DD

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Le Breton, Morgan
Judgment Date:	21 October 2010
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Text

[2010] JRC 193

ROYAL COURT

(Samedi Division)

Before:

J. A. Clyde-Smith, **Esq., Commissioner, and** Jurats Le Breton **and** Morgan

In the Matter of Articles 11(2) and 51 of the Trusts (Jersey) Law 1984

Between
DD
First Representor
and
A
Second Representor

and

B
Respondents

and

C

Advocate D. M. Cadin **for the Representors.**

Advocate J. S. Dickinson **for the Respondents.**

Authorities

In re Sanne Trust Company Limited [2009] JRC 025B.

In the matter of Green CLG Trust [2002] JLR 571.

Seaton v Morgan [2007] JRC 206.

In the matter of the A Trust [2009] JRC 245.

THE COMMISSIONER:

1 On 21 st July the Court rectified the trust deed of the trust made between the second Representor, A as settlor ("the settlor") and D ("D"), the original trustee, on 11 th March, 2004, ("the trust") and an associated declaration. The current trustee is the first Representor, DD ("DD").

Background

2 The facts of this case are very similar to those in the case of *In re Sanne Trust Company Limited* [2009] JRC 025B, where the remedy of rectification was granted. In 2003, the settlor was resident in the United Kingdom; he now lives in Switzerland. He had been advised that he was non-domiciled in the United Kingdom for Capital Gains Tax purposes but deemed domiciled for Inheritance Tax purposes, having resided in the United Kingdom in not less than seventeen of the previous twenty years. He was concerned to safeguard some of his assets from being chargeable to Capital Gains Tax in the event of a rule change in the 2004 budget which would make the assets of non-domiciled persons susceptible to Capital Gains Tax.

3 He therefore sought advice from H of J, a specialist tax accountant and lawyer, who had advised him on tax matters on an *ad hoc* basis in the past. The settlor asked him to advise about the potential UK tax implications of putting some of his funds into a company or a

trust. Following a conversation, H emailed him on 1 st December, 2003, advising him *inter alia* that if funds were to be transferred to a trust, it should be a trust which provided him and his wife with successive life interests. He specifically advised that a discretionary trust would not be a good idea.

4 Following further exchanges, the settlor instructed H in late February 2004 that he wished to proceed with the transfer of foreign securities totalling approximately €7.5M to a trust to achieve his objective of protecting those assets from potential future CGT charges whilst being IHT neutral. That sum equated to the value of securities he held through two accounts numbered 473414 and 73415 with HSBC in Luxembourg.

5 On 2 nd March, 2004, H instructed E of D to proceed with *"a transfer to a discretionary trust"* for the benefit of the settlor and his family. In his affidavit of 3 rd June, 2010, H confirmed that this reference to a discretionary trust was a mistake as it was for good reason that an interest in possession trust was clearly in contemplation. His instruction to E should therefore have referred to an interest in possession trust and not a discretionary trust. Establishing a discretionary trust would subject the settlor to an immediate 20% IHT charge.

6 The settlor and his wife met with E and completed a trust application form which, as instructed by H, referred to a discretionary trust. Neither the settlor nor his wife knew the significance of the expression, being unfamiliar with trust terminology. He trusted the professionals involved to send him the appropriate documentation to execute in order to achieve his desired objective.

7 There was time pressure to complete the transfer before the April budget. The settlor instructed the bank to give E the relevant account details. With that information E prepared a short declaration of trust ("the Declaration") in which the settlor declared that he held the accounts specified on bare trust for D as trustee of the trust. The Declaration was sent to the settlor and signed by him on the 11 th March, 2004. In error it named his personal account as well as the two accounts which held the securities. The trust was executed by D on the same day.

8 The personal account was not accepted by D as an asset of the trust and is not referred to in the trust accounts. It has remained under the control of the settlor, consistent with his understanding and that of D that it was the two accounts holding the securities valued at approximately €7.5M that was being settled.

