Tait v Apex Trustees Ltd

Jurisdiction:	Jersey
Judge:	The Deputy Bailiff
Judgment Date:	07 August 2012
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[2012] JRC 148

ROYAL COURT

(Samedi)

Before:

W. J. Bailhache, **Q.C.**Deputy Bailiff, **and**Jurats Clapham**and**Liston.

Between
Ian Greville Tait
Representors
Janet Felicity Tait
and
Apex Trustees Limited
Respondent

Advocate P. M. Livingstone **for the Representors**.

Advocate D. J. Petit **for the Respondent**.

Authorities

Trusts (Jersey) Law 1984.

Re Gulbenkian's Settlements [1970] AC 508 .

Insurance Business (Jersey) Law 1996.

A Trust [2009] JLR 447 .

Pitt -v- Holt and *Futter -v- Futter* [2011] EWCA Civ. 197.

S Trust [2011] JRC 117 .

Re the Lochmore Trust [2010] JRC 068 .

Trust — annuity investment trusts, purpose of trusts, links to annuity purchase deeds, applicable law and law of mistake.

The Deputy Bailiff

1 The Representors are retired doctors, both now in their 80s, and both domiciled in England. They are married, with children, and they live, and have at all material times lived at Westfields, Aldeburgh, Suffolk ("Westfields"). They had the great misfortune to be introduced in late 2002 to an asset management plan launched by a Nottingham firm of solicitors calledBaxendale Walker. That firm was promoting through financial advisers a small estates income plan which was marketed on this basis:-

(i) Capital would be exchanged for a deferred income stream;

(ii) The assets most suitable for transfer to the small estates income plan were those with no unacceptable capital gains tax burden in the United Kingdom;

(iii) The assets would be irrevocably protected immediately from inheritance tax and future capital gains tax upon transfer to a trust.

2 Messrs Baxendale Walker held out that in addition to the provision of a future income stream, the use of the estate income plan would protect the wealth of those participating by providing four key advantages:-

(i) The removal of selected assets from the participant's estate for inheritance tax purposes;

(ii) The accumulation and growth of trust assets free of tax;

(iii) Continued access to and enjoyment of such assets available throughout the participants' lifetimes;

(iv) The securing and protection of assets for enjoyment by and distribution to children and grandchildren as death beneficiaries, free of tax.

3 It was all too good to be true, and it was not true. However, in the present case arrangements were made, as set out below.

4 The respondent is the present trustee of the Trust described below. It was appointed as trustee at some point in 2009, and we have been assisted by a helpful affidavit from Advocate Petit, a director of the respondent.

5 On 24 th June, 2003, a trust instrument (the “Trust Deed”) was created and named the Tait Annuity Investment Trust. The founder of the Trust was Enhance Inc, a corporation registered in the British Virgin Islands. Atlas Trust Company (Jersey) Limited (“Atlas”) was appointed as trustee. The founder provided to the trustee the sum of £500 by way of initial trust fund, which monies had been provided to it by the Representors through Messrs Baxendale Walker. Enhance Inc was not only the founder of the Trust but also the first enforcer. The proper law was said to be the law of Jersey although the trust deed is littered with references to tax legislation of the United Kingdom. Although the trust instrument is described as the Tait Annuity Investment Trust, there are in fact no beneficiaries under this Trust, which is a purpose trust. The purpose for which the trust was declared was the negotiation, arrangement, execution and performance of capital authorised contracts. An authorised contract was defined as a written agreement between the trustee and any other person:-

(i) by which the trustee agreed to provide a deferred annuity to a person for valuable consideration;

(ii) which satisfies each and every one of the conditions precedent set forth in Schedule 3 to the Trust.

6 Schedule 3 contained a number of conditions precedent to the authorisation of an authorised contract. The first was in these terms:-

“The purchaser of the annuity (hereinafter 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.”

7 There were a number of other conditions precedent which are not relevant for the purposes of this judgment, but it is clear from the first condition precedent cited above that the

language used is capable of giving rise to criticism, to which we return later in this judgment.

8 On 14 th July, 2003, Atlas entered into an estate annuity purchase deed with each of the two Representors individually. This deed was expressed to be governed by and in accordance with the laws of England and Wales. By Clause 4 of the deed made with the First Representor, Atlas undertook to pay to the First Representor various payments, starting 12 months after the date of the deed. The consideration payable by the First Representor for the grant of this annuity consisted of the home in which he and his wife lived and the deed contains an undertaking by the First Representor to convey to Atlas title to the property and an obligation on the part of the First Representor to hold legal title to Westfields upon trust absolutely for Atlas as from the date of the deed. The calculation of the amounts of the payments is not straightforward, and indeed arguably makes no sense whatever by any standards.

