig for a consideration of £160,000. That consideration has not been paid but the sale agreement provided that it was to carry interest at 8%. On 25<sup>th</sup> April, 2004, the Representors entered into an agreement with Craig ("the Agency Agreement") whereby they were appointed as agents to manage the Let Properties on behalf of Craig. They opened a bank account in Inverness in the name of Craig in respect of which they were the signatories. They were informed by Baxendale-Walker that they did not have to declare the rental from the Let Properties on their tax returns because the rental was not theirs; accordingly they have not done so. The rent from the Let Properties has been paid into this bank account and monies have been withdrawn for repairs and maintenance in respect of the Let Properties.

- 13 Under the trust deed, the Enforcer has power to designate any asset of the Trust as a 'Restricted Asset' which cannot then be sold without the prior consent in writing of the Enforcer. Enhance was designated as the first Enforcer under the deed.
- 14 By a written resolution dated 21<sup>st</sup> November, 2003, Enhance resolved to exercise its power under the trust deed to appoint the Representors as the new Enforcer and to resign upon acceptance of such appointment by the Representors. There is an endorsement which records that the Representors accepted appointment as Enforcer on 3<sup>rd</sup> December, 2003. It would therefore appear that the earliest moment at which the Representors could have been appointed as Enforcer was 3<sup>rd</sup> December, 2003. However, by letter dated 21<sup>st</sup> November, 2003, they had written a letter to Atlas designating the Properties as Restricted Assets. That letter would therefore appear to be of no effect.
- 15 Atlas resigned as trustee in favour of Nautilus Trustees Limited on 29<sup>th</sup> February, 2008, and Nautilus Trustees Limited in turn resigned as trustee on 20<sup>th</sup> January, 2009, in favour of Apex.
- 16 No annuity has ever been paid to either of the Representors despite the fact that such payments should have begun as described above in paragraph 10.
- 17 The scheme, the terms of the Trust and the provisions of the EAPD's were in almost identical form to the equivalent documents in *Seggins* and *Robinson* (referred to at paragraph 1). We can accordingly deal with the matter comparatively briefly.

### **The mistakes**

- 18 Advocate Renouf referred to a number of difficulties in relation to the Trust. However we would prefer to consider the matter under two broad headings.

**(a) Mistake as to tax consequences**

- 19 It is quite clear from the evidence that the Representors established the Trust in order to avoid inheritance tax on those assets which they transferred to the Trust. Whilst, technically, Enhance was the named settlor, it is clear that all assets which were transferred into the Trust, (including the initial funds) were provided by the Representors and accordingly they are the settlors. They made the transfers in the belief that inheritance tax would be avoided because that was what they had been advised by Baxendale-Walker. Tax advice has been sought for the purposes of this application and we have had the opportunity of considering it. It is clear from that advice that the original advice from Baxendale-Walker was completely wrong and that inheritance tax remains payable on the assets in the Trust in the event of the Representors' deaths.

**(b) Impossibility of performance**

- 20 We are satisfied that the scheme could not be performed in the manner which was set out in the trust deed. Thus:—

(i) Under Schedule 1 of the Insurance Business (Jersey) Law 1996 ("the Insurance Law") contracts to pay annuities are classified as long term insurance business. By virtue of Article 5 of the Insurance Law, it is an offence for any person to carry out long term insurance business unless he holds a permit for that purpose issued by the Jersey Financial Services Commission. Neither Atlas nor any of the successor trustees has at any stage held such a permit and the EAPD's were accordingly illegal contracts to the extent that they imposed an obligation on Atlas to pay a deferred annuity. They could not lawfully be performed by Atlas.

(ii) On the evidence, it would never have been possible to pay the deferred annuities in accordance with the scheme; there were always going to be insufficient assets in the Trust to pay them at that rate. Thus:—

(a) Under both EAPDs, the annuity rate was described as being calculated as the product of the Flat Life Office Annuity Rate plus 2% and the Flat Indexed Capital Value. The Flat Indexed Capital Value was defined as meaning the value of the property transferred to the Trust at the date of the EAPD plus the sum (to the relevant payment date) of each Deemed Flat Annual Accretion. The latter expression was defined as meaning in each year the product of the original value of the property plus the aggregate of any and all earlier Deemed Flat Annual Accretions and the annual increase in the retail price index from the previous year. Thus, at the end of the first year after the EAPD was entered into, the Flat Indexed Capital Value would be the original value of the property as increased by the increase in the retail price index for that year. In the following year, one would start with the increased value from the previous year and increase it again by the increase in the retail price index. Thus there was a

compounding element. There would have been a considerable increase in the original value by the time the first annuity payment was due on the relevant Representor's 75<sup>th</sup> birthday. The Flat Life Office Annuity Rate is defined as meaning the annuity rate quoted in writing by any life office to Atlas within six months of the EAPD failing which 6%. No such quotation was received and accordingly the effective rate was 6% plus 2% i.e. 8%. Thus the annual annuity payment was to be 8% of an increasing capital sum by reference to the value of the property transferred.

