

First Mistake Case Post Trust Law Amendment No: 6 - In the matter of Strathmullan Trust [2014]...

Insights - 29/04/2014

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This decision is the most recent Jersey decision to consider setting aside a trust on the ground of mistake, and the first Jersey case decided after the introduction of the recent amendments to the Trusts (Jersey) Law 1984 (**the Amendment**) which included provisions concerning mistake.

Facts

The Settlor sold his share in the family business and settled the proceeds into a Jersey trust as part of a move to the Isle of Man.

Despite having taken tax advice, the Settlor was not told that under English deemed domicile rules he would continue to be treated as UK resident and domiciled for up to three years, (regardless of the fact that he had elected the Isle of Man as a domicile of choice), triggering tax liabilities accounting for 25% of the trust fund.

The Application

The Settlor therefore sought an order from the Royal Court that the trust be set aside on grounds of mistake, under Article 11 of the Trusts (Jersey) Law (as amended) 1984 (**the Law**), alternatively under Article 47E of the Law. He argued that had he known of the tax consequences at the time, he would not have established the trust then (or possibly at all).

The Law

The Deputy Bailiff considered the interplay between Articles 11 and 47E. He noted that relief under Articles 47B to 47H of the Amendment required the pre-existence of a trust in order for the Court's discretion to declare a transaction voidable to be successfully invoked, whereas relief under Article 11 could be applied for where the creation, validity and duration of a trust was at stake. On that basis he concluded that the provisions were distinct from one another, that Article 11 still stood and was not now subsumed within Article 47E and that he would approach these proceedings under Article 11 of the Law.

To decide whether the relief should be granted, the Deputy Bailiff applied the three part test set down by the Royal Court in *Re Lochmore Trust* [2010] JRC 068 and the three following questions were considered:

The Deputy Bailiff was satisfied that the Settlor had wrongly appreciated the tax implications of setting up the trust and that he would not have entered into this transaction but for his incomplete understanding of the situation. The Royal Court was also satisfied that it would be unjust to leave this state of affairs uncorrected and therefore intervened to declare the creation of the trust invalid.

The Deputy Bailiff alluded briefly to the point raised by Lord Walker in the English Supreme Court's decision in *Pitt v. Holt* [2013] UKSC 24 that in applications involving a request for the rectification on the consequences of artificial tax avoidance, relief could be refused on grounds of public policy or on the basis that the taxpayer could be deemed to have accepted the risks associated with such arrangements. He found that it was unnecessary to consider the point further in this case, however, trustees and taxpayers relying on expert tax advice should keep this in mind.

Costs

The trustee sought an order from the Royal Court for the trust fund to cover the trustee's administrative costs from October 1997 to date and reasonable legal fees in this action, to the extent it could not recover these through the indemnity it had been provided with from the tax advisers of the Settlor. The trustee drew the Royal Court's attention to the decision in *Des Pallieres v JP Morgan Chase & Co* [2013] JCA 146 where it was recognised that in circumstances where a fiduciary actioned to administrative proceedings is acting reasonably and in the absence of any misconduct, it would be entitled to an indemnity from the trust fund in relation to all costs and reasonable expenses.

The Court distinguished the present case from both the *Re Buckton* [1907] 2 Ch 406 and the *Des Pallieres v JP Morgan Chase & Co* [2013] JCA 146 decisions and found the trustee could not rely on article 53 of the Law or the trust deed in circumstances where the trust had been set aside. However it would still be possible for the trustee to seek such an order pursuant to article 26 of the Law and the inherent jurisdiction of the Court because where no wrongdoing on the part of the trustee could be established, there would be "no equity in leaving the trustee out of pocket".

Ultimately the Royal Court found that the trustee was entitled to pay itself, or retain to the extent already paid, its costs of the present application out of the trust assets if not otherwise paid, unless the Royal Court found these to have been incurred unreasonably. That way, if the tax advisor (who had indemnified the trustee's reasonable costs of the application) disputed the reasonableness of the costs, the matter could be brought back before the court for a determination.

Comment

This decision provides useful clarification that Article 11 is to run in parallel to the Amendment provisions contained in Article 47 of the Law. It also confirms that the definition of mistake and the test for establishing mistake under the well known Jersey cases continues to be good law.

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