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L v EFG Trust Company Ltd

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith OBE., Jurats Olsen, Dulake
Judgment Date:	10 November 2020
Neutral Citation:	[2020] JRC 237
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Text

[2020] JRC 237

ROYAL COURT

(Samedi)

Before:

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

Between
L
Representor
and
EFG Trust Company Limited
First Respondent
N
Second Respondent
O
Third Respondent
P

Fourth Respondent

Advocate O. J. Passmore for the Representor.

Authorities

Trusts (Jersey) Law 1984 (as amended).

In the Matter of the Robinson Annuity Investment Trust [\[2014\] JRC 133](#)

In re G [\[2016\] \(2\) JLR Note 8](#)

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

In re Remuneration Trust [\[2009\] JRC 164A](#)

BNP Paribas Jersey Trust Corporation Limited and Others v Crociani and Others [2018] (2) JLR 175

In the Matter of the G Trust [\[2019\] JRC 056](#)

In Z Trust [\[2016\] JRC 048](#)

Trust — re transfers.

THE COMMISSIONER:

- 1 On 7th September 2020, the Court set aside certain transfers made by the Representor into a Jersey discretionary trust known as the M Trust (“the Trust”). This is another case in which a banking client of EFG Private Bank Limited in London (“EFG”), who was neither resident nor domiciled in England, has established a Jersey discretionary settlement funded, quite unnecessarily, through a London bank account.
- 2 We set out the facts as we found them to be, having taken into account all the evidence before us over which there was no contention, including the affidavits of the Representor and of Ms Constance Clark, a director of the First Respondent EFG Trust Company Limited (“the Trustee”).
- 3 The Trust was established on 8th May 2013, pursuant to a trust instrument entered into between the Representor and the Trustee. The Representor and her three adult children (the Second to Fourth Respondents) were each named as beneficiaries.
- 4 Following the establishment of the Trust, the Representor made three transfers of cash to it

("the Transfers"). The Transfers were remitted from the Representor's UK-based bank account and were treated as additions to the trust fund. The Representor was non-UK domiciled and resident at the time of the Transfers. She became UK resident in 2016 but moved back to [Redacted] in October 2018 and had resided there since.

- 5 Two of the Transfers were made to a law firm in England. Those funds were used as the deposit and as part of the completion monies relating to the purchase by the Trustee of all of the shares in a Jersey incorporated company called Company 1 Limited.
- 6 The third transfer was made to another company owned by the Trust called Company 2 Limited. The purpose of the third transfer was to provide funds in order for some expenses and loan interest to be paid.
- 7 The Representor relied upon EFGL to inform her if potential tax issues might arise such that she needed to take tax advice. As EFGL did not so inform her, the Representor assumed that no such tax issues would arise as a result of making the Transfers from her UK bank account.
- 8 It came to light that contrary to the Representor's belief at the time the Transfers were made, adverse tax consequences had arisen. She therefore applied to set aside the Transfers on the grounds of mistake pursuant to Article 47E of the Trusts (Jersey) Law 1984 (as amended) ("the Trusts Law").
- 9 Each of her adult children was convened and they wrote confirming that they supported the application. The Trustee also supported the application. HMRC was notified but responded that it did not wish to make any representations. The Attorney General was notified, representing the interests of the default charitable purposes, and he responded saying he would rest on the wisdom of the Court and take no active part in the proceedings.

The applicable Law

- 10 The Trust is governed by Jersey law. Article 9(1) of the Trusts Law provides that the validity of a Jersey trust (Article 9(1)(a)) and the validity and effect of any transfer of property to a Jersey trust (Article 9(1)(b)) shall be determined in accordance with the law of Jersey and no rule of foreign law shall affect such question. This means the domestic law of Jersey without reference to its conflict of law principles (see *In the Matter of the Robinson Annuity Investment Trust* [2014] JRC 133 at paragraph 23). The Court therefore applied the Jersey law of mistake to the issue before it.