9 The annual payment which Atlas agreed to make to the Representors was defined as the product of an annuity rate plus the flat indexed capital value. In effect, the latter was defined as the value of the property Westfields plus on each successive payment date annually, the aggregate of the then present value of Westfields plus all previous annual values of Westfields. The parties cannot possibly have intended to make an estate annuity purchase deed of this kind. The result was that even at the end of the first year, Atlas was undertaking to make a payment of 100% of the purchase price back to the purchasers, and at the second year, assuming no increase in value at Westfields or RPI movement, was undertaking to make a payment of 200% of the value of Westfields to the purchasers. If construed according to its ordinary language, the estate annuity purchase deed made on its face commercial nonsense even without taking into account the tenancy agreement to which we will briefly return.

10 The Second Representor executed a deed in very similar terms. The result therefore was the completion of deeds by which Atlas agreed to pay annuities of an uncertain amount to the Representors, the price for which was the transfer to Atlas of the house in which the Representors lived. The same day Atlas, as trustee of the Tait Annuity Investment Trust, entered into a tenancy agreement with the Representors by which the Representors agreed to pay rent of £850 per month for Westfields, for a period of seven years. Approximately a month earlier, Messrs Baxendale Walker had written to the Representors to confirm that the sale of Westfields to the trustee was a commercial arrangement but as the Representors would be living in the property for the foreseeable future, the trustee would expect to charge a rent. Conversely, as the trustee would owe the Representors “a rental stream”, it would be possible to offset one against the other. The Representors had therefore obtained in the interval a valuation as to market rent from a local firm of estate agents. The tenancy agreement suggests by implication, that Atlas had entered the estate annuity purchase deed as trustee of the Tait Annuity Investment Trust.

11 Worse was to follow. On 11 th June, 2004, the Second Representor paid Atlas a further

consideration representing her half share in a portfolio held jointly with the First Representor, together with a further portfolio of shares which were in her own name. The total involved was approximately £53,350. Once again these assets were declared to be held upon their trust absolutely for Atlas, and once again Atlas undertook to pay an annuity of an uncertain amount to the Second Representor. The deed is governed by English law. The same day the First Representor made a similar deed in relation to his half share in the portfolio of securities held jointly with his wife, the Second Representor. The only difference in relation to these latter deeds is that it appears the share portfolios were actually transferred to Atlas.

12 Notwithstanding the execution of these various documents, no annuity payments have ever been made to the Representors, and no rental payments have ever been made by the Representors. The Representors have paid fees to Messrs Baxendale Walker of some £23,000 and to Atlas, as original trustee, in the sum of £11,358. Fees to the present trustee total some £10,260 up till December 2011. The Representors have additionally incurred costs with the second trustee and with their English solicitors and for tax advice. They remain in occupation of Westfields and have not executed any conveyance in respect of that property to date. They now seek orders from the Court which would declare the Tait Annuity Investment Trust, the estate annuity purchase deeds and the tenancy agreement void with such order for costs as might be appropriate. There are various bases for these applications, none of which have been disputed by the trustee.

The Applicable Law

13 The first question is which law we should apply to the different documents which have been put before us. The Tait Annuity Investment Trust is expressed to be governed by Jersey law. The various estate annuity purchase deeds are expressed to be governed by English law and there is a stipulation to the non-exclusive jurisdiction of the English courts in relation to those agreements. The tenancy agreement was made between the original trustee, whose principal place of business was in Jersey, and the Representors, who are English domiciled and resident, and relates to real estate in England. Although the document is silent as to the governing law, it is marked with appropriate stamp duty, payable under the relevant English fiscal provisions, and we think in the normal course of events that it would be governed by English law.

14 On the other hand, Article 9(1) of the Trusts (Jersey) Law 1984 (“the Trusts Law”) makes it plain that where one is dealing with non-Jersey domiciled settlors – and in this case the founder, otherwise to be known as the settlor, was a BVI incorporated company – any question concerning the validity or interpretation of a trust or the validity or effect of any transfer or other disposition of property to a trust is to be determined in accordance with the law of Jersey, and no rule of foreign law shall affect such question. Furthermore the Jersey law of conflicts will not be applied in these cases. It seems to us as a matter of Jersey law therefore that if the estate annuity purchase deeds are sufficiently linked to the trust deed, it follows that they fall to be construed according to Jersey law in so far as one is looking at their validity or effect, notwithstanding the express choice of English law and the election of

the non-exclusive jurisdiction of the English courts.

