Doctrine of mistake and rule in Hastings-Bass

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Doctrine of mistake and rule in Hastings-Bass

Damian Evans, 'A question of what's just', Trust Quarterly Review (Vol18 Iss1), pp.4-14

In 2019, Jersey's Royal Court (the Court) had to carefully consider the breadth of its discretion to grant relief under the Trusts (Jersey) Law 1984, as amended (the Law), which enshrines in statute the so-called rule in Hastings-Bass and the doctrine of mistake.

In March 2019, In the Matter of the B Trust, the 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 considering whether to grant relief. On 13 June 2019, in In the Matter of the J Settlement, the Court gave judgment on an application by the trustee of the J Settlement for a number of resolutions it had adopted to be declared voidable on the grounds of mistake. And, on 3 December 2019, in In the Matter of the D and E Trusts, the Court declared void certain actions of a trustee by which the assets of two Jersey law trusts were transferred into a circular ownerless corporate structure, terminating the trusts.

In this article, we look at the way in which the Court has exercised its discretion to grant relief and examine some of the factors that may be relevant to such an exercise. In deciding whether to exercise its discretion to grant relief, the Court has had to consider in detail the question of the justice of involving the Court in helping trustees and individual beneficiaries out of a problem that had been created by the mistaken advice that they have received, or that they had failed to seek.

In the Matter of the B Trust[1]

In March 2019, the Royal Court of Jersey (the 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 considering whether to grant relief. The Court also made plain that it is no part of its function to take steps to improve the taxation position of the applicant.

Facts

The applicant was the economic settlor of a Jersey law trust declared on 2 March 1998 by Lincoln Trust Company (Jersey) (Lincoln). The beneficiaries were expressed to be the siblings of a resident in another jurisdiction, their issue, their spouses and any person nominated by the trustee by instrument to be members of the class of beneficiaries. The applicant was not specifically named in the trust deed, but he was a beneficiary.

Prior to declaring the trust, advice was given by Lincoln to the applicant 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 advised that the trust deed should not contain details of the true beneficiaries, suggesting that the nominal settlor be an elderly relative who had emigrated from the UK. Lincoln also advised the applicant that income tax liability was based primarily on residence and capital gains tax (CGT) on residence and ordinary residence. The advice continued:

> *'Inheritance tax, in contrast, is based on domicile. If a person is domiciled in the UK he is liable to UK inheritance tax on his word-wide assets even though he may be both resident and ordinarily resident in another country. If a person is not domiciled in the UK he is liable to inheritance tax on UK assets in his own name, only.'*

The value of the trust fund at the date of the hearing was approximately GBP2.4 million (initial capital sum of GBP200,000 in 1998, and other amounts contributed thereafter).

The applicant contended that he made two mistakes:

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

The 'mistakes'

As to the first mistake, the applicant originally understood that he would still be in control of the trust property but had since been advised that his letter of wishes was not contractually enforceable. He argued that had he known that the trustee was not obliged to behave in accordance with the letter of wishes, he would not have transferred the property to the trust.

As to the second mistake, the applicant understood that the trust deed was structured in such a way that the trustee had the ability to make capital distributions to beneficiaries in the UK without having any tax liability, whether to income tax, CGT or any form of capital taxation. He had subsequently been advised that, because he had not obtained a domicile of choice outside the UK when he made the gifts into trust, the trust was subject to the relevant property regime with the consequence that trust property will be taxed every ten years and upon every occasion the property leaves the trust.

The Court's decision

The Court proceeded under art.47E of the Trusts (Jersey) Law 1984, as amended (the Law), which provides, insofar as is relevant, that the Court can declare a transfer or disposition to a trust voidable and of such effect as the Court shall determine, or is of no effect from the time of its existence, where:

> *'(3) 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.'*

A mistake as to the tax consequences of a decision is a relevant mistake for the purposes of applications under the Law (*In the matter of the B Trust*). [2] The applicant's reason for settling property into the trust was that it was to be held tax efficiently. Had he known that the property he introduced would effectively always be subject to UK tax, he would have never given it to the trust. The Court, therefore, accepted the applicant's evidence and was satisfied that art.47E(3)(a) and (b) were satisfied.

