

The Representation of Mr a the K Trust

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Blampied, Christensen
Judgment Date:	25 October 2017
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Text

[2017] JRC 177

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, Esq., Commissioner, and Jurats Blampied and Christensen.

In the Matter of the Representation of Mr a in the Matter of the K Trust
And in the Matter of Articles 11, 47E, 471, 51 and 53 of the Trusts (Jersey) Law 1984, as
Amended)

Advocate E. C. P. Mackereth **for the Representor.**

Authorities

Trusts (Jersey) Law 1984 (as amended).

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

Pitt v Holt [2013] UK SC 26 .

Goff & Jones 9th edition.

In the matter of the S Trust and in the matter of the T Trust [\[2015\] JRC 259](#) .

Trust — reasons of the Court relating to the setting aside of certain transfers by the representor into the K Trust.

THE COMMISSIONER:

- 1 On 15th September, 2017, the Court set aside certain transfers by the representor into the K Trust, pursuant to Article 47E of the Trusts (Jersey) Law 1984 (as amended) (“the Trusts Law”), and we now set out our reasons.
- 2 The representor, a businessman, resides abroad, and is a citizen of two other countries. He and his family have never lived in the UK, but he had a long-standing banking relationship with B Limited (“the Bank”), where he maintained banking accounts, his principal point of contact at the Bank being Mr C, who he had known since the 1990s and who he regarded as a trusted financial adviser.
- 3 In October 2009, the representor was considering purchasing certain investment properties in London, and took advice from Mr C as to how those investments should be held. Mr C explained the UK Inheritance Tax implications of owning UK assets, even though the representor was non-resident and non-domiciled for UK tax purposes, and to ensure that he did not pay unnecessary Inheritance Tax, advised that he would need to own the properties through a non-UK company, which for succession planning purposes could be put into a trust.
- 4 The representor was attracted to the idea of a trust, partly for what he thought then was IHT protection and succession planning, but also because having someone else in control of the assets would suit him, because of his business commitments. A meeting note shows that much of the discussion related to how the investments could be structured in such a way as to minimise IHT.
- 5 Fee proposals were put forward by B Offshore Limited and at a subsequent meeting, Mr C took the representor through a Trust Questionnaire in which:-
 - (i) It was stated that the initial cash sum for the proposed trust would come from the London branch of the Bank.

(ii) His UK lawyer and accountant were named as his professional advisers. However, the lawyer was only engaged by the trustee to act for the companies used to purchase the properties in London, and the accountant was not engaged to provide tax or accounting advice in relation to the proposed trust.

(iii) The question “Has all relevant advice been obtained to ensure that all parties understand the implication of creating the appropriate structure?” was left unanswered.

(iv) The representor acknowledged that B Offshore Limited did not give advice on tax consequences arising outside Jersey, and that it strongly recommended that this advice was sought prior to formation of the proposed trust.

- 6 The K Trust was established on 25th November, 2009, by B Trust Company Limited (“the trustee”) by declaration. It is a discretionary trust, governed by Jersey law, and the beneficiaries were named as the representor, his wife and two children; one of whom is a minor for whom his mother acted as guardian *ad litem*.
- 7 Between the 4th December, 2009, and 1st June, 2016, the representor made transfers from his personal bank account with the Bank into the K Trust of some £18.4 million. Within the same period the trustee made distributions to the representor, which with one exception were paid into the same bank account, of some £3.5 million. A distribution of shares was also made to him.
- 8 In November 2016, the representor was made aware that there was a potential issue over the transfers into the K Trust being subject to UK tax. Advice was sought from English counsel, namely Mr D of Pump Court Tax Chambers, and in simple terms, although the representor was non-UK resident and domiciled for all UK tax purposes, the bank account used by the representor to transfer funds into the K Trust was UK situs for the purposes of IHT. As a consequence, those transfers gave rise to a very substantial IHT liability of some £4.5 million (plus interest) if discharged by the representor, or £3.6 million (plus interest) if discharged by the trustee. The same issue arose out of the distributions made to him, which were paid to his UK bank account. These IHT liabilities could have been easily mitigated by the simple use of a non-UK situs bank account, of which the representor had many. As the representor said at paragraph 7.6 of his affidavit:-

“7.6 I would not have structured the payments in that way had I known the true tax consequences that would result. I was completely unaware that there would be any liability to IHT on the funds I settled into the Trust from my Personal UK Bank Accounts and indeed on any appointments out of the Trust's UK bank account paid to my Personal UK Bank Accounts. I did not realise that despite being resident abroad, transferring funds into a trust from a UK bank account would cause a UK tax liability to arise. Had I appreciated that I would have not have proceeded to make the payments directly from my Personal UK Bank Accounts. It would have been a simple matter to give funds into trust from a non-

UK bank account and since learning more about the UK inheritance tax I have ensured that I do not keep significant funds in the UK.”