15 What is a “sufficient link” for these purposes? Advocate Livingstone submitted that the documents should be taken together in the round. One difficulty with that submission is that there is absolutely nothing on the face of the estate annuity purchase deeds to suggest that they are in any way linked to the Tait Annuity Investment Trust. The original trustee is not even described as being a trustee, other than as is apparent from its name, which describes it as a trust company. It does not enter the documents, at least ostensibly, as trustee of the Tait Annuity Investment Trust, or indeed as trustee at all. Furthermore the warranty given by the representors in the estate annuity purchase deeds is that they hold English real estate on trust for Atlas. It is unsurprising that the parties stipulated the non-exclusive jurisdiction of the English courts, because in order to give effect by specific performance to that obligation, one would expect to be before the courts of the country in which the real estate is situated.

16 Furthermore there is nothing in the Tait Annuity Investment Trust, other than the name of the trust, which suggests that it is anything to do with the Representors at all. They are not mentioned by name, other than the name of the trust and there is nothing within the trust deed to suggest any links with them. We add that the tenancy agreement cannot reasonably fall within the terms of Article 9 of the Trust Law either. It is not a disposition of property to a trust, but, if it fits this description at all, is a tenancy agreement granted by trustees. In this case, the tenancy agreement does make it plain that it is an agreement granted by the trustee of the Tait Annuity Investment Trust.

17 It is hard to believe that this set of documents was put together by a firm of lawyers, so incompetent is the drafting, unless the purpose were to obscure and confuse.

18 However, the Court should try to give legal documents a sensible meaning – see Lord Upjohn in *Re Gulbenkian's Settlements* [1970] AC 508 at p522 B-D. We have received an affidavit from the First Representor. In it, he describes how he was introduced to the asset management scheme launched by Baxendale Walker. He exhibits the different documents and describes how their inter-relationship was explained to him. In the circumstances we think that it is right to treat the Tait Annuity Investment Trust as a document drawn up with the Representors in mind, in accordance with the scheme which was sold to them, and we also think it is right to link the estate annuity purchase deeds with the Tait Annuity Investment Trust because without that trust, it is extremely improbable that the Representors would have made the estate annuity purchase deeds. These deeds, although described as annuity purchases, were in reality deeds of transfer of property into the Tait Annuity Investment Trust. They thus fall within Article 9(1) of the Trusts Law. Accordingly we apply Jersey law to the questions which are put to us in relation to these documents. We add, in passing, that even if we were to apply English law to these documents, we think that a similar result would be obtained.

The trust deed

19 There are numbers of difficulties with this document. The first lies in the definition of the purpose trusts coupled with the other provisions relevant thereto. Clause 3 of the deed provides that the primary purpose – no secondary purpose is ever set out – of the trust is the negotiation arrangement execution and performance of authorised contracts. These are written agreements which satisfy each and every condition precedent set forth in Schedule 3. The opening condition of Schedule 3, set out in paragraph 6 above, requires that the agreement relates to the purchase of an annuity by an employee or director or former employee or director of the founder or other person approved by the founder or any other person. It is unclear what those final words "or any other person" qualify. Do they provide a mechanism, other than through the founder, to ascertain the person who is to be approved, or do they simply mean a person who is not an employee, director etc who is nonetheless the purchaser of the annuity? There are difficulties with either construction. If it means the former then the purchaser of the annuity, with whom the trustee has made an arrangement bringing the purchase within the defined expression of an authorised contract, must be a person who is approved by another person. That would seem to be a provision of such width as to give rise to real potential difficulties of certainty. Conversely, if the proper construction of clause 1 of Schedule 3 is simply that the purchaser of the annuity must be any other person, that equally takes one into territory where doubt must arise as to whether the purpose is properly achieved by the purchase of this particular annuity. It is relevant to note that the words "or any other person" are fundamentally important because Schedule 2 defines excluded persons as each and every person who is connected with the founder. It is hard to see how the trustee could sensibly make an authorised contract for the provision of a deferred annuity to a person who is excluded, and clause 3.6 of the deed makes that expressly clear. It would seem that Schedule 3, if it is to make any sense at all as a matter of language, must read either:-

> ***"The purchaser of the annuity … must be an … employee, director [etc] of the Founder approved … by any other person" or "the purchaser of the annuity … must be an … other person".***