(b) The aggregate value of the Properties at the time of transfer was stated as £355,000. Each EAPD committed Atlas to pay an annuity calculated by reference to that value. Thus, even assuming no increase in value, this would have meant an annuity of £28,400 for each Representor. In practice, the figure would have been greater because of the formula for increasing the value of the Properties between 2003 and the date when the annuities would have become due.

(c) Given the level of rental, there would clearly have been insufficient funds to pay an annuity at this level. This would have been so even if one interprets the EAPD's as a package so that each Representor would receive an annuity based on only half the value of the Properties. The scheme was therefore incapable of performance.

## The applicable law

- 21 The Trust is governed by Jersey law. Although the two EAPDs are expressed to be governed by English law, Article 9(1) of the Trusts (Jersey) Law 1984 ("the Law") provides that the validity of a Jersey trust (Art 9(1)(a) and the validity and effect of any transfer of property to a Jersey trust (Art 9(1)(b) shall be determined in accordance with the law of Jersey and no rule of foreign law shall affect such question. The Court held in *CC Limited v Apex Trust Limited* that this means the domestic law of Jersey (i.e. without reference to its conflict of law principles). Thus we must apply the Jersey law of mistake to the issue before us.
- 22 We also agree with the decision in both *Tait* (at para 18) and *Seggins* (at para 24) that the creation of the Trust itself and the EAPDs are so closely linked that they must all be considered together. The EAPDs were an essential part of the scheme which led to the establishment of the Trust and they were entered into as part of the scheme to establish the Trust.
- 23 In its judgment in *Robinson*, the Court at paragraphs 25–32 considered the relationship between Article 11 and Articles 47B–47J of the Law as introduced by the Trusts (Amendment No.6) (Jersey) Law 2013. We do not think it necessary to repeat what is stated there. In summary, the Court decided that, whether the matter was approached under Article 11 or under Article 47E, the test was for all practical purposes identical and was summarised in *Re Lochmore Trust* [\[2010\] JRC 068](#) at para 11 in the following terms:–



***“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 The cases have also made clear that it does not matter whether the mistake is one of fact, law, effect or consequences. Thus a mistake as to the tax consequences of a Trust or a transfer to a Trust is a mistake for these purposes ( *Re S Trust* [\[2011\] JLR 375](#)). The definition of ‘**mistake**’ in Article 47B (2) is to like effect.

## Conclusion

25 Her Majesty's Revenue and Customs in the United Kingdom has been given notice of this application but has not sought to intervene.

26 Taking the first question, we are quite satisfied that there were two mistakes on the part of the settlors as described at paras 19 and 20 above. First, they were advised and believed that entering into these arrangements and establishing the Trust would avoid inheritance tax on those assets which were put into the Trust. This was quite clearly wrong for the reasons given earlier. Secondly, it was impossible for an annuity to be paid at the level set out in the EAPDs.

27 As to the second question, we are satisfied that they would not have entered the transaction ‘but for’ the mistake as to inheritance tax. There would have been no purpose in entering the scheme had they not understood that they would be avoiding inheritance tax.

28 However, on the unusual facts of this case, we cannot conclude that they would not have entered the transaction ‘but for’ the mistake concerning whether the annuity could be paid at the level set out in the EAPD's. That is because in his affidavit the First Representor states that, in conversations with representatives of Baxendale-Walker, they stated that the scheme would not require the Representors actually to pay rent nor would it require the trustee actually to pay the annuities in future. Thus, whilst the Representors no doubt believed that the documents would effectively provide for what they had been told they would provide, they did not believe that the deferred annuity would actually be paid. In those circumstances, it does not seem to us that we can conclude that, if they had known that mathematically the deferred annuity could not be paid because of insufficient funds, this would not have made any difference provided that the tax planning advantage in respect of inheritance tax was still achieved.



- 29 As to the third question, we are satisfied that the mistake as to inheritance tax was of so serious a character as to render it unjust on the part of the donee to retain the property. There are no beneficiaries of the Trust who will suffer by setting it aside. The Representors have incurred fees over the years for no benefit and such fees will continue to accrue should the Trust be left in place, with no benefit accruing as a result. It is fully accepted by the Representors that, if the Trust is set aside, the assets will be deemed always to have been theirs and they, or their estate, will have to pay such taxes (including income tax on all the rental as well as inheritance tax) as may arise as a consequence.
- 30 For these reasons, we declare that the Trust and the two EAPDs are invalid. It follows that the assets of the Trust are held by Apex on bare trust for the Representors and have been so held (whether by Apex or its predecessors as trustee) at all times.