Discretion

Seriousness

The Court then considered whether to exercise its discretion to grant the relief. The first question was whether the mistake 'is of so serious a character'. On this question, 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 noted that:

> *'Such a long delay does not work to the benefit of the Applicant. It suggests that as far as the Applicant 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.'*

The Court rejected a submission that a year's delay was not a significant delay, but ultimately found the 'delay at the margins of what was acceptable' and exercised its discretion in favour of the applicant on the point. The main consideration was that the loss amounted to approximately 25 per cent of the trust fund and therefore showed the mistake to have been serious.

Justice

The Court then considered the issue of whether it was 'just' to grant relief. The applicant claimed a distinction between a person who takes advice that is plainly wrong and a person who does not take advice at all when they should have done, and that, in the present case, the applicant had been foolish.

The Court noted that the contrary position (although not argued before it) would be that:

> *'the Court should not exercise its discretion to help a transferor who does get advice which should put him on notice but ignores it; is associated with a trust which deliberately hides his identity and his status as a beneficiary...'*

The Court found that the applicant had accepted what he was told by Lincoln because it was what he wanted to hear and that he was not an unsophisticated or naïve man. However, the Court concluded that the applicant probably did not fully understand the question of domicile and the legal and taxation issues that arose out of it. He was found to be foolish and, *'although it is a matter of fine margins'*, the Court considered it appropriate to make a declaration in this case.

From when should the dispositions be voided?

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 applicant's case was somewhat unusual; he argued that the Court could go further than merely voiding the transfers and declaring them to be of no effect, and could instead give effect

to his intentions on making the transfers into the trust. The applicant claimed that merely voiding the transfers into the trust so that the assets fell back into his estate would not be tax efficient. He asked the Court to declare that the transfers to the trust were voidable and should take effect as gifts to the settlor's wife, because that would ensure that his wife and children were provided for tax efficiently. The Court was unimpressed:

> *'It is one thing to say that the Applicant 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 Applicant 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 when determining the seriousness of a mistake. 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 will require an explanation from the applicant as to the steps taken to bring the application before it without delay and a failure to do so may lead the Court to decline to consider exercising its discretion.

It should also be borne clearly in mind that it is not the function of the Court to take 'a positive step to improve the taxation outcome' of an applicant.

In the matter of the J Settlement [3]

On 13 June 2019, in *In the Matter of the J Settlement*, the Court gave judgment on an application by the trustee of the J Settlement for a number of resolutions it had adopted to be declared voidable on the grounds of mistake. In deciding whether to exercise its discretion to grant relief, the Court considered in detail the question of the justice of involving the Court in helping trustees and individual beneficiaries out of a tax problem that had been created by the mistaken advice that they have received.

Facts

The J Settlement was a discretionary Jersey law trust. The primary beneficiary was Mr F, who was also the economic settlor by reason of a number of loans that he made to the J Settlement amounting to GBP41.5 million. At the start of 2017, the assets of the trust comprised:

- two ordinary shares in a Jersey company (Company D), with each share held by a nominee for the trustee;
- the share capital of another Jersey company that held an investment portfolio for the J Settlement; and
- an interest-free loan receivable from Company D and repayable on demand of approximately GBP18.2 million.

Both the trustee and Mr F engaged a firm of accountants in the UK to advise on the tax affairs relevant to the J Settlement and to Mr F. Advice was given in relation to changes to UK tax law introduced by the *Finance Bill 2017*, as a result of which Mr F was to become deemed UK domiciled for all tax purposes with effect from 6 April 2017. A restructuring was advised. The advice included a recommendation that Mr F's loan to the J Settlement be repaid, or adjusted to commercial terms, by 6 April 2017, failing which the J Settlement would be tainted. The advice included a number of steps:

1. a bonus issue of redeemable A preference shares by Company D to the trustee (representing gains of approximately GBP2 million on Company D's assets) and the subsequent transfer to Mr F of those shares by way of partial repayment of his loan;
2. the company D would then convert its GBP18.2 million shareholder's loan granted by the trustee into a second class of redeemable B preference shares by way of repayment of the loan made to Company D;
3. the B shares would carry a value of approximately GBP18 million and would be subsequently transferred to Mr F by way of partial repayment of his loan to the J Settlement; and
4. the ordinary shares in Company D would then be appointed to Mr F and transferred from him to a UK corporate entity. The payment of the remaining trust assets would be made to Mr F by way of repayment of his loan and a capital appointment, and the J Settlement would then be wound up.