20 Either way it is the most extraordinary condition precedent.

21 The second problem with the Trust Deed is that by Article 11(2)(a)(iv) a trust is invalid to the extent that it is created for a purpose in relation to which there is no beneficiary, not being a charitable purpose, unless, by Article 12, the trust provides for the appointment of an enforcer in relation to the non-charitable purposes. In the case of this trust, the first enforcer was the founder, Enhance Inc, the BVI incorporated company. However, the Court has been shown a letter dated 5th October, 2004, from Atlas to the Representors informing the Representors that the founder, Enhance Inc, resigned as enforcer of the trust as of 18th June, 2003, and that they were appointed as new enforcers with effect from 1st July, 2003. The resignation of the first enforcer therefore took place before the trust was established. There are provisions in paragraph 10.4 of the trust deed for the enforcer to resign upon notice, and in the event that the enforcer does resign without appointing a successor, the power to appoint a new enforcer rests in the trustee. In this case however, one cannot really treat Enhance as having resigned as enforcer because it had never been appointed. The

resignation, if that was what it was, occurred before the Trust Deed was made, and there must be a real doubt as to whether the purported appointment by Atlas of the Representors as enforcer was in any event valid. Of course if it were not valid, then the trust fails for breach of Article 11 of the Trust Law.

22 The third difficulty arises out of the combination of the Tait Annuity Investment Trust and the estate annuity purchase deeds. The trust is ineffective, in the sense that the purpose cannot be achieved, unless there is an authorised contract, namely one by which the trustee agrees to provide a deferred annuity. The provision of deferred annuities, it was submitted by Advocate Livingstone, fell within long term insurance business for the purposes of Schedule 1 part 1 of the Insurance Business (Jersey) Law 1996, and by virtue of Article 5 of that Law, no person is permitted to carry on such business without a permit issued by the Jersey Financial Services Commission. Neither Atlas nor the successor trustees are or have been registered for the purposes of carrying out long term insurance business. Accordingly the estate annuity purchase deed, assuming it fell within Schedule 1 part 1 of the Insurance Business (Jersey) Law 1996 was illegally entered into. The respondent, we were told, is not prepared to continue with the arrangements in the estate annuity purchase deed because it fears it would be in breach of the Insurance Business Law if it did.

23 We accept the submissions of Advocate Livingstone and Advocate Petit in this connection. The result is that the obligations of the estate annuity purchase deed were not capable of being performed by Atlas lawfully, having regard to its absence of registration under the Insurance Business Law. It is wholly unclear as to whether the obligations of Atlas were or were not assigned to successor trustees. If they were so assigned, then the successor trustees were in no better position than Atlas to perform the obligations of the estate annuity purchase deed, because they too were not registered under the Insurance Business (Jersey) Law 1996. On the basis that we are looking at these arrangements in the round, the written documentation therefore reflected an arrangement that could not be performed.

Further difficulties

24 As we have indicated, the estate annuity purchase deeds do not refer to the Tait Annuity Investment Trust. The estate annuity purchase deeds are not expressed to be binding on the successors of the original trustee and in fact the original trustee did not assign the benefit of these deeds to its successor trustee which did not assign or purport to assign the property purportedly transferred by the estate annuity purchase deeds to the respondent, or its predecessor as trustee.

25 The tenancy agreement could, if the rent had been paid, have provided some income to the original trustee. However, the income could not possibly have been sufficient to meet the annuity payments if calculated on what appears to be the annuity rates set out in the different estate annuity purchase deeds. In his affidavit, the First Representor describes how the rent was settled, and then goes on to say this about the annuity:-

> *"From the outset, because of what we were told … we did not anticipate paying any rent although we did not know whether we could expect to receive the annuity, or perhaps they reduced the annuity taking into account the rental we 'owed'.* We were also unclear as to how the Tait AIT would pay us the annuity, albeit we did understand that we would be able to receive an annuity or 'income stream' if the need arose."

26 Either an annuity fell to be paid under the estate annuity purchase deed, or it did not. If it did fall to be paid, it is completely unclear how it could have been paid without the sale of the Representors' property, which Atlas as original trustee, apparently had let to them. If the contract did not amount to a deferred annuity at all, then it would not be an authorised contract for the purposes of the trust deed anyway.

27 One of the main purposes of these various transactions was to enable the Representors to pass their property tax free to their children. The other purposes are as set out in paragraphs 1 and 2 above. It is absolutely clear that quite apart from the appalling drafting of the different legal documents, which brings with it difficulties of identification as to what was being done, the purpose of making these arrangements could never have been achieved. There could not have been any payment of an income stream of the amount envisaged without a sale of the house in which the Representors lived, and such a sale was never contemplated; and even then there would not be sufficient capital to make the income payments. Indeed, the sale would have been contrary to another purpose of the arrangement, namely the passing onto the children of a capital asset free of inheritance tax.

28 For these reasons Advocate Livingstone submits that the whole arrangement should be set aside as having been made under a combined mistake of fact and law.