9 E in his affidavit of 8 th June, 2010, states that he had no reason to investigate the tax position of the settlor bearing in mind the instructions received from H and was not aware that the settlor had been a resident in England for seventeen out of the previous twenty years. If he had been aware that the establishment of a trust and acceptance into it of assets would have triggered a significant IHT charge on the settlor and/or the trust, he

would certainly have questioned the setting up of the trust.

10 When DD was appointed trustee, F, a director of DD, conducted a file review and questioned the use of a discretionary trust for an individual he was aware was deemed to be domiciled in the United Kingdom for Inheritance Tax purposes. Advice was taken from Bedell Cristin and Speechly Bircham, the latter advising that:-

> (i) An IHT liability of not less than £1, 650,000 arose upon the assets being transferred into the trust. Both the settlor and the trustee are chargeable.
>
> (ii) An account of the chargeable transfers of 11 th March, 2004, should have been delivered by the settlor within a period of twelve months from the end of that month. The settlor was liable to penalties for failure to deliver an account unless he has reasonable excuse.
>
> (iii) Interest on unpaid tax is chargeable from the date the tax is due; some £318,098.66 for the period up to 25 th May, 2010, if the settlor pays the tax.
>
> (iv) Furthermore, a charge potentially arises immediately before each ten year anniversary of the date the trust commenced and there will be a charge to tax on the settlor's death if he is still a beneficiary of the trust at or within seven years of his death.

Legal test

11 The Representors sought rectification of the trust and the Declaration or in the alternative that the trust be set aside on the basis of mistake.

12 The well-established three stage test to be satisfied on rectification as set out in *Sanne* is as follows:-

> (i) The Court must be satisfied that there is sufficient evidence that a genuine mistake has been made so that the document does not carry out the true intentions of the parties.
>
> (ii) There must be full and frank disclosure.
>
> (iii) There should be no other practical remedy. The remedy of rectification remains a discretionary remedy.

Application to the facts

13 It was clear to the Court that a genuine mistake had been made so that the trust and the Declaration did not carry out the true intentions of the parties. The settlor's intentions in

establishing the trust were clear, namely to protect his assets from potential future CGT charges whilst being IHT neutral, which in accordance with H's advice required an interest in possession trust. Furthermore, it was never his intention to transfer into the trust or the intention of the trustee to receive into the trust his personal account. Understandably, he relied upon his professional advisers to put his intentions into effect. He had no experience of trusts and was not aware of the significance of the various terms used. Commendably, H has confirmed on oath that he made a mistake when issuing instructions to E to create a discretionary as opposed to an interest in possession trust. Mr Dickinson, for the respondents, agreed that the evidence strongly supported the conclusion that a genuine mistake had been made.

14 We have received affidavits from the settlor, his wife (who supported his evidence and the application), H, E, F and G of DD. We were satisfied that there had been full and frank disclosure.

15 Turning to other practical remedies, it would be open to the settlor to seek to action J, which no longer exists as a firm as its assets were acquired in 2006 by Squire, Sanders and Dempsey LLP, a suggestion that as a matter of policy has not previously attracted the Court (see *In the matter of Green CLG Trust* [2002] JLR 571 and *Seaton v Morgan* [2007] JRC 206). To require the settlor, who has already been let down by his professional advisers, to engage in and personally fund potentially costly and lengthy civil litigation with all the risks that litigation brings with it is not, in our view, a remedy sufficiently practicable to lead us to decline the discretionary remedy of rectification.

16 Mr Cadin, consistent with his duty to the Court, raised the question of whether the discretionary remedy of mistake (the Representors' prayer in the alternative) could be described as another practical remedy, bearing in mind the broader test for mistake that now applies under Jersey law (see *In the matter of the A Trust* [2009] JRC 245). Rectification has the benefit of preserving that which a settlor intended to establish. Assuming the now broader test for mistake was made out, the Court would have two discretionary remedies at its disposal and in our view the remedy which preserved the trust was to be preferred to a remedy which set aside that which the settler intended to establish.

17 For these reasons, we granted the application of the Representors and ordered the rectification of the trust so as to create successive life interests in favour of the settlor and his wife and the Declaration by removing the reference to the settlor's personal account, such rectification to have retrospective effect from 11 th March, 2004.