

Don't delay! – Jersey's Royal Court rules that time is a factor in granting trust mistake discretion

Insights - 25/03/2019

In a judgment of the Royal Court issued on 20 March 2019, *In the matter of the B Trust* [2019] JRC 035, the Royal Court indicated that delay in bringing an application to set aside a transfer of property to a Jersey trust due to mistake would be a factor taken into account when the court came to exercise its discretion as to whether to grant relief. The court also clarified the extent of its powers on such an application.

Facts

The background facts don't make easy reading.

Prior to establishing a Jersey law discretionary trust in 1998, the Settlor received advice from Lincoln Trust Company (as incumbent trustee) (**Lincoln**) which was as follows:

"... we need to find an arrangement which offers 'the best of both worlds', in the sense of the ownership of the assets truly resting elsewhere, and yet the control remaining in your hands ...

... we require a structure which will remove the assets out of your name so that any statement by you that the assets do not belong to you, cannot be refuted and ... on your demise the control will pass to those you wish, both validly, and also without any impact on your personal estate.

... should we fail to comply with your instructions under the letter of wishes your right of redress would clearly not be under the Trust Law, for breach of trust (where clearly we have complete discretion, on the face of it) but would be under contract law for our not complying with the terms of the letter of wishes, which is regarded as an implied contract."

Lincoln also advised that the trust deed should not contain the list of real beneficiaries and that an elderly relative who had emigrated from the United Kingdom many years previously should contribute the initial nominal trust fund.

Application

On application, the Settlor asserted that by making the trust, and relying upon the trustee's ability to add members to the beneficial class, his intention was that he and his immediate family would be the persons to benefit wholly or primarily from it and that he believed that he was in control through his letter of wishes.

The Settlor made several dispositions of property or assets into the Trust, an initial capital sum of £200,000 in 1998 and thereafter other amounts. The value of the trust fund at the date of the hearing was approximately £2.4 million.

The Settlor contended that he made for the purposes of the Trusts (Jersey) Law 1984 (Law) two mistakes relevant to this present application:-

- (a) He misunderstood the true nature and effect of establishing a Jersey law trust; and
- (b) He misunderstood the UK inheritance tax treatment of the Trust.

His case was that *"but for"* these two categories of mistakes, he would not have settled assets into the Trust in 1998, nor would he have continued to make dispositions to the Trust during the ensuing years. Instead, he would have used other methods, acceptable to HMRC, in order to reduce his UK inheritance tax bill such as gifts in his lifetime to his wife, those gifts being exempt from UK inheritance tax.

Court's decision

The court proceeded under Article 47E of the Law:

"(2) The court may on the application of any person ... and in the circumstances set out in paragraph (3), declare that a transfer or other disposition of property to a trust –

(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"

The court accepted the Settlor's evidence and was satisfied that Article 47E(3) (a) and (b) were satisfied.

When considering whether the mistake was of so serious a character as to render it just for the Court to make a declaration, the Court said that it will look first at the issue of delay. In this

case, the question of mistake was raised a year before the application was commenced. The Court said that *"such a long delay does not work to the benefit of the [Settlor]. It suggests that as far as [the settlor] is concerned the mistake which was made may not have been quite so serious as he now needs to persuade the Court that it was – after all, if a serious mistake has been made, one would expect a very prompt application to correct it"*.

Ultimately, the Court found the *"delay at the margins of what was acceptable"* and exercised its discretion in favour of the Settlor on that point, one consideration being that the loss of approximately 25% of the trust fund showed the mistake to have been of a serious character.

The Court then had to consider the question of whether the dispositions into trust should be voided from the time of their being made or from some other date. When making a determination on this issue, the court will need to consider the effect of the declaration upon donees and third parties (including the trustee as a potentially affected third party) and the court may need to adjudicate upon change of position defences. Accordingly, in exercising its discretion as to the appropriate remedies and consequential orders to authorise, the court will have to take into account all factors relevant to those issues.

The settlor's case was somewhat unusual. The settlor argued that the Court could go further than merely voiding the transfers and declaring them to be of no effect, and could actually give effect instead to the intentions of the settlor on his making the transfers into the Trust, in this case up to 20 years ago. The settlor claimed that merely voiding the transfers into the Trust so that the assets fell back into his estate would not be tax efficient and that the Court should therefore declare that the transfers to the Trust were voidable and should take effect as gifts to the settlor's wife, because that would come closest to achieving his intentions under the Trust. The Bailiff was unimpressed:

"It is one thing to say that the [settlor] has the right to give his money where he likes if it is returned to him following a declaration by the Court voiding his original gift; but it is another to say that the Court should act according to his direction as to who should have benefit. In the latter case, the [settlor] is making the new gift; in effect the Court is making the gift as requested by him. That clearly has potential tax implications which are of a different character than the implications of an order merely returning the original gift into trust. This Court will not be drawn into such schemes. It is one thing to make orders as to the validity of transactions where those orders might have tax consequences, and it is quite another thing to select for one of the parties which order to make so as to achieve the best taxation outcome. That is no part of the business of this Court".

The Court declared the transfers into trust voidable and of no effect from the dates on which they were made, such that those sums were held upon trust for the settlor absolutely (which itself had tax consequences to the settlor).

Comment

This decision makes clear that delay is a factor that the court will weigh in the balance when determining if the mistake is of so serious a character as to render it just to make a declaration setting aside a disposition into trust. As soon as it is realised that an issue has arisen by reason of mistake or possible mistake, steps must be taken promptly. The Court is likely now to require an explanation from the applicant as to the steps taken to bring the application before it without delay.

The Court has made clear that its powers under Article 47E of the Law are not there to *"require the court to take a positive step to improve the taxation outcome for the [settlor] as though that were the objective itself. It may be the [settlor's] objective, but it is not the objective of the Court"*.

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