A v First Names Corporate Services Ltd and B and C and D and Oxfam and HM Attorney General

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Lister, Blampied
Judgment Date:	19 November 2015
Neutral Citation:	[2015] JRC 234B
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Court:	Royal Court
Date:	19 November 2015

Text

[2015] JRC 234B

ROYAL COURT

(Samedi)

Before:

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

IN THE MATTER OF THE REPRESENTATION OF THE V TRUST

AND IN THE MATTER OF ARTICLES 11 AND 47E OF THE TRUSTS (JERSEY) LAW 1984

Between
A
Representor

and
First Names Corporate Services Limited
First Respondent

and

B
Second Respondent

and

C
Third Respondent

and

D
Fourth Respondent

and

Oxfam
Fifth Respondent

and

Her Majesty's Attorney General
Sixth Respondent

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

Authorities

Trust (Jersey) Law 1984.

Trusts (Amendment No. 6)(Jersey) Law 2013.

Re Lochmore Trust [2010] JRC 068.

Re S Settlement [2011] JLR 375.

Representation re Strathmullan Trust [2014] JRC 056.

In the matter of W Trust and X Trust [2014] JRC 112.

Trust — application by the representor to set aside the trust on grounds of mistake.

THE COMMISSIONER:

1 This is an application by A (the Representor) to set aside a settlement ("The V Trust") declared on 4 th April 1995 at a time when he was resident in Belgium and into which he transferred assets. His intention was to create a flexible and tax-efficient vehicle to assist him in planning financially for him and his family. He was advised by Mr B Le Hérissier of the Bank of Scotland Trust Company International Limited, which is the same trustee as at present but under a former name, that, and quoting from Mr Le Herissier's letter of 27 th March, 1995:–

> *"An offshore discretionary trust is a most flexible and tax-efficient vehicle capable of meeting a client's current needs as well as any possible change in his/her current future circumstances."*

He says in his affidavit that he had explained to Mr Le Herrissier his full circumstances and in relation to tax-efficiency the letter advised that, and quoting again:–

> *"Inheritance tax will not apply on any death and that the annual management fees in relation to the trust should be viewed against the tax savings that would be made in particular the elimination of capital gains and inheritance taxes."*

2 The representor was not advised to take his own tax advice and he did not do so. He says this in his affidavit at paragraph 43:–

> *"I did not take further UK tax advice following on from my interaction with Mr Le Herissier.* I cannot say with certainty why it did not cross my mind to obtain professional and definitive UK tax advice. I thought that given the fact that I was non-UK resident and, in fact, a Belgian resident at the time and following the telephone call and subsequent 27 March letter from Mr Le Herissier, I proceeded on the basis that sufficient consideration had been given to my particular circumstances. I assumed that there would be no adverse tax consequences arising out of the settling of assets into a trust. I simply did not realise that UK tax advice was necessary as I was not residing in the UK at that time. At no point was I advised by the Trustees to obtain formal tax advice."

3 In January 2015 the trustee brought to the representor's attention the fact that, contrary to the advice given, the transfer of assets into the V Trust did give rise to an immediate and future substantial inheritance tax liabilities, principally as a consequence of his being deemed domiciled in the UK at the time those transfers took place. The tax consequences are helpfully summarised in the trustee's letter of 27 th March, 2015, in this way:–

> *"As the V Trust is a settlor-interested discretionary trust formed by you as a UK-deemed domiciled individual in 1995, the trust has no and never has had any tax benefits whatsoever as you are taxable on all trust income and always have been; you are taxable on all capital gains and always have been; the transfer of assets into the trust created an inheritance tax charge.* The trustees within the scope of inheritance tax exit tenure charges and the trust is transparent for

inheritance tax purposes under the Gift with Reservation of Benefit Rules."

It is clear to me and them that you were not aware of the tax position when you settled the trust in 1995 and had you been aware you would not have created the trust.

4 More detailed advice has been obtained from Smith and Williamson LLP the total inheritance tax now owed in £197,000 which includes interest on late payment but does not include any possible penalty. This is a substantial proportion of the sums transferred into the V Trust.

5 The V Trust is a standard discretionary settlement subject to proper law in Jersey, the current beneficiaries of which are the representor, his three children and Oxfam. There is a default trust in favour of charitable purposes. The trustee and the beneficiaries have been convened to the application and HMRC notified in writing. The trustee and his three children support the application. Oxfam have responded saying that they do not wish to attend the hearing and have no views to put to the Court. The Attorney General did not consider it necessary to attend and there has been no response from HMRC.

