

The Noor Trust

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| Judge: | Deputy Bailiff |
| Judgment Date: | 03 February 2021 |
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Text

[2021] JRC 33

ROYAL COURT

(Samedi)

Before:

R. J. MacRae, Esq., Deputy Bailiff, and Jurats Ramsden and Austin-Vautie

In the Matter of the Noor Trust
And in the Matter of the Representation of E, J and K
And in the Matter of Articles 467E, 471, 51 and 53 of the Trusts (Jersey) Law 1984 (As Amended)

Advocate O. J. Passmore for the Representors

Authorities

Trusts (Jersey) Law 1984 (as amended).

In re S Trust [\[2011\] JLR 375](#)

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

Inheritance Tax Act 1984

Trust — reasons.

Deputy Bailiff

THE

Introduction

- 1 On 22nd January 2021, the Court made various orders in respect of certain transfers made into the Noor Trust (“the Trust”). We now give reasons for our decision.
- 2 The Representors, E, J and K are settlors of a Jersey discretionary trust known as the Noor Trust, together with the late husband of K and father of E who we will call L. L died in December 2015.
- 3 The Trust was established on 22nd September 2009 pursuant to a declaration by the Trustee, EFG Trust Company Limited (“the Trustee”). The facts of this matter bear some resemblance to certain recent decisions of the Court, as this is the eighth and final, we are told, application to come before the Court involving the same Trustee in order to address the matters arising from the transfer of funds to the Noor Trust, a Jersey discretionary trust, and similar trusts, from UK bank accounts.

Background

- 4 The settlors were first introduced to the concept of a trust by way of a conversation between L and a representative of the Trustee in earlier 2009 in the context of succession planning, as both L and K felt that owing to their ages, such planning would be appropriate.
- 5 The family are, and were, resident and domiciled in Pakistan and at no stage prior to establishing the Trust did the Trustee or any representative of the Trustee discuss any potential tax implications of the Trust with the settlors, nor did the settlors take such advice. L, E and K (J, who is E's wife, became jointly responsible for settling sums on trust subsequently) assumed that as they were neither UK domiciled nor resident in the UK,

there would be no UK tax implications for them in setting up the Trust.

- 6 The source of funds is a family business in Pakistan which was set up in 1983 and continues to be operated by the family. Prior to setting up the Trust, in 2003 L and K opened an account with EFG Private Bank (Channel Islands) Limited in Guernsey ("the Guernsey Bank"), which was operated until September 2013 when it was closed – at that date the account holders were E, L and K.
- 7 Subsequent to the opening of the Guernsey account, in October 2007 E and L opened a bank account with EFG Private Bank Limited London branch ("the London Bank"). The principal purpose of this account was to enable purchase of property in the United Kingdom, and also to allow the family to spend money whenever they visited the United Kingdom. The account was funded by cash imported by the family, within the limits set by customs requirements. There were also bank transfers into the UK account from accounts in other jurisdictions held by L or held by L with his wife K. J was added as an account holder for the UK account in September 2009, as was K in 2011. Prior to the creation of the Trust, two companies were formed in the British Virgin Islands. One, which we will call Company A, was set up to hold and rent out the properties in London. The second, which we will call Company B, was set up in order to buy out the minority shareholder in the Pakistan family business. The shares in Companies A and B were jointly held by E, L and K until they were settled into the Trust in 2009.
- 8 Exhibited to E's affidavit sworn in support of the application is the Trust Formation Questionnaire that E and his parents signed. This purported to indicate by way of a tick to a box entitled "Yes" that *"all relevant advice [had] been obtained to ensure that all parties [had understood] the implications of creating the appropriate structure"*. By ticking the box "yes", the settlors agreed to furnish the Trustee with a copy of the *"relevant advice"*. In any event it appears that no such advice was taken by the settlors or provided to the Trustee. I says that representatives of the Trustee took them through the questions on the form which they completed for the settlors based upon the answers that they gave. I said that the box in relation to advice was answered "yes" because they did not believe that they needed advice at the time.
- 9 In any event, E, L and K signed the questionnaire and by doing so they made a declaration that the Trustee had not given advice on any tax consequences arising outside Jersey and that they recommended that advice be sought prior to formation of the Trust. The beneficiaries of the Trust are K, L, E, any spouses or widow(er)s (unless remarried) of K, L or E, or remoter issue. Accordingly, there are currently five beneficiaries, two of whom are minor children of J and E. J was appointed at the convening hearing to represent them and any unborn issue and she confirmed in those capacities that she had no objection to the relief sought.
- 10 Her Majesty's Attorney General, in relation to the default charitable beneficiary, and HMRC were also notified of the hearing of the Representation and stated that they had no

representations that they wished to make.