The trustee accepted the advice on 27 March 2017 and adopted a number of resolutions giving effect to the proposals above on the same day. On 29 March 2017, the A and B preference shares were transferred to Mr F and the balance of the share capital of Company D was appointed out of the J Settlement to Mr F.

The mistake

The trustee's decision to procure the issue of the A preference shares led to a liability to a UK

income tax charge of approximately GBP1.02 million in respect of the trustee, and a personal tax liability for Mr F of GBP200,115. More recent tax advice was that if the Court set aside the trustee's decision and thereby the bonus issue of A preference shares in Company D, then the income tax charges in question would not arise.

The Law

The trustee applied to the Royal Court to have the different resolutions entered into set aside under articles 47G and 47H of the Law which provide:

> "***47G Power to set aside the exercise of powers in relation to a trust or trust property due to mistake***
>
> *(1) In this paragraph, "person exercising a power" means a person who, otherwise than in the capacity of trustee, exercises a power over, or in relation to a trust, or trust property.*
>
> *(2) The court may on the application of any person specified in Article 47I(2), and in the circumstances set out in paragraph (3), declare that the exercise of a power by a trustee or a person exercising a power over, or in relation to a trust, or trust property, is voidable and –*
>
> *(a) has such effect as the court may determine; or*
>
> *(b) is of no effect from the time of its exercise.*
>
> *(3) The circumstances are where the trustee or person exercising a power –*
>
> *(a) made a mistake in relation to the exercise of his or her power; and*
>
> *(b) would not have exercised the power, or would not have exercised the power in the way it was so exercised, 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.*
>
> ***47H Power to set aside the exercise of fiduciary powers in relation to a trust or trust property***
>
> *(1) In this paragraph, "person exercising a power" means a person who, otherwise than in the capacity of trustee, exercises a power over, or in relation to a trust, or trust property and who owes a fiduciary duty to a beneficiary in relation to the exercise of that power.*
>
> *(2) The court may on the application of any person specified in Article 47I(2), and in the circumstances set out in paragraph (3), declare that the exercise of a power by a trustee or a person exercising a power over, or in relation to a trust, or trust property, is voidable and –*

(a) has such effect as the court may determine; or

(b) is of no effect from the time of its exercise.

(3) The circumstances are where, in relation to the exercise of his or her power, the trustee or person exercising a power –

(a) failed to take into account any relevant considerations or took into account irrelevant considerations; and

(b) would not have exercised the power, or would not have exercised the power in the way it was so exercised, but for that failure to take into account relevant considerations, or that taking into account of irrelevant considerations.

(4) It does not matter whether or not the circumstances set out in paragraph (3) occurred as a result of any lack of care or other fault on the part of the trustee or person exercising a power, or on the part of any person giving advice in relation to the exercise of the power."

The persons that may make such an application and who are specified in Article 47I(2) of the Law are:

(a) the trustee who exercised the power concerned, or the person exercising a power (as the case may be);

(b) any other trustee;

(c) a beneficiary or enforcer;

(d) the Attorney General in relation to a trust containing charitable trusts, powers or provisions;

(e) any other person with leave of the court.

Decision

The trustee sought orders that its decision to make the different resolutions should be set aside under art.47G of the Law on the ground that the trustee made a mistake when exercising its power and that it would not have exercised the power but for the mistake. Alternatively, the trustee sought relief under art.47H of the Law on the ground that it failed to take into account relevant considerations and would not have exercised the power in the way it was exercised but for that failure. It was those decisions that started the process, which came to fruition later with the decisions of the directors and shareholders of the companies. However, it was those latter decisions that the trustee really sought to have set aside. The Court noted:

'Article 47G and Article 47H deal with applications in relation to the Trust. A declaration that the trustee has taken a step which has no effect within the Trust does not it seems to us necessarily carry with it a decision about the validity or otherwise of what a separate juridical entity might have done in the meantime. In other words, the decision of the Court to make the relevant declaration might result in the decision having no effect within the Trust, but it does not necessarily mean that what has been done at company level ceases to have validity'.