6 Turning to the Law, Article 11 of the Trusts (Jersey) Law 1984 (the "Trusts Law") reads as follows:–

"11 Validity of a Jersey trust

(2) … a trust shall be invalid –

(a) …

(b) To the extent that the Court declares that –

i. the trust was established by … mistake…"

7 The Court can also proceed under Article 47E of the Trusts Law which was adopted by the Trusts (Amendment No. 6)(Jersey) Law 2013. Article 47E reads as follows:–

"47E Power to set aside a transfer or disposition of property to a trust due to mistake

(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 along 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."

8 Whether the matter is approached under Article 11 or Article 47E of the Trusts Law, the test is, for all practical purposes as summarised in *Re Lochmore Trust* [2010] JRC 068 and as settled in *Re S Settlement* [2011] JLR 375.

9 It follows that the Court must ask the following questions:–

Application of the Law to the facts

Taking each of the above questions in turn:–

(i) Was there a mistake on the part of the representor?

(ii) Would the representor not have entered into the transaction "but for" the mistake? And

(iii) Was the mistake of so serious a character to render it unjust on the part of the trustee to retain the property?

(i) Was there a mistake on the part of the representor?

10 From the affidavit evidence it is clear to us that the representor's intention on setting up the V Trust was to set aside assets for the benefit of his family, predominantly for his children's education and well-being. Included in this rationale, was the representor's intention to financially plan for his future in the most effective manner. This is evidenced by the contents of the letter he received from Mr Le Herissier, which refers heavily to the tax benefits of creating a trust in the Island.

11 The oversight in relation to the representor's deemed domicile, which was caused as a

result of him having relocated to Belgium as part of his employment at the time the V Trust was created, resulted in the representor being mistaken as to the tax efficiency of the trust he was creating. It also explains why a trust would not achieve that which it was intended to achieve.

12 The representor was unaware that there would be any liability to inheritance tax on the assets that he no longer believed formed part of his estate. Nor was the representor aware that he would be liable for capital gains tax and income tax on the trust assets.

13 We are satisfied therefore that there was a mistake on the part of the representor.

14 It is a settled case law in Jersey that a mistake about tax effects of a particular transaction can be treated as relevant mistakes for the purposes of Article 11 of the Law (see *Representation re Strathmullan Trust* [2014] JRC 056). Furthermore Article 47B2 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"***

ii Would the representor not have entered into the transaction "but for" the mistake?

15 Inheritance tax was due on the 1995 chargeable lifetime transfer and then on the ten year anniversary in 2005. Combined with interest the inheritance tax liability as at 2005 totalled £147,000. In addition to the above another ten year anniversary charge became due this year which takes the inheritance tax liability, as we have said, to £197,000. Penalty payments have not been included in the above figure and could be between 10% and 20% of the outstanding sum, depending on how HMRC views the circumstances surrounding the failure to pay.

16 In *In the matter of W Trust and X Trust* [2014] JRC 112 the Deputy Bailiff, as he then was, noted that:–

> ***"It is obvious that if transactions are entered into upon the basis that there would be tax gains as a result, and for no other substantial purpose, the First Representor would not have entered into the transaction had the true***

position been known."

17 It is clear from the affidavit evidence and as a matter of common sense that the representor would not have settled the assets into the V Trust but for his mistaken understanding that there would be tax advantages to the creation of such a trust, doubly so in circumstances where the trust actually creates tax liabilities where none would otherwise have existed.

18 We accept therefore that but for the mistake the representor would not have created the V Trust.

iii Was the mistake of so serious a character to render it unjust on the part of the trustee to retain the property?

19 The nature of the representor's mistake is clearly serious in that it has resulted in the creation of a trust that does not achieve that which it was intended to achieve.

20 As a result of the mistake, an unforeseen and unintended inheritance tax liability has arisen in the sum of £197,000 (excluding penalties). Aggravating the position is the fact that the inheritance tax will still be due on the representor's estate on his death in relation to the assets that he transferred to the V Trust.

21 Far from being a tax efficient structure, the trust has created an inheritance tax liability in the form of chargeable lifetime transfers and 10 yearly anniversary charges where none would otherwise have existed.

22 Oxfam is a named charity but the recipients in our view of any exercise of the trustee's discretion were intended primarily to be the representor and his family and there is no certainty that Oxfam would ever have benefitted from the assets within the trust.

23 We conclude therefore that it would be unjust for the trustee to retain the trust property causing substantial tax losses to the representor and, ultimately, for his family. We therefore grant the application pursuant to Article 11 of the Trusts Law we declare that the V Trust was established by mistake and is therefore invalid.