The law

- 9 The application was brought under both Article 11 and Article 47E of the Trusts Law, but proceeded under the latter alone. Article 47E is in the following terms:-

“(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.”

- 10 As a settlor the representor was a person specified under Article 47I(1) and therefore able to make the application. The three questions for the Court therefore were:-

(i) Was there a mistake on the part of the representor in relation to the transfers to the K Trust?

(ii) Would the settlor not have made the transfers but for **“the mistake”**?

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

- 11 Whilst the factors the Court will take into account in deciding whether it is just to make a

declaration are at large, it is clear that the Court will take into account firstly, whether it would be unjust on the beneficiaries for the transfers to be set aside and secondly, whether the position of third parties would be prejudiced (*In re Remuneration Trust* [2009] JRC 164A at paragraph 32).

12 “**Mistake**” is defined under Article 47B(2) as including:-

“(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.”

Thus, a mistake as to the tax consequences of transfers to a trust is a mistake for the purposes of Article 47E.

13 As Advocate Mackereth pointed out, whilst there have been many Jersey cases on mistake in this context, there are no decisions which attempted to find what may be considered as an operative mistake, either under the Trusts Law or at customary law.

14 The leading English case in this regard is the Supreme Court decision in *Pitt v Holt* [2013] UK SC 26 at 108 and the fullest academic treatment of this topic is in Goff & Jones 9th edition at paragraphs 9–41 to 9–54. In summary, three different situations are distinguished under English law of which only the first two (following the decision in *Pitt v Holt*) equity has the power to relieve:-

(i) incorrect conscious beliefs: where, owing to his ignorance of some fact or facts, the claimant held an incorrect conscious belief which caused him to act;

(ii) incorrect tacit assumptions: where the claimant acted on the basis of a tacit assumption about some fact which was falsified by some other fact of which he was ignorant; or simply on the basis of an incorrect tacit assumption about a fact; and

(iii) mere causative ignorance: where the claimant made neither an active nor a tacit mistake and simply acted in a state of mere causative ignorance. He would not have acted as he did had he known of some fact of which he was ignorant; but when he

acted, he held no belief or assumption about that fact, conscious or tacit; and no conscious belief or tacit assumption on which he acted was falsified by his ignorance of the relevant fact.

- 15 In *Pitt v Holt*, the Supreme Court noted that the authors of (the then current edition of) Goff and Jones, were, on balance, in favour of treating mere causative ignorance as sufficient.
- 16 HMRC placed reliance on this in representations they made to the Court in the case of *In the matter of the S Trust and in the matter of the T Trust* [\[2015\] JRC 259](#) (paragraph 23) to the effect that the representors in that case were in a state of mere causative ignorance, which HMRC said was insufficient, an argument implicitly rejected by the Court. Whether or not mere causative ignorance is sufficient to constitute an operative mistake as a matter of Jersey law is not a matter with which this Court had to grapple, because the Court found that the representor in this case held an incorrect conscious belief that the transfers from his bank account in London to the K Trust would not give rise to any UK tax liability.

Decision

- 17 In the view of the Court, the facts of this case brought it comfortably within the circumstances set out in Article 47E(3) of the Trusts Law. The representor was mistaken in believing that the transfers he made would not give rise to any UK tax liability, and it is self-evident that he would not have made those transfers from his London bank account if he had been advised of the tax liabilities that they would give rise to. Having regard to the quantum of the liabilities that have arisen, there can be no question that the mistake was serious.
- 18 In terms of justice, the representor was neither resident nor domiciled in England, and the tax liability was incurred quite unnecessarily; all that was required was for the transfers to be made from any one of his non-UK bank accounts. The trustee supported the application as did the other beneficiaries of the K Trust, but in any event, they are all family members, and it was not in their interests for the family wealth to be unnecessarily depleted in this way. There were no third parties who would be affected by the transfers being set aside; no payments had been made to third parties that it would be necessary to unwind.
- 19 HMRC had been notified of the application, and responded saying that having reviewed the papers, they did not intend to make any representations. They pointed out that taxpayers considering seeking a trust law remedy in a court of equity and wishing to contact HMRC before issuing court proceedings should now write to HMRC, SO842, Fitzroy House First Floor, Inheritance Tax Technical, Central Mail Unit, Newcastle NE98 1ZZ.
- 20 In conclusion, the Court found that the mistake of the representor was of so serious a character as to render it just for the Court to make a declaration.

21 The Court declared the transfers void ab initio pursuant to Article 47E of the Trusts Law and made further orders consequential thereto.