The first question that arose was whether the Court had jurisdiction to set aside decisions of shareholders in relation to a Jersey company, upon the basis that the shares were trust property. The Court resolved the issue by deciding that it had jurisdiction to make orders concerning Company D pursuant to art.47I(3) of the Law, which enables the Court to make such consequential orders as it thinks fit, as a result of a declaration made under arts.47G or 47H:

'... we think that if the orders are to be made in relation to the companies which are wholly owned by the Trust, then these are orders which can only be made as consequential under Article 47I(3). It was thus right that the companies should be party to these proceedings. On the facts of this case, we are satisfied that it is right to look at the actions taken by the companies as consequential upon decisions of the trustee, and accordingly, if it is right to grant relief in relation to the alleged mistake of the trustee, it is right to make consequential orders in relation to the steps taken by the companies giving effect to the trustee's decisions'.

The Court found that the trustee was mistaken as to the tax consequences of its decision and that, but for that mistake, the trustee would not have made the decision that it did. Instead, the trustee would have sought some alternative means by which to repay that part of Mr F's loan, which was repaid through the A preference shares.

Discretion

Seriousness

In determining whether the mistake was 'of so serious a character', the Court confirmed that the size of the potential loss was a relevant factor, as was the issue of delay in bringing the application (which was not a feature in the present case).

Justice

The Court was left to consider the question of the justice of involving the Court in helping trustees and individual beneficiaries out of a tax problem that has been created by the mistaken advice they have received, noting that:

'If a trust were not involved, one would expect the tax payer to bring proceedings against

his or her adviser to recover the loss which had been sustained and which, on this analysis, could have been avoided. In some respects, it might be said that that was the desirable approach to take with trusts as well. It is not obvious that the Courts should come to the rescue of a trustee or his professional advisers for a mistake that one or other might have made in circumstances where, had there been no trust, the trustee as client would have sued the professional adviser for the loss in question. It might be said that if trustees were aware that this was a step which they might be required to take, they would be more careful is setting the terms of reference under their contract with the tax adviser in question.'

In the case of *Re Onorati Settlement*, [4] the Court considered whether such litigation should be the outcome, rather than the grant of relief under the doctrine of mistake. In *Onorati*, the trustee took no professional advice on the tax consequences of the appointment, which was ultimately set aside. It was informed by one of the beneficiaries that she had taken advice but the trustee never asked to see it. The trustee was therefore in breach of its fiduciary duty. Notwithstanding, the Court in *Onorati* said:

'In our judgment, our discretion in this case should be exercised in favour of setting the appointment aside. It is clear that the Applicants did not take their own tax advice and they bear no responsibility for what has occurred. They have incurred a substantial unnecessary tax burden amounting to some 35% of the sum appointed to them. It may be that they could bring an action against the Trustee but it would not necessarily … More generally, we are not attracted by the proposition that beneficiaries should be left to a remedy of bringing litigation against trustees or professional advisers. The beneficiaries are usually not at fault and have already incurred loss by reason of unnecessary tax charges. To force them to incur further expense in what may be uncertain litigation when the law allows for the avoidance of a decision made in breach of the trustees' duties seems unnecessary, undesirable and unjust.'

The question facing the Court in *J Settlement* was whether the same approach should be taken where the potential plaintiffs in a negligence action would be the trustee and/or Mr F.

The Court accepted that trust and negligence litigation can be very expensive and that it was not obvious that it would be in the interests of beneficiaries to drive trustees down a route of seeking funding for litigation purposes, or alternatively risking trust monies for such a venture (a trustee presumably having made a *Beddoe* application).

The Court reached the conclusion that the decision in *Onorati* should be extended to trustees so that trustees were not left to bring proceedings in negligence against the tax advisor in circumstances such as these. Thus, the Court found that it was just to grant the relief in respect of the trustee's mistake.

In order to give effect to the setting aside of the trustee's decision, the Court declared invalid

the related steps of the nominee shareholders and directors of Company D and certain other documentation executed concerning Company D and the loan repayments.

Cautionary words

The Court concluded with two notes of caution.

The first concerned 'aggressive tax avoidance schemes' (which was not suggested was the case here). The Court said that if any external tax authority were to make such a contention before the Court in future, it would potentially be a matter that might go to the exercise of the Court's discretion in such a case.