- 11 In addition to the shares in the two BVI companies, various assets have been settled into the Trust from time to time. From 2009 to the first contribution made on 6th September 2010 and in respect of all sums settled into Trust since 14th June 2013, such sums have originated from non-UK sources. However, between 6th September 2010 and 14th June 2013 there were 11 additions to the Trust, all of which came from the UK bank account referred to above. In each instance, the settlors (three of them prior to 2011) were settling the relevant sums in the Trust jointly. The total sum settled in this way amounted to £2,180,000. The addition of funds to the Trust via the UK account could easily have been avoided by use of the Guernsey account or other accounts available to the family. One of the reasons for the use of the UK account was that, at some point in 2010, the Guernsey Bank informed the family that they would no longer accept cash deposits, but the London Bank was prepared to continue doing so. The family did not anticipate that the change in the route by which funds were added to the Trust might have any tax implications as at no stage did the family reside or have any domicile in the United Kingdom. Further, all the funds were at all times sourced from the family business in Pakistan.
- 12 A number of the assets settled into the Trust was accompanied by a "*Letter of Addition*" signed by some or all of the settlors. Certain of these Letters of Addition contained a statement confirming that the settlor had taken appropriate advice as to the effect of settling the funds into the Trust. In fact, such advice had not been taken. E explains that this was because at all times the family proceeded on the assumption that they were not subject to UK tax in connection with any of the additions into the Trust.
- 13 Virtually all of the assets that were settled on Trust and originated from the UK accounts were used to make loans to the BVI companies. These advances are described in detail in the affidavit sworn on behalf of the Trustee. The Trustee did not oppose this application and indeed lent support to it. The specific sums contributed as described above, were loaned in order to fund the purchase or refurbishment of properties in London owned by Company A, save for a small amount of cash that was retained in the Trust and, in respect of the last three contributions to the Trust originating from the UK account in 2012 and 2013, those sums were applied towards servicing interest due on Company A's loan owed to the Guernsey Bank pursuant to a separate loan agreement and in partial repayment of this loan. Company A had borrowed money at interest from the Guernsey Bank. In contrast, the loans made by the Trustee to Company A referred to in this judgment were all unsecured and interest free and, accordingly it was advantageous to use the funds borrowed from the Trustee to, where appropriate, repay the Guernsey Bank.
- 14 Certain distributions have been made out of the Trust to beneficiaries, although these were irrelevant for the purpose of this application. All the distributions post-dated by some two years the loans referred to above.

- 15 In March 2020 the Trustee notified E of the fact that a liability to UK Inheritance Tax had arisen, owing to the settlement of funds in the Trust from the UK bank account. E, K and J were surprised by this news and obtained advice from English counsel, Oliver Conolly of Pump Court Tax Chambers, which was exhibited to E's affidavit.
- 16 E says, and it is plain that this is the case, that his parents and he would not have arranged for the transfer of assets into the Trust in the way that they did had they known of the tax consequences that would result. It would have been straightforward to have prevented these tax problems arising.
- 17 The transfers in question gave rise to IHT charges at 20%. The charges arise against the settlors (L, J and E prior to November 2011 and all four settlors in respect of the transfers after November 2011) and the Trustee. The inheritance tax due, if the debt is discharged by the settlors, is £251,875 plus interest of approximately £64,117; if the liability is discharged by the Trustees the tax due is £201,500 plus interest of £54,405. There is also an additional charge to tax on the estate of L of between roughly £31,000 and roughly £39,000 depending on whether the tax is discharged by the Trustee or by L's personal representatives.
- 18 Accordingly, K, J and E have applied to set aside the transfers from the UK account ("the Transfers") on the grounds of mistake.

The legal principles

- 19 This is a Jersey law trust and, accordingly, the provisions of Article 47B to J of the Trusts (Jersey) Law 1984 (as amended) ("the Law") apply. Article 47I of the 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."

- 20 Article 47D of the 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."

- 21 Accordingly, it does not matter that the Transfers occurred prior to the enactment of Article 47E.

- 22 The relevant part of Article 47E of the 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.”

23 The definition of mistake is widely drawn for the purposes of Article 47E, as held in the leading case decided prior to the amendment of the Law to codify and expand upon the customary law in relation to mistake – In the matter of the *S Trust* [\[2011\] JLR 375](#).

24 The relevant provision is Article 47B(2) of the 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.”

25 Applying the Law to the facts of this case it is clear that:

- (i) There was a mistake on the part of the settlors i.e. as to the UK tax consequences that were occasioned by the Transfers; and
- (ii) The settlors would not have entered into the Transfers but for the mistake, as is confirmed by E in his affidavit; and
- (iii) The mistake is, in the opinion of the members of the Court, of so serious a character as to render it just for the Court to make the declarations sought.