The law

29 The law as to mistake is well settled in Jersey.

30 In the matter of the *A Trust* [2009] JLR 447, the Royal Court declared invalid a trust as having been made on the ground of mistake as to the resulting liability to inheritance tax. The Court held that a voluntary disposition by a donor or a settlor could be set aside on the ground of mistake if the donor or settlor had been under a mistake, whether of fact or of law, that was so serious as to render it unjust on the part of the donee to retain the property given to him. As is described in the headnote, in applying that test, the Court had to be satisfied that the donor or settlor would not have entered into the transaction "but for" the mistake.

31 In the matter of the *R Remuneration Trust* [2009] LRC 164A, the Royal Court was faced with an application by the representor to set aside a trust and certain gifts to that trust on the grounds of mistake, coincidentally a scheme which was marketed by the same firm of

Baxendale Walker. Contrary to the understanding of the representor at the time of the creation of that trust, the trustees could not make loans to him in the manner which he envisaged at that time, and his wife and children could not become beneficiaries of the trust following his death. He contended that he would not have made the trust, had he known that that was the position. In adopting the principles set out in the matter of the *A Trust*, the Court said this:-

> ***"32. The Court has a discretion as to whether to set aside a transaction entered into under a mistake. Two factors which the Court will take into account in deciding whether to exercise the discretion to set aside the settlement on the grounds of the mistake of the settlor as to its legal effect are, first, whether it would be unjust on the beneficiaries for the settlement to be set aside and second, whether the position of third parties would be prejudiced if the settlement were to be set aside."***

32 In that case, it appears that the Royal Court applied English law to the facts of the case, that being the proper law of the trust. As a result of the decision in *Pitt -v- Holt* and *Futter -v- Futter* [2011] EWCA Civ. 197, English law has developed since that time. For the reasons we have given, we are applying Jersey law to this particular application but we take the opportunity of adding that even if we were to have applied the *Pitt -v- Holt* test, we would have reached the same conclusions on the facts of this case.

33 The proper approach on an application to set aside a Jersey trust by mistake was confirmed in the matter of the *S Trust* [2011] JRC 117 where Sir Philip Bailhache, Commissioner, considered at length the rationale laid out in *Pitt -v- Holt*, and the criticisms in that court made of the decision of the Royal Court in the matter of the *A Trust*. The Royal Court confirmed that it would follow the decision in the *A Trust*, which had in fact also been refined by Birt, Bailiff, in *Re the Lochmore Trust* [2010] JRC 068 where he said this:-

Application to the facts of this case

> ***"10. The law regarding the setting aside of a trust on the ground of mistake has been considered in depth and clarified in the recent decision of the Royal Court in*** *Re the A Trust* [2009] JRC 245 . ***In that judgment, Commissioner Clyde-Smith reviewed the different tests set out in*** *Gibbon -v- Mitchell* ***… and*** *Ogilvie -v- Allen* ***… and adopted the test set out in the latter case, namely whether the donor or the settlor was under some mistake of so serious a character as to render it unjust on the part of the donee to retain the property given to him.*** In applying that test, the Court must be satisfied that the donor or settlor would not have entered into the transaction "but for" the mistake …
>
> ***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?"

34 The first question is what was the mistake. It seems to us that several mistakes can be identified. The first is that the obligations of the trustee under the estate annuity purchase contract could never have been performed. The annuity payments simply could not be made on the basis provided for by that deed unless the two Representors had died very shortly after the making of the deed. Secondly, the Representors made the mistake of thinking that they were putting up their home under the estate annuity purchase deed in circumstances where it would in fact be retained for their benefit and for the benefit of their estates and yet nonetheless annuities would be paid to them. In other words, although there could be no substantial disposition of Westfields, the trust nonetheless would provide a steady and not insubstantial income stream should that be required.

35 Addressing the second question, we have no doubt whatever that the Representors would not have entered into this transaction but for the mistake. We are entirely satisfied that they did not contemplate for one moment that their home might be sold from underneath them; nor do we think that they would have entered into an arrangement by which they would receive a deferred annuity payment from an organisation which by Jersey law was incapable of making such payments to them.

36 Addressing the third question, the justice of the matter is that these arrangements should be set aside. The trustee does not object. There are no other proposals under the Tait Investment Annuity Trust other than the benefit of the Representors and their estates, and accordingly it would be unjust to allow a situation to arise where the Representors might be the subject of an application for specific performance of their obligations under the estate annuity purchase deed.

37 For all these reasons we set aside the Tait Annuity Investment Trust and the estate annuity purchase deeds of 14 th July, 2003, and 11 th June, 2004. The purported tenancy agreement clearly fails as a result, because there was no title in Atlas to grant that tenancy.