The second was that there was an important distinction to be made, in relation to consequential orders under art.47I, between those orders that are directly consequential and those that amount to fresh steps designed to achieve the same tax benefits, which, but for the mistake, would have been achieved if the transaction had not been declared voidable. The Court noted that:

> *'In the latter case, the Court will scrutinise with great care exactly what it is asked to do bearing in mind that it is no part of the Court's function to facilitate foreign tax avoidance'.*

In the Matter of E and E Trusts [5]

Finally, on 3 December 2019, in *In the Matter of the D and E Trusts*, the Court declared void certain actions of a trustee by which the assets of two Jersey law trusts were transferred into a circular ownerless corporate structure, terminating the trusts.

Facts

Certain beneficiaries of the trusts were French tax residents. During the latter part of 2011, the trustee was advised by Chown Dewhurst to transfer the assets of the trusts to companies incorporated in the British Virgin Islands (BVI), in response to the introduction of French tax legislation that was due to come into effect on 1 January 2012. Chown Dewhurst considered that the legislation could lead to a change in the way foreign trusts were to be fiscally treated in France. As a result, he sought to engage the services of a French tax specialist.

Chown Dewhurst proposed to the trustee the form of corporate structure that was ultimately used, namely, two BVI companies that would own each other. The trustee then implemented the restructuring, under which:

- the assets of the trusts were transferred into newly incorporated holding companies, at that stage owned by the trustee in its capacity as trustee, respectively of each trust;
- two BVI companies were formed that owned each other (the BVI Structure);

- the shares in the holding companies were transferred by the trustee to one of the companies in the BVI Structure;
- the trustee entered into deeds by which the trust periods of the trusts were brought forward to expire on the same day, thus bringing the trusts to an end; and
- consultancy agreements were entered into with two of the beneficiaries of the trusts (which was the only way to extract value).

Thus, all trust assets were transferred out of the trusts into a circular ownerless corporate structure (the 2011 Restructuring).

Following the implementation of the 2011 Restructuring, the trustee did not consider the French tax legislation applied to the assets held within the BVI Structure, as it no longer considered that the trusts were in existence. It therefore never filed declarations with the French tax authorities.

French tax consequences

The trustee first became aware of the potential implications of the 2011 Restructuring in 2017. In early 2019, it obtained advice from a French tax lawyer who advised that:

- the trustee had in 2011 (and still had) reporting obligations to the French tax authorities;
- the 2011 Restructuring would be viewed from a French tax viewpoint as having created a de facto or constructive new trust;
- as the 2011 Restructuring had been implemented by the trustee, it would be deemed to be the trustee of the new trust;
- the trustee should have filed an 'event disclosure' with the French tax authorities before 31 December 2012, and disclosures each year from 2012;
- the settlors of the trusts may be taxed on the assets originally transferred into the trusts;
- the IHT the death of the settlors would be higher than if no 'new trust' had been created (and the rate of IHT is 60 per cent); and
- the French tax authorities were likely to regard the 2011 Restructuring as an artificial arrangement and might claim penalties up to 80 per cent for 'fraudulent manoeuvres'.

The French tax advice was that if the transfer into the BVI Structure was set aside it would likely be viewed by the French tax authorities more favourably than the BVI Structure.

Chown Dewhurst accepted that, with the benefit of hindsight and on reviewing its files for the purposes of the application, the French tax specialist did not provide specific advice on the BVI Structure nor did he formally advise on the 2011 Restructuring, rather he provided a general commentary in respect of certain aspects of French law as they were understood at the time.

BVI law issues

In 2019, the trustee also received BVI law advice in relation to the BVI Structure to the effect that:

- The structure raised an issue of public policy, because it tied up property indefinitely without any clear legitimate public purpose or private benefit and it would not be clear what duties the directors of the two BVI companies would have in these circumstances.
- If valid, it would seem that no one may benefit from the assets owned by the companies while the companies are in existence and after the dissolution of the companies, its assets would either pass to the Crown or in trust to the trustee, in its capacity as the trustee of the trusts from which those assets were appointed.

Court's decision

The trustee originally sought relief under arts.47G or 47H of the Law (the purposes of which are described above).

The Court found that art.47H, not art.47G, was the appropriate jurisdiction under the Law for the following reasons:

- The only relevant tax advice was French tax advice and Chown Dewhurst had confirmed that the French tax specialist did not formally advise on the 2011 Restructuring and the use of the BVI Structure. The trustee therefore proceeded without considering the French tax implications of the 2011 Re-structuring.
- The trustee proceeded without considering BVI law advice on the use of the BVI Structure or of Jersey law advice on the use of the relevant powers under the trust deeds to place the trust assets into such a structure. Without that advice, it was not possible for the interests of the beneficiaries to be considered.