The relief the Court granted

- 26 The Court has a wide discretion as to the relief that it may grant and, in particular (see the decision of the Court of Appeal in *BNP Paribas Jersey Trust Corporation Limited and Others v Crociani and Others* [2018] (2) JLR 175), the Court may declare the transfer in question to be voided and of no effect from the time that it took place. That is the principal relief which is sought in this case. Pursuant to Article 47I(3), and without prejudice to the Court's powers under Article 51, the Court may, consequential upon a declaration under Article 47E, make such order as it thinks fit. This power 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. However, Article 47I(4) protects the interests of bona fide purchaser for the value of any trust property without notice of the matters which render the transfer voidable.
- 27 Counsel who provided advice on the inheritance tax consequences of the Transfers advised that, as a matter of English law, if the Court orders that the Transfers are set aside, and further and in consequence, orders that the funds represented by the Transfers have at all times been held by the Trustee on bare trust for the persons who settled them, then on the death of L his interests therein will have passed by survivorship to the other beneficiaries under the bare trust. He advised that once the Court has set aside the Transfers, the family or the Trustee may make a claim under the relevant provision of the Inheritance Tax Act 1984 which would have the effect that no tax interest or penalties payable as a result of the Transfers would now be due.
- 28 One matter that concerned the Court was the suggestion that the Court should order that the Transfers are now held on bare trust by the Trustee on behalf of L, E and K in respect of the Transfers made before November 2011 and all four settlors in respect of the Transfers made from November 2011 (with L's interest thereunder having passed by survivorship on his death to the other three beneficiaries of that bare trust) on the footing that (although no order is sought to this effect) the Transfers are not in fact to be repaid to the beneficiaries of the bare trust but the Trustee now holds a proportion of the loan receivable from the

Company A on bare trust for the beneficiaries of that Trust.

- 29 The Trustee says that the assets representing the Transfers are now contained within the loan receivable from Company A by the Trustee. The Trustee has calculated that the loan receivable is represented as to 46% of the same (£2,133,807) by the Transfers. The balance of the loan was derived from other non-UK sources of assets transferred to the Trust.
- 30 It seems to us that if the Representors, E, J and K wished, as a consequence of the setting aside of the Transfers, for the funds represented by them to be repaid to them, then they would be entitled to the same. However, it appears from the affidavit sworn by E that the family is content to proceed on the footing that if the Court sets aside the Transfers, then to the extent that they were used to fund the loans to Company A, then the Trustee would hold a commensurate proportion of the loan receivable on bare trust for E, J and K.
- 31 As to the small sum (approximately £32,000) which was not loaned to Company A but remained in the Trustee bank account, where, again the beneficiaries under the bare trust would be entitled to have the funds returned from the Trustee, they did not make such a claim and the said sum was notionally re-settled by the family on the terms of the Trust.
- 32 Accordingly, although no authority on all fours was cited to the Court, we were of the view that it was appropriate to proceed on the footing that the funds which were subject to the Transfers would not be repaid to the beneficiaries of the bare trust but would, as to a very small proportion, be notionally re-settled and as to the majority of funds would now, as to the relevant proportion of the loan receivable owed by Company A to the Trustee be held on bare trust for the said beneficiaries.
- 33 As to the circumstances in which this mistake came about, we note for the purpose of the judgment that counsel for the Representors, who was also instructed by the Trustee, confirmed that the costs incurred by the Representors were not being borne by the Representors, nor were they coming from the assets of the Trust.
- 34 Accordingly, the Court:
- (i) declared that the Transfers be set aside on grounds of mistake and be declared to be voided and of no effect from the dates they were made pursuant to Article 47E of the Trusts (Jersey) Law 1984;
 - (ii) ordered that the Transfers have from the dates upon which they were made at all times been held on bare trust by the Trustee on behalf of:
 - (a) L, E and J in respect of those Transfers made before November 2011; and

(b) All four Settlers in respect of those Transfers made from November 2011,

with L's interest thereunder having passed by survivorship on his death to the other beneficiaries of that bare trust;

(iii) directed that the Trustee can retain the remuneration it has already charged and the reimbursement it has already received for expenses and liabilities reasonably incurred, and can continue to charge its reasonable remuneration and reimburse itself for all expenses and liabilities reasonably incurred up to the date of this declaration; and

(iv) directed that the Trustee is relieved from liability for any breach of the bare trust upon which it has held the trust assets, save to the extent that any breach of the bare trust would also have constituted a breach of the Trust for which the Trustee would have been liable had the Transfers not been declared to have been held on bare trust from the dates on which they were made.