The Law

Locus and timing

11 Article 471 of the Trusts Law provides that an application under Article 47E(2):

“... may be made by any settlor or any of his or her personal representatives or successors in title.”

12 Article 47D of the Trusts Law provides that:

“Articles 47E to 47I apply in relation to the transfer or other disposition of property to a trust, or the exercise of any power over or in relation to a trust or trust property that occurs either before or after the coming into force of the Trusts (Amendment No 6) (Jersey) Law 2013.”

13 The Representor is the settlor of the Trust and therefore has locus to make the application under Article 47E(2). Further, although two of the Transfers in respect of which the mistake was made predate the enactment of Article 47E, the Court still has jurisdiction to consider the application in relation to those transfers pursuant to that provision.

Legal Test to be applied

14 Article 47E of the Trusts Law provides as follows:

“(1) ...

(2) The Court may on the application of any person specified in Article 47I(1) and in the circumstances set out in paragraph (3), declare that a transfer or other disposition of property to a trust—

(a) by a settlor acting in person (whether alone or with any other settlor) or

(b) through a person exercising a power ,

is voidable and –

(i) has such effect as the court may determine, or

(ii) is of no effect from the time of its exercise .

(3) The circumstances are where the settlor or person exercising a power –

(a) made a mistake in relation to the transfer or other disposition of property to a trust; and

(b) would not have made that transfer or other disposition 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”.

15 The meaning of a mistake for the purposes of Article 47E is set out in Article 47B(2) of the Trusts Law, which provides as follows:

“(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.”

16 Therefore, the Court had to ask itself:

(i) whether there was a mistake on the part of the Representor,

(ii) whether the Representor would not have entered into the transaction but for the mistake, and

(iii) whether the mistake was of so serious a character as to render it just for the court to make the declaration sought (see *In re G (Royal Court)* [\[2016\] \(2\) JLR Note 8](#)).

17 It is well settled in Jersey that a mistake about the tax effects of a particular transaction can be treated as a relevant mistake for the purposes of Article 47E of the Trusts Law (see paragraph 39 of *Re S Trust* [\[2011\] JLR 375](#) and the comments of the Court, at paragraph 29 of *In the matter of the Robinson Annuity Investment Trust*).

18 In *In re Remuneration Trust* [\[2009\] JRC 164A](#), at paragraph 32, the Court noted that, in determining whether to exercise its discretion to set aside a settlement on the grounds of the mistake of the settlor as to its legal effect, two factors which the Court will take into account 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. The Court's comments were in relation to an application

brought under Article 11 of the Trusts Law (i.e. to set aside the entire trust). However, for the reasons set out in *In the matter of the Robinson Annuity Investment Trust* at paragraph 28, we agree that the same two factors should be applied by the Court in determining whether to exercise its discretion under Article 47E to set aside a transfer into a trust.

19 Article 47E and parallel provisions were considered by the Court of Appeal in *BNP Paribas Jersey Trust Corporation Limited and Others v Crociani and Others* [2018] (2) JLR 175. In particular, the Court of Appeal stated at paragraphs 93 to 95 that taking the natural meaning of the words which appear in Article 47E the court may follow one of three courses:

- (i) It may declare the transfer in question to be voided and of no effect from the time it took place;
- (ii) It may declare the transfer to be voided 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 voided from a date subsequent to the time of its having taken place.

What is a mistake?

20 Articles 47B and 47C provide that the concept of error in Articles 47D to 47J is to be interpreted with the greatest possible width but is not to include the doctrine of *erreur* as understood in Jersey customary law – *BNP v Crociani* at paragraph 72.

21 In the recent decision of *In the Matter of the G Trust* [\[2019\] JRC 056](#) at paragraphs 13–16, the Court concluded that it is inappropriate to make the distinctions made in English law as to incorrect conscious beliefs, incorrect tacit assumptions or mere causative ignorance because in the Court's view such distinctions were rather artificial. The Bailiff stated (at paragraph 16):

“...We note first that the phrase ‘mere causative ignorance’ is not one which reflects generally why these applications before us come about.

Ignorance does not usually cause the transfer to be made – indeed it cannot really be regarded as causative of anything very much. The cause of the transfer is usually an intention to benefit the trust. That cause is almost invariably not removed by the ignorance which might accompany it and it is difficult to say in those circumstances that the ignorance caused the transfer. It is more to the point that the transferors would have made the transfer in a different way, e.g. by making the transfer from a non UK bank account if they **had known the effects or consequences of the transfer might have been**. Secondly, the intellectual space between incorrect tacit assumptions and mere causative ignorance is in our judgment almost impossible to find because tacit assumptions will invariably be mistakes only when the maker of the assumption is ignorant of some material fact.”

Seriousness of the mistake and whether it is just to make the declaration

- 22 In *Re G Trust*, the Court noted at paragraph 17 that once it is satisfied that there has been a mistake made in relation to the transfer into a trust and that the transfer would not have been made but for the mistake, the Court needs to ask itself whether the mistake was of such a serious character as to render it just for the Court to make a declaration.
- 23 In relation to the seriousness of the mistake, the Court (at paragraph 17 of its judgment) comments as follows:

“... the Court needs to ask itself whether the mistake was of such a serious character as to render it just for the Court to make a declaration.

The grammar of the question makes it plain that there are two component parts, the first as to whether the mistake was of a serious character and the second as to whether it is just for the Court to make a declaration. The seriousness of the mistake will often be analysed by reference to the effect both on the transferor and potentially on the trustees and beneficiaries of the trust. In the context of taxation consequences, the mistake may not be of a very serious character if the quantum of the exposure is very limited as compared with the value of the Trust Fund or of the remaining assets held by the transferor, although that might also depend on whether there are any future consequences including the loss of future potential in relation to the trust as a result of the particular transfer which is impugned” .

- 24 The Court continues at paragraph 18:

“The question of justice is more nuanced. It is well settled that mistakes in relation to tax are capable of being taken into account by the Court in deciding whether or not to set aside a transfer or disposition into trust or indeed the trust itself.”

Having discussed a number of examples, the Court concluded at paragraph 22 that there is a ***“real discretion to be exercised.”***

Effect of setting aside the Transfers

- 25 If the Court sets the Transfers aside pursuant to Article 47E with effect from the date on which they were made, then the assets transferred will have been held on bare trust by the Trustee on behalf of the Representor and have been so held at all times (*In Re G Trust* at paragraph 27 and *Crociani* at paragraph 94).

Consequential orders and ratification/confirmation

- 26 Pursuant to Article 47I(3), and without prejudice to Article 51, the Court may, consequential upon a declaration under Article 47E, make such order as it thinks fit. However, that is subject to Article 47I(4), which provides that no such order may be made which would prejudice any *bona fide* purchaser for value of any trust property without notice of the matters which render the transfer voidable.
- 27 The Court's power to make orders pursuant to Article 47I(3) includes the power to ratify/confirm otherwise unauthorised actions which may have been innocently carried out by the recipient of the transfers which have been set aside.
- 28 *In Z Trust* [2016] JRC 048, the Court distinguished between three forms of ratification or confirmation, all of which may have substantially the same practical result, but which are conceptually distinct:
- (i) Confirmation by perfection of an imperfect act or transaction (ratification properly so-called). In this regard, the Court stated that conceptually there was no reason why an act or transaction which is initially invalid should not be validated or treated as valid by reason of some subsequent act or agreement of the parties or order of the Court.
 - (ii) Confirmation by replacement of a tainted or doubtful act or transaction by an effective one with a similar effect.
 - (iii) Confirmation by non-intervention in acts or omissions which were not or may not have been authorized but have nevertheless actually been acted upon, so that these acts or omissions remain undisturbed and the trusts are accordingly administered on the same footing as if those acts or omissions had been authorised.

Application of the law to the facts

Was there a mistake on the part of the Representer?

- 29 The purpose of the Representer adopting a trust structure, as per the Trust Formation Questionnaire ("the Questionnaire") completed by the Representer, was for estate planning so as to ensure that the assets placed into the Trust "stay(ed) in the family blood line". The Representer mistakenly believed that the Transfers would be tax neutral. She stated that:
- (i) She was introduced to the idea of establishing a trust, and to the Trustee, by her client relationship officer at EFGL in 2012.
 - (ii) She did not know very much about financial matters. As regards establishing the Trust, she was relying on EFGL for guidance, agreed to their suggestions and signed whatever they told her to sign.
 - (iii) She thought EFGL was looking after her interests and doing the right thing by her.

She relied on EFGL to tell her anything she needed to know before signing the Questionnaire and she would have expected EFGL to have told her if there were tax matters that she needed to think about.

(iv) EFGL did not discuss tax matters with her and no-one ever said to her that she should seek advice to check that what was being suggested was in her best interests.

(v) She thought that the Questionnaire was just a formality and she simply signed where the *'post-it'* notes were.

(vi) She was told by EFGL to pay the Transfers from her EFGL bank account. No-one told her that there would be any adverse tax consequences from making the Transfers in this way and she had no way of knowing this, given at the time she was not a UK tax resident, nor had she received any UK tax advice, as she relied completely on EFGL.

(vii) She was surprised when she was informed of the inheritance tax liability by the Trustee in August 2018. She had complete trust in EFGL that whatever they proposed to her would be in her best interests. Because EFGL did not raise that there might be such tax consequences, she mistakenly believed that the Transfers were tax neutral.

- 30 The Representor was unaware that there would be any liability to UK inheritance tax on the Transfers. In fact, there were considerable IHT consequences, as explained in the opinion of Mr Oliver Conolly of English counsel dated 5th February 2020, which were needlessly incurred. There was therefore a mistake on her part as to the tax consequences of the transfers.

Would the settlor not have entered into the transaction “but for” the mistake?

- 31 The Representor would not have structured the payments in that way had she known the true tax consequences that would result. It would have been a simple matter to give funds into trust from her Monaco (i.e. non-UK) bank account.

Was the mistake of so serious a character as to render it just for the Court to make a declaration?

- 32 The mistake had given rise to a liability to IHT of between £232,358.76 and £290,448.45 (depending on whether the Representor or the Trustee discharged the liability) plus interest, which liability need not have been incurred. The mistake is clearly serious, as its result is unnecessarily to deplete the assets available to the Representor and her family by those considerable amounts. The Representor and her family will suffer as a result.

Conclusion and consequential orders

- 33 A number of steps were taken by the Trustee, following receipt of the Transfers and to the extent that any of those steps were carried out using the funds received from the Transfers, it would have been unauthorised if the Transfers were set aside.
- 34 Some part of the Transfers was used to purchase shares in Company 1 Limited, and if those transfers were set aside, the Trustee will hold a commensurate portion of those shares on bare trust for the Representor.
- 35 However, a small proportion of the Transfers was used by the Trustee to discharge liabilities to third parties, administration fees and some loan interest. The Representor confirmed that she did not wish to make a claim against the Trustee in relation to these third party expenses, and, further, that she was content for the Trustee to be released from any personal liability to her in relation to the same, pursuant to Article 45 of the Trusts Law. Furthermore, the Representor did not seek any consequential orders which would unwind the unauthorised steps carried out by the Trustee.
- 36 On 29th April 2020, the Representor had received a cash distribution of £50,000. However, this distribution did not pose any difficulties for the purposes of the application; the distribution was funded by a loan from Company 1 Limited.
- 37 Accordingly, on that basis, and given the Representor's position as set out above, other than HMRC there are no third parties who would be affected by the Transfers being set aside. No payments had been made to third parties which would have to be unwound.
- 38 The Court concluded, therefore, that it was just to make a declaration and it did therefore declare that the Transfers are set aside pursuant to Article 47E of the Trusts Law with effect from the date upon which each transfer was made and that the Transfers have been held on bare trust on behalf of the Representor and have been so held at all times. The Court made certain other consequential orders.