The Court noted that what may fall within the class of 'aggressive tax-avoidance schemes' may go to the exercise of its discretion to grant relief. The Court referred to *IFM Corporate Trustees Limited v Helliwell and others,* [6] a case involving rectification of a trust:

> *'What seems to us perhaps to be open to argument is whether, in an area which involves the exercise of a judicial discretion in cases where the court's assistance is being sought for a mistake which has been made, there is room for the argument that the discretion ought not to be exercised if on the facts of a particular case, the scheme in question is lawful but appears to be so contrived and artificial that it leaves the Court with distaste if, in effect, it is required to endorse it.'*

The French tax advice to the trustee made it clear that the French tax authorities might well

regard the 2011 Restructuring as an artificial arrangement. However, the Court found that the most egregious aspect of it was the transferring away of substantial assets to a circular ownerless set of entities, out of which no distributions could be made to the beneficiaries, with the possibility of all of it being lost to the Crown.

The Court noted that the duty of a trustee to account to its beneficiaries is at the core of the trustee and beneficiary relationship.[7] The Court found that the beneficiaries in this case went from trusts, where they were able to monitor their interests and hold the trustee to account, to a corporate structure in which they appeared to have no such ability. The BVI advice made clear that there was a serious question over whether the directors of the BVI companies (provided by the trustee) had any duties to perform for the former beneficiaries of the trusts. Ordinarily, directors owe their fiduciary duties to the shareholders as a whole, but in this case, the directors of the BVI companies owed their duties to a company that was owned by the company of which they were directors.

The Court also noted that the beneficiaries under the trusts had the protection of the supervisory jurisdiction of the Court, but that the Court had no such supervisory jurisdiction over companies (and certainly not BVI-incorporated companies). The assets had been transferred to a BVI Structure that was, on the face of it, unaccountable.

There was also no evidence that any of the beneficiaries (other than one) knew about the 2011 Restructuring and the Court did not consider that any beneficiary, properly informed, would consider a transfer to an unaccountable circular ownerless structure from which no distributions could be made, to be in their interests, whatever the tax advice.

The Court took the view that it could not allow the trust assets to be transferred away in this manner and, accordingly, because the trustee had failed to take relevant considerations into account (French tax advice and BVI law advice) and on the basis that had the trustee taken those considerations into account it would not have exercised the relevant powers, the Court declared the transfers and the deed shortening the trust periods void.

In making those declarations, the Court concluded that notwithstanding the terms of art.47H(4) (which allows the Court to set aside the exercise of a power irrespective of whether there was a lack or care or fault on the part of the person exercising the power), it was difficult to escape the conclusion that there was a lack of care on the part of the trustee.

Comment

In exercising its discretion in this case, at the very heart of the Court's considerations was, understandably, the welfare of the beneficiaries who, absent a declaration, may have lost the entire trust fund.

Conclusion

The Court's powers to grant relief under arts.47E, 47G and/or 47H of the Law are wide and it is clear that, in determining whether it is just to make a declaration, the Court may take into account any number of factors when considering the exercise of its discretion. It is not possible to attempt an exclusive list of factors that will be relevant from case to case, but the Court has given helpful words of guidance and caution:

- 'aggressive tax avoidance schemes' that are challenged by an external revenue authority as being such, will be scrutinised carefully by the Court in the exercise of its discretion;
- delay in bringing an application is a factor that the Court will consider in determining the seriousness of any mistake;
- trustees and/or beneficiaries should not be left to bring proceedings in negligence against tax and professional advisors where the advice given is wrong;
- it is not the Court's function to facilitate foreign tax avoidance and it will scrutinise with great care if it is asked to take steps not directly consequential to the relief granted; and
- the Court will weigh heavily in the balance the interests of the beneficiaries as a whole.

The Court's jurisdiction to grant relief continues to be vibrant.

[1] [2019] JRC 035

[2] In re Link Trustee Services (Jersey) Ltd, re the B Trust [2018] JRC 043

[3] [2019] JRC 111

[4] [2013] (2) JLR 324

[5] [2019] JRC 246

[6] [2015] JRC 160

[7] Armitage v Nurse [1998] CH 241